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THE

CIVIL LAW

IN ITS

Natural ORDER:

Together with the

PUBLICK LAW.

Written in FRENCH by

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With Additional REMARKS on ſome Material Differences between the CIVIL LAW and the LAW of ENGLAND.

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FH
MVSEVM
BRITANNICVM

THE CIVIL LAW, IN ITS NATURAL ORDER.

PART II.

Of SUCCESSIONS.

BOOK III.

Of Teſtamentary Succeſſions.

THE general Reflections which might be made here on the Subject-Matter of Teſtamentary Succeſſions, before we enter on the particular Detail thereof, having been neceſſary, and more properly ſet down in another Place, it is not proper to repeat any of them here; and it is ſufficient to advertiſe the Reader, that he may ſee on this Subject what has been ſaid of it in the foregoing Preface *a*.

Neither is it proper to repeat here what has been ſaid in the Preamble of the Second Book, to give an account why we have thought it fitting to treat of the Succeſſion to Inteſtates before the Teſtamentary Succeſſions, although theſe are explained in the firſt place in the *Roman* Law.

a See the ſaid Preface, n. 5. and the following.

TIT. I.

Of Teſtaments.

IN the *Roman* Law, and in the Provinces of *France*, which are govern'd by the written Law, the Name of Teſtament, in the proper

Signification of it, is applied only to Diſpoſitions, which contain the Inſtitution and Appointment of an Heir or Executor; and all the other Diſpoſitions, in which there is no Heir or Executor named, are call'd *Codicils*, or *Donations* made in proſpect of Death.

According to this Diſtinction of Teſtaments and Codicils, or Donations in proſpect of Death, there ought to be no Teſtaments at all in the Provinces which are governed by their Cuſtoms, but only Codicils, or Donations in proſpect of Death; becauſe in the Cuſtoms there can be no other Heirs but thoſe of Blood, and they give only the Name of univerſal Legataries to the Perſons who ſucceed to all the Goods which one has power to diſpoſe of by Will. But nevertheleſs, they do give the Name of Teſtaments to Diſpoſitions made in view of Death, which contain only particular Legacies: And with much more reaſon may we give the Name of Teſtaments to the Diſpoſitions which name univerſal Legataries, ſeeing they are bound for the Charges in proportion to the Share which they have of the Goods, in the ſame manner as if they were Heirs or Executors, and that they may even have all the Goods in the Cuſtoms where the Teſtator is at Liberty to diſpoſe of all his Acqueſts, and of all his Moveables, if the Teſtator were a Perſon whoſe Eſtate conſiſted wholly of Goods of theſe two kinds, and who had no Eſtate of Inheritance which came to him by Deſcent from his Anceſtors.

We make here this Remark, to adverтiſe the Reader, that we ſhall in the Sequel of this Work uſe the word Teſtament both in the one and the other of theſe two Senſes, which comprehend all the Diſpoſitions that are made in view of Death; but we ſhall do it in ſuch a manner, that it will be eaſy to diſtinguiſh in each Place whether it ought to be underſtood either barely of Diſpoſitions which contain the Inſtitution of an Executor, or only of the others.

We have not inſerted in this Title that Rule of the *Roman* Law, That the Power of making a Teſtament, is part of the publick Law *a*. For beſides that in all the Cuſtoms it is on the contrary receiv'd as the univerſal, and as it were publick Law, that no one can make a Teſtament, that is, an Inſtitution of an Heir or Executor; we aſcribe, properly ſpeaking, this Character of publick Law only to what relates to Matters in which the Publick has an Intereſt, ſuch as Matters belonging to the Exchequer, Matters criminal, and others of the like nature *b*. And altho it be true, that the Power of making a Teſtament being eſtabliſhed and regulated by the Laws which make one of the principal Parts of the univerſal Order of human Society, it may be ſaid in this Senſe that the Power of making a Teſtament is part of the publick Law; yet the Nature of Teſtaments is not thereby diſtinguiſhed from that of many other Matters, which are as much or more neceſſary in this Order of Society than Teſtaments; ſuch as ſeveral ſorts of Covenants, Guardianſhips, and others, the Uſe of which is eſtabliſhed and regulated by the Laws. Thus Teſtaments are no more a part of the publick Law, than Guardianſhips and other Matters; unleſs that any one ſhould think that it might be ſaid that Teſtaments were in another Senſe part of the publick Law under the *Roman* Law, becauſe at firſt People were allowed to make their Teſtaments in the publick Aſſemblies *c*. But it does not ſeem as if this were the Reaſon why it is ſaid in the *Roman* Law, that Teſtaments are part of the publick Law, becauſe there were other Ways of making one's Teſtament in private, even whilſt that other Way was in uſe.

a Teſtamenti factio non privati, ſed publici juris eſt. *l.* 3. *ff. qui teſt. fac. poſſ.*

b See the xivth *Chap. of the Treatiſe of Laws.* n. 27.

c Calatis comitiis. §. 1. *Inſt. de teſt. ord.*

SECT. I.

Of the Nature of Teſtaments, and their Kinds.

Teſtaments wholly witten with the Teſtator's Hand.

IT is fit to acquaint the Reader, that he will find nothing in this Section concerning that Kind of Teſtaments which are called *Holographe*, that is, entirely written and ſigned with the Teſtator's Hand, without any Witneſſes. For altho they have been approved by a Novel of *Theodoſius* and *Valentinian a*, and that the Proof of the Teſtator's Will may be fully as authentick, or rather more, by his Writing, than by his Declaration before Witneſſes; yet ſince the Teſtaments written with the Teſtator's own Hand, without Witneſſes, are not of univerſal Uſage, and that they are not received in the *Roman* Law but

a Nov. 2. §. 1. de Teſtam.

with

with the Teſtimony of ſeven Witneſſes, the Teſtator being diſpenſed with there only from ſigning it with his own hand *b*, we have not thought proper to ſet down here a Rule concerning the uſe of theſe Teſtaments without Witneſſes, contrary to the expreſs Proviſion of the *Roman* Law received in many Places.

Teſtaments of poor Country People.

Neither ſhall we make any mention in this Section of the Teſtaments of poor Country People, which are called *Teſtamenta Ruſticorum*, in which the Laws diſpenſe with the exact Obſervance of the Formalities, as appears by the laſt Law *Cod. de Teſtam.* For as the Privilege which that Law gives for theſe ſorts of Teſtaments, is only to diſpenſe with the number of ſeven Witneſſes, in the Places where ſo many Perſons cannot be found, who know how to write their Names, and to make the number of five Witneſſes ſufficient in this caſe; ſo this Privilege ſeems altogether uſeleſs according to our Uſage in *France*, which requires the Preſence of a Publick Notary with Witneſſes, and where it is not neceſſary that the Witneſſes be Perſons who can write. But there is ſeldom want of ſuch Witneſſes in a Place where there are Publick Notaries.

Teſtaments among Children.

There is likewiſe another kind of Teſtaments, which we have thought fit to leave out in this Section, which is that of Teſtaments among Children, that is to ſay, Diſpoſitions which a Father makes among his Children, whether by way of Teſtament, or by way of Partition. This kind of Teſtaments is diſtinguiſhed from all the others for this reaſon, becauſe ſuch Wills were ſo favourable in the *Roman* Law, that in whatever manner a Father explained his Intention of dividing his Eſtate among his Children, whether by a Teſtament begun and not finiſhed, *ſive cœptum, neque impletum Teſtamentum*, or by a Letter, *ſive per epiſtolam*, or by any other Writing whatſoever, *ſive quocunque alio modo ſcripturæ, quibuſcunque verbis vel indiciis inveniantur relictæ*; this Will, altho ever ſo imperfect and void of Form, was nevertheleſs to be executed *c*. This ſeems to proceed from the ſame Spirit of the *Roman* Law which gave Fathers ſuch an abſolute Authority over their Children, that at firſt they had power to diſinherit them without any cauſe, as has been obſerved in another Place *d*. This Licence given to Fathers in making their Wills among their Children, does not ſeem to be founded on the Favour of the Childrens Intereſt, ſince on the contrary it is the common Intereſt of the Children, that their Fathers ſhould preſerve the natural Equality among them. Thus the Conſideration of the Children is not a Motive that renders the Wills of Parents favourable, when they give greater Advantages to ſome of their Children than to the others. And if this Favour of the Children were to be conſidered in the Difficulties that ariſe concerning Wills made by Fathers among their Children, it would help rather to annul them if they are defective in point of Form, than to ſupply the want of Formalities, in order to make them valid, when they deſtroy that Equality which is to preſerve Union among Brothers.

This exceſſive Licence in the imperfect Wills of Fathers among their Children was reſtrained by *Juſtinian*, who by his 18th *Novel*, *c.* 7. ordains, That they ſhould be ſigned either by the Father, or by the Children. And by his 107th *Novel* he added, That the Father ſhould write with his own Hand the Date, the Names of his Children; and that he ſhould likewiſe ſet down with his own Hand, at length, and not in Numbers, or Cyphers, the Portions which he ſhould regulate for every one. But altho it ſeems that all theſe Precautions ought to ſuffice to make theſe Teſtaments valid, even without Witneſſes; yet many Interpreters have been of opinion that none of theſe Laws diſpenſe with the Neceſſity of Witneſſes. And he that is reckoned the moſt able of the ſaid Interpreters, being conſulted in a Queſtion concerning the Validity of a Father's Teſtament among his Children, was of opinion, that the Number of Witneſſes was neceſſary; and that all Teſtaments of Fathers among their Children without this Formality, are null; and gives particular Anſwers to all the Laws above-mention'd, to ſhew that none of them diſpenſe with this Formality.

It is upon theſe Conſiderations, that altho the Uſe of theſe Teſtaments, or Partitions, among Children, is receiv'd in ſome Provinces, and that they are there approved of, altho they want the Formalities, yet ſeeing this is not an univerſal Uſage, we have not thought proper to lay it down here as a general Rule, that the imperfect and unformed Will of a Father among his Children ought to ſubſiſt: For this would be a Law too uncertain and undetermin'd, ſince

b l. 28. §. 1. *C. de Teſtam.*

c V. l. 16. 21. *& l. ult. C. fam. erciſc. l.* 21. §. 1. *C. de Teſtam.*

d See the Preface to this Second Part, num. 7.

ſince it would leave Fathers at liberty to diſpenſe with all ſorts of Formalities in their Teſtaments, ſo as that there could be no Teſtament ſo imperfect, but what would be made valid in this manner, if we ſhould give to the Words of theſe Laws the indefinite Extent which they ſeem to have, and which does no ways agree with the Character of Plainneſs and Clearneſs, that is neceſſary to make Rules certain and fixed as they ought to be. So that it is to be wiſhed that there were, in relation to this Matter, ſome fixed Rules, which might either ſubject theſe Teſtaments to the Formalities of others, or regulate the Formalities that cannot be diſpenſed with in them; as has been done in the Cuſtoms of ſome Provinces, which have regulated the Formalities of Partitions made by Fathers among their Children. In ſome Cuſtoms theſe Partitions are not received unleſs the Children have conſented to them; others require in ſuch Partitions the Preſence of a Publick Notary, and two Witneſſes, as in all other Teſtaments; it having been judg'd neceſſary, that an Act ſo ſerious, and of ſuch Importance, as a Teſtament among Children, ſhould be made with as much Application and Exactneſs as a Teſtament which calls Strangers to be Heirs or Executors; but eſpecially when a Father will make unequal Partitions among his Children, and when there is leſs Inconvenience in favouring the Equality among Children, and in requiring in the Wills of Fathers Formalities that are eaſy, than to approve without diſtinction the imperfect and undigeſted Wills of Parents, which perhaps are only rude Draughts of what they project in their Imaginations, without coming to a final Reſolution therein, and which give occaſion of Strife and Contention among the Children.

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I.

A Teſtament is an Inſtitution or Appointment of an Heir or Executor, made according to the Formalities preſcribed by Law; whether that together with the ſaid Inſtitution there be any other Diſpoſition, or that there be nothing in it beſides the bare Inſtitution *a*. 1. *Definition of a Teſtament.*

a Quinque verbis poteſt (quis) facere teſtamentum; ut dicat Lucius Titius mihi hæres eſto. *l.* 1. §. 3. *ff. de hæred. inſt.*

Teſtamentum eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri velit. *l.* 1. *ff qui teſt. fac. poſſ.*

It follows from the firſt of theſe Texts, that the eſſential part of a Teſtament is the Inſtitution of an Heir or Executor, ſeeing theſe Words, I will that ſuch a one be my Heir or Executor, *make a Teſtament.*

[The word *Heir* hath not altogether the ſame Signification in the Law of *England*, that it hath in the Civil Law. For by the Common Law of *England*, he is only *Heir* which ſucceedeth by Right of Blood; and a Man cannot, properly ſpeaking, be Heir to Goods and Chattels, but only to ſome Eſtate of Inheritance. *Coke* 1 *Inſt. fol.* 7. *b.* 237. *b.* However, ſeeing the Civil Law uſes the Word *Heir* promiſcuouſly in Teſtaments, as well as Deſcents, we are obliged, in ſpeaking of Teſtaments, to make uſe of the Word *Heir*, as well as that of *Executor*, for the better underſtanding of the Texts of the Civil Law, which are quoted in the Notes upon the ſeveral Articles. But the *Engliſh* Reader will obſerve, that whenever the Word *Heir* is uſed in the matter of Teſtaments, it is to be underſtood only of the *Teſtamentary Heir*, not of the *Heir of Blood*.]

The Interpreters are divided among themſelves upon this Queſtion, whether the Definition of a Teſtament, as it is ſet down in the ſecond Text here quoted, be ſo juſt and exact as a Definition ought to be. And many, even of thoſe of the greateſt Learning among them, undertake the Defence of it againſt thoſe who ſay it is not exact. As to which we may ſay, that if the Authors of the Laws have not always in their Definitions, and in their Expreſſions, that Juſtneſs and Exactneſs which Logicians and Mathematicians have; it is but juſt that that Defect ſhould be ſupplied, in order to give to the Laws the natural Senſe which one clearly ſees their Intention does demand. But ſeeing we endeavour

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in this Book to render every thing intelligible to every Reader, and to obſerve throughout the whole, as much as we are able, that Exactneſs; we have judged that, in order to give the juſt Idea of a Teſtament, and ſuch as may diſtinguiſh it from other Diſpoſitions made in proſpect of Death, we ought to form the Definition of a Teſtament in the manner in which it is conceived in this Article. For whereas the other Diſpoſitions are only of a part of the Goods, it is eſſential to a Teſtament, that there be named in it an Heir or Executor, who is the univerſal Succeſſor. See the firſt Article of the firſt Sect. Of Heirs and Executors in general.

It is to be remarked on this Definition, that it does not agree with the Diſpoſitions which People may make of their Eſtates in the Cuſtoms. For, as has been obſerved in the Preamble of this Title, one cannot have other Heirs in the Cuſtoms but the Heirs of Blood.

II.

2. *The bare naming of an Executor makes a Teſtament.*

It follows from this Definition of a Teſtament, that it comprehends two eſſential Characters neceſſary to be diſtinguiſh'd. One is, that it contains the Diſpoſal of all the Teſtator's Goods; and the other is, that it is a Diſpoſition made in view of Death, which may be revoked *b*. We ſhall explain in the two following Articles the Effects of theſe two Characters, and in what manner they are comprehended in the Definition explained in the firſt Article.

b This is a Conſequence of the Definition of a Teſtament. See the two Articles which follow.

III.

3. *The Teſtament implies the Diſpoſal of all the Goods.*

Since it is eſſential to a Teſtament, that it contain the Inſtitution to an Heir or Executor, and that the Heir or Executor is univerſal Succeſſor of all the Goods that are not particularly bequeathed, every Teſtament implies the Diſpoſal of all the Goods; whether it be that the whole is left to the Heirs or Executors, or that others are to have a ſhare with them: Which makes no Alteration in the Nature of a Teſtament; and all the different Diſpoſitions that may happen to be in it, make only one Act, which contains a Declaration of the Teſtator's Will, as to the Diſpoſal of all the Goods which he ſhall happen to leave behind him *c*.

c This is alſo a Conſequence of the Definition. See the 1ſt Art. of the 1ſt Sect. Of Heirs and Executors in general.

IV.

4. *The Teſtament hath its Effect only by the Death of the Teſtator.*

The Teſtament is a Diſpoſition made on occaſion of Death, that is, made in the view that the Perſon who diſpoſes of his Goods by Teſtament has of his own Death, and with deſign that his Diſpoſition ſhall not have its Effect till after his Death: for it is only by this Death that the Heir or Executor has his right. From whence it follows, that the Teſtament having no effect till the Death of the Teſtator, he is always at liberty to revoke it, and either to change it by making another, or to deſtroy it quite by ſuppreſſing it, without making another. Thus, when there happen to be ſeveral Teſtaments of one and the ſame Perſon, it is always the laſt that ought to ſubſiſt, except in ſo far as this laſt Teſtament ſhould ratify and confirm the Diſpoſitions of the former *d*.

d De eo quod quis poſt mortem ſuam fieri velit. *l.* 1. *ff. qui teſt. fac. poſſ.*

Prius teſtamentum rumpitur cum poſterius rite perfectum eſt. *l.* 2. *ff. de inj. rupt. irr. fact. teſt.*

Ambulatoria enim eſt voluntas defuncti uſque ad vitæ ſupremum exitum, *l.* 17. *ff. de adim. vel transf. leg.*

Altho this laſt Text does not, ſtrictly ſpeaking, relate to what is ſaid in this Article; yet nevertheleſs it may be applied to it.

See, touching the Nature of Diſpoſitions becauſe of Death, what has been ſaid of that Matter in the Preamble of the Title of Donations, that have their effect in the Life-time of the Donor.

V.

5. *The Heir of Blood is Teſtamentary Heir, if he is inſtituted.*

Altho the Teſtator name no other Heir or Executor, but the Perſon who ought to ſucceed to him, if he died inteſtate; yet if he accepts the Inheritance or Succeſſion, he ſhall be Teſtamentary Heir, and bound in this Quality to diſcharge the Legacies, and all the other Charges impoſed by the Teſtament *e*; for it is only by this Title that he enjoys a Succeſſion which the Teſtator might have left to others if he had pleaſed.

e See the 17th Article of the 5th Section, and the Texts which are there quoted.

VI.

6. *The Teſtament ought to contain the Inſtitution of an Heir or Executor.*

Diſpoſitions made in view of Death, which do not contain the Inſtitution of an Heir or Executor, are not properly Teſtaments, but Codicils or Donations becauſe of Death *f*.

f Codicillis hæreditas neque dari, neque adimi poteſt; ne confundatur jus teſtamentorum & codicillorum. §. 2. *inſt. de codicill.*

VII.

7. *The Will of the Teſtator is in place of a Law.*

It follows from the Liberty which the Laws give to Perſons to diſpoſe of their Effects by a Teſtament, that all the Wills of a Teſtator, whether it be in what relates to the Appointment of an Heir or Executor, or the other particular Diſpoſitions which he may have made, are in the place of Laws both to the Executor,

Executor, if he accepts of the Succeſſion, and alſo to the Legataries, if they accept their Legacies *g*; but this is to be underſtood with this Reſerve, that the Teſtator has ordained nothing contrary to Law or good Manners *h*. For with reſpect to the Teſtator, his Diſpoſitions have the Authority of the Law, which permits him to make them; and as to thoſe who receive any Benefit by a Teſtament, their Acceptance of it engages them to the Charges, which it may contain, in the ſame manner as if they had treated with the Teſtator, he leaving to them his Eſtate upon the Conditions, and with the Charges, which he has explained, and they accepting the Eſtate with thoſe Charges; and in the ſame manner likewiſe as if they had treated with the Perſons to whom the Teſtator engages them *i*.

g Verbis legis duodecim tabularum his, *uti legaſſit ſua rei ita jus eſto*, latiſſima poteſtas tributa videtur, & hæredes inſtituendi, & legata, & libertates dandi, tutelas quoque conſtituendi. Sed id, interpretatione coanguſtatum eſt, vel legum, vel auctoritate jura conſtituentium. *l.* 120. *ff. de verb. ſignif. inſt. de leg. falcid.*

Diſponat unuſquiſque ſuper ſuis, ut dignum eſt, & ſit lex ejus voluntas. *Nov.* 22. *c.* 2.

h Nemo poteſt in ſuo teſtamento cavere, ne leges in ſuo teſtamento locum habeant. *l.* 55. *ff. de legat.* 1.

Teſtandi cauſa de pecunia ſua legibus certis facultas eſt permiſſa: non autem juriſdictionis mutare formam vel juri publico derogare, cuiquam permiſſum eſt. *l.* 13. *ff. de teſtam.*

Quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, & ut generaliter dixerim contra bonos mores fiunt, nec facere nos poſſe credendum eſt. *l.* 15. *ff. de condit. inſtit.*

This indefinite Liberty of Teſtators is naturally reſtrained within the Bounds of what is not contrary to Law, as is ſaid in the Article: And a Teſtator can ordain nothing that is contrary to the Diſpoſition and Spirit of any Law. Thus, he cannot prohibit his Heirs or Executors to make Partition of his Eſtate. Thus, he cannot direct that a Subſtitution which he has made in his Teſtament, ſhould not be publiſhed and inrolled. Thus, he cannot deprive his Children of their Legitime, or Child's Part.

i Quaſi ex contractu debere intelligitur. §. 5. *in fin. Inſt. de oblig. quæ quaſ. ex contr. naſc.* Videtur impubes contrahere cum adiit hæreditatem. *L.* 3. *in fin. ff. quibus ex cauſ. in poſſ. eatur.*

See, touching the Engagement of the Heir, or Executor, the 8th Art. of the firſt Sect. of Heirs and Executors in general.

VIII.

8. The Teſtament ought to depend on the Will of no other Perſon but the Teſtator.

Since the Diſpoſitions of a Teſtament have their effect by the Will of the Teſtator, which is in place of a Law; it is only from this Will that they have their Force. And if a Teſtator, inſtead of chuſing and naming his Heir or Executor himſelf, had ſaid in his Teſtament, that his Will was, that ſuch a one ſhould be his Heir or Executor, whom a certain Perſon, whom he ſhould name, ſhould chuſe and call to his Succeſſion; this Inſtitution would be lame, and have no effect. For it would want the Character that is eſſential to a Teſtament, of containing the proper Will of the Teſtator, and not that of another Perſon. And it would be even contrary to Equity, that the Choice of an Heir or Executor ſhould depend on any other Perſon than him who has the Right to diſpoſe of his Eſtate: ſeeing on one hand the Teſtator may be deceived by that Perſon who after his Death may abuſe in ſeveral reſpects the Confidence which the Teſtator has put in him; and on the other hand, he who ſhould happen to be choſe Heir, or Executor, would owe this Benefit leſs to the indefinite Will of the Teſtator, than to the Choice of him who had the Right to name the Heir or Executor *l*.

l Illa Inſtitutio quos *Titius voluerit*, ideo vitioſa eſt quod alieno arbitrio permiſſa eſt. Nam ſatis conſtanter veteres decreverunt, teſtamentorum jura ipſa per ſe firma eſſe oportere: non ex alieno arbitrio pendere. *l.* 32. *ff. de hæred. inſtit.* See the 25th Art. of the 5th Sect. of this Title, and the Remark that is there made on it.

¶ Altho we have endeavour'd throout the whole of this Book to confine our ſelves to the Rules and Remarks that ſeemed neceſſary, and to abſtain from every thing that is only matter of Curioſity; yet we cannot forbear to remark here, that there is among the Laws of *Spain* a Rule directly contrary to that which is explained in this Article. For there it is permitted to every one to name a Perſon to whom he gives power to make his Teſtament for him, and to diſpoſe of his Goods after his Death, and to chuſe for him ſuch Heirs or Executors as he ſhall think fit. And whatſoever is ordered by this Perſon who is commiſſioned to make the Teſtament, whom they call *Cometido a fazer teſtamento*, is obſerved in the ſame manner as if the Deceaſed had ordained it; excepting only that he cannot name himſelf Heir or Executor, nor diſinherit the Children or other Deſcendants of that Perſon whoſe Teſtament he makes, nor ſubſtitute to them by any manner of Subſtitution, nor name a Teſtator to them, unleſs he has expreſs Power from the Deceaſed ſo to do. *V. la ley* 31. *de Toro, and the Additions to the Laws of* Alphonſus IX. *Part the 6th, Title of Teſtaments.*

IX. It

IX.

9. *Two ſorts of Queſtions concerning Teſtaments: What the Teſtator had power to do, and what he had a mind to do.*

It follows from the Rules explained in the foregoing Articles, that there are only two ſorts of Queſtions that can ariſe from the Diſpoſitions of a Teſtament, when it is made according to Form, and ought to ſubſiſt. One is of thoſe where the Queſtion is to know whether the Diſpoſition of the Teſtator has nothing in it that is contrary to Law; and the other is of thoſe where the Matter in queſtion is to know what has been the Teſtator's Intention. For it is his Intention that ought to ſerve as a Rule, if it is not contrary to Law *m*.

m. Toties ſecundùm voluntatem teſtatoris facere compelluntur (hæres) quoties contra legem nihil ſit futurum. *l.* 37. *ff. de cond. & dem.*

See, touching the Difficulties in the Interpretation of Teſtaments, the vith *Section, and the others which follow.*

X.

10. *One cannot inſtitute an Heir or Executor ſo, as that his Inſtitution ſhall begin, or ceaſe to be, after a certain time.*

Since the Heir or Executor, that is named in a Teſtament, ought to be univerſal Succeſſor to all the Goods, and all the Charges of the Deceaſed, a Teſtator cannot inſtitute an Heir or Executor in Terms which limit the Inſtitution, either not to take place but within a certain time after the Teſtator's Death, or to ceaſe to have effect after a certain time which he has preſcribed; ſo as that in the firſt Caſe the Succeſſion ſhould be without any Heir or Executor during all that time; and that in the ſecond Caſe there ſhould be no Heir or Executor after the time limited is expired. For it is eſſential to the Quality of Heir or Executor, that he take the place of the Deceaſed after his Death; and that the Succeſſion do not remain vacant, and without a Maſter, who may proſecute the Rights, and acquit the Charges of it. But altho this Diſpoſition ſhould have no effect, yet the Teſtament which contains it would not be null for this ſingle Defect, and the Heir or Executor would be reputed ſuch from the time of the Teſtator's Death, and for all the time to come, as much as if the Inſtitution had not been limited in this manner *n*.

n Hæreditas ex die, vel ad diem, non rectè datur: ſed vitio temporis ſublato, manet inſtitutio, *l.* 34. *ff. de hæred. inſt.*

It is not the ſame thing with reſpect to bare Legacies and Legacies in Truſt, which may begin to be due, or ceaſe, at a certain Day. For in this there is no manner of Inconvenience; the Right to the Thing bequeathed remaining with the Heir or Executor, whilſt the Legatary has it not, and reverting to him when the Legatary ceaſes to have it.

This Rule is not contrary to that other, which permits the Teſtator to charge an Heir or Executor to deliver over the Succeſſion after a certain Time to another Perſon, who ſucceeds in his place by a fiduciary Bequeſt, which we ſhall treat of in its proper place. For the Succeſſion does not by this means remain vacant: And beſides, this Heir or Executor, who reſtores the Inheritance, continues nevertheleſs to be Heir or Executor, and to be bound for the Charges, againſt which the Succeſſor ought to indemnify him. See the viiith Article of the the firſt Section of Subſtitutions.

XI.

11. *The Teſtament hath its effect by the Acceptance of the Heir or Executor.*

Altho the Nature of the Teſtament, and its Validity, conſiſts in this, that it contains the Will of the Teſtator, and that it is by this Will that it ought to have its effect; yet it hath its effect only when the Heir or Executor, accepting of this Quality, engages himſelf thereby to all the Diſpoſitions of the Teſtator, and to all the Charges of the Inheritance *o*.

o Cùm ſemel adita eſt hæreditas, omnis defuncti voluntas rata conſtituitur. *l.* 55. §. *ad Senat. Trebell.* See the viith Article.

XII.

12. *Divers kinds of Teſtaments.*

There are Teſtaments of divers kinds, and which are diſtinguiſhed, not by that which is eſſential to their Nature, which is the Inſtitution of an Heir or Executor common to all Teſtaments, but by the different Formalities which the Laws have eſtabliſhed for the Uſe of Perſons, who have a mind to diſpoſe of their Eſtates, according as theſe Formalities may agree either to the Quality of the Perſon, or to the Circumſtances of the Condition in which he is, as will appear by the following Articles *p*.

p See the following Articles.

XIII.

13. *Teſtaments of thoſe who are blind, deaf, or dumb.*

As to what concerns the Perſons of the Teſtators, we may make one prime Diſtinction of Teſtaments, which may be made by thoſe whom ſome Infirmities render incapable of certain Ways in which others may make their Teſtaments. Thus, Perſons who are blind, deaf, or dumb, can make their Teſtaments only with ſuch Formalities as they are capable of, as ſhall be explained in the following Section *q*.

q See the viith, viiith, ixth, xth, *and* xith *Articles of the following Section, and the Remarks on them.*

XIV.

XIV.

14. *Military Teſtaments.*

The ſame Conſideration of the Difference in Teſtators, furniſhes us with another Diſtinction of Teſtaments that are made by Officers in the Army, and Soldiers, that are actually engaged in their military Functions, and taken up in ſuch a manner that it were not poſſible for them to obſerve the Formalities which the Law preſcribes in Teſtaments. For the Law diſpenſes with theſe Formalities in Perſons who are in this Condition, that it is impoſſible for them to obſerve them, and facilitate their Diſpoſitions, as ſhall be explained in the third Section *r*.

r See the xvth *Article of the third Section.*

XV.

15. *Teſtaments in time of a Plague.*

The ſame Conſideration of the Conjunctures in which Teſtators cannot obſerve the Formalities neceſſary to a Teſtament, has induced the Lawgivers to diſpenſe with thoſe that are obliged to make their Teſtaments in a time of Plague, from obſerving therein rigorouſly all the Formalities which they have preſcribed. We ſhall explain in the third Section the Temperament which they allow of whenever this Caſe happens *s*.

s See the xvith *Article of the third Section.*

XVI.

16. *Secret Teſtaments.*

Seeing a Teſtator may reaſonably wiſh that his Will may be kept ſecret till after his Death, he may make a private and ſecret Teſtament in the manner that ſhall be explained in the third Section *t*.

t See the xviith *Article of the third Section.*

XVII.

17. *Several Originals of one and the ſame Teſtament.*

In what manner ſoever a Teſtament is made, the Teſtator may, if he pleaſes, make only one original Teſtament, or make two or more Originals, for the ſurer Preſervation of his Will, depoſiting them in different Places, or keeping one Original in his own Cuſtody, and depoſiting another in the hands of ſome other Perſon *u*.

u Unum teſtamentum pluribus exemplis conſignare quis poteſt. Idque interdum neceſſarium eſt. Fortè ſi navigaturus & ſecum ferre, & relinquere judiciorum ſuorum teſtationem velit. *l.* 24. *ff. qui teſt. fac. poſſ.* See the ixth Article of the ſeventh Section.

XVIII.

18. *The Teſtament is common to all Parties that have an Intereſt under it.*

Seeing a Teſtament is a Title that belongs in common to the Heirs or Executors, to the Legatees, to the Perſons who are ſubſtituted, or other Perſons who have Intereſt in any of the Diſpoſitions thereof; every one of thoſe who may have any Intereſt under it, has a Right to have this Title in his Cuſtody. But ſince they all cannot have the original Teſtament, every Perſon that has an Intereſt in it, may get a Copy of it written in due Form, and ſigned by the publick Officer that has the Cuſtody of the Original; and ſuch a Copy will ſerve in place of the Original *x*.

x Tabularum teſtamenti inſtrumentum non eſt unius hominis, hoc eſt hæredis, ſed univerſorum quibus quid illic adſcriptum eſt. *l.* 2. *ff. teſtam. quem aper. inſpic. & deſcr.*

SECT. II.

Who may make a Teſtament, and who is capable of being Heir or Executor, or a Legatary.

THERE are two Things to be conſidered in a Teſtament, in order to know its Validity, and what Effect it may have. One is, to know whether the Perſon that has made the Teſtament had power to make one; and whether the Perſons, in favour of whom the Teſtator has diſpoſed of his Goods, are capable of receiving what is given them: And this ſhall be the Subject-matter of this Section. The other is, to know if the Teſtament is made according to Form; which ſhall be explained in the following Section *a*.

It is to be obſerved on the Subject-matter of this Section, that beſides the Cauſes of Incapacity of receiving a Benefit by a Teſtament, which are here explained, we have in *France* two Rules which annul the Diſpoſitions of ſome Perſons made in favour of others, to whom it is prohibited to give any thing. One is of the Ordinance of *Francis* I. in the Year 1539. *Art.* 131. and of *Henry* II. in the Year 1549, *Art.* 2. which annuls all Donations, whether by Teſtament, or otherwiſe, that may be made

a Si quæramus an valeat teſtamentum, imprimis animadvertere debemus, an is qui fecerit teſtamentum, habuerit teſtamenti factionem: deinde ſi habuerit, requiremus an ſecundùm regulas juris teſtatus ſit. *l.* 4. *ff. qui teſt. fac. poſſ.*

by

by Minors to their Tutors, Curators, Guardians, and other Adminiſtrators, during their Adminiſtration, or to other Perſons for their behoof. And the other is that of ſome Cuſtoms which forbid the Diſpoſitions made by the Wife in favour of her Husband, or by the Husband in favour of his Wife; which ſome Cuſtoms reſtrain to the Diſpoſitions of the Wife in favour of her Huſband, and do not prohibit thoſe of the Husband in favour of his Wife.

It may alſo be proper to obſerve, in relation to the Capacity of making a Will, that there are ſome Cuſtoms where a married Woman is not allowed to make her Will, unleſs it be with the Permiſſion of her Husband, or that ſhe had this Power given her by the Contract of Marriage.

We muſt remark here, with reſpect to the Incapacity of making a Will, that we have not ſet down in this Section a Rule of the *Roman* Law; which ſome Reader perhaps may find fault with, and therefore we have thought fit to give the reaſon why we have omitted it. It is that Rule which directs, that Perſons who doubt of their State and Condition may not make a Will *b*: From which Rule Soldiers were excepted *c*, who had power to make their Will notwithſtanding this Doubt. Thus he who was uncertain whether he was under his Father's Power, or emancipated, could not make a Teſtament *d*, becauſe a Son that was ſtill in his Father's Family could not make a Will.

We have judg'd it proper not to inſert this Rule here: For in all appearance there can never happen any Caſe where it can be put in practice; and whenever there is a Teſtament, it is natural to preſume that he who made it, did not doubt of his having power to make it; and one would not ſtart the Queſtion to know whether he was in this Doubt, or not. But even altho we ſhould ſuppoſe that a Teſtator had ſome Reaſon to doubt of his Condition, and that he was really uncertain of it; would this Reaſon alone be ſufficient to hinder him from making his Will? Thus, for example, if we ſuppoſe that a young Man of the Age of fourteen Years compleat, being out of his own Country, and not knowing preciſely the Day of his Birth, ſhould happen to fall ſick, and ſhould make a Teſtament, being uncertain whether he was of ſufficient Age to make a Will, or not; but ſtill thinking it better to make a Teſtament, that may be valid, if it ſhould appear that he had the Age that was neceſſary, than to omit making one, becauſe that the Teſtament which he ſhould make, would be null, if it appeared that he was not of the Age that is required; would it be ſaid of ſuch a Teſtament, that it ought to be annulled, becauſe the Teſtator was ignorant of a Fact, which, if he had known it, would have added nothing either to his Age, or to his Experience? But would ever any one think of demanding whether this young Man knew his own Age? And if any one ſhould ſtart this Doubt, which would appear very odd, would it not be ſufficient that this Teſtator had really the Age and Power requiſite for making a Teſtament, to make it valid in theſe Circumſtances? To which we may add, that ſince this Rule did not take in the Caſe of Soldiers, we may infer from thence that even the Authors of it did not look upon it to be a Rule of the Law of Nature: For in that Caſe it would not have been juſt to diſpenſe with the Obſervance of it, even in Soldiers. But the Law of Nature demands that Truth ſhould always have its Effect, and that he who has acquired a Right ſhould not be deprived of it, under pretext that he doubts whether his Right be ſecure. This Effect of Truth has been found ſo juſt, even by the Authors of the Niceties in the *Roman* Law, that we ſee in a Law, that he who being his own Maſter, and free from his Father's Authority, and by that means capable of inheriting an Eſtate that had fallen to him, might inherit it, altho he not only doubted of his being his own Maſter, but was falſly perſuaded of the contrary, thinking himſelf ſtill to be under his Father's Power *e*. Thus they were convinced that Truth ought to ſupply not only a Doubt, but even an Error of this kind.

b l. 15. *ff. de teſt. mil.*
c l. 11. §. 1. *ff. eod.*
d l. 9. *ff. de jur. codicil.*

e See l. 21. *ff. de cond. & dem.*

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I.

1. *Thoſe who are under no Incapacity may make a Will.*

TO know who are the Perſons that have the power of making a Teſtament, or receiving any Benefit by one, it is neceſſary to know whom the Law has render'd incapable thereof: For whoever is under no Incapacity, is capable both of the one and the other *a*.

a Si quæramus an valeat teſtamentum, imprimis animadvertere debemus an is qui fecerit teſtamentum habuerit teſtamenti factionem. *l.* 4. *ff. qui teſt. fac. poſſ.*

II.

2. *Males under* 14, *and Females under* 12 *Years of Age, cannot make a Will.*

The Cauſes which render Perſons incapable of making a Will, proceed from ſome one of thoſe Qualities which have been explained in the Title of Perſons; ſuch as the Qualities of Unripeneſs of Age, of being a Foreigner, being under Sentence of Death, and others. Thus we may reckon, as the firſt Cauſe of Incapacity of making a Teſtament, the want of that Age which is called in the *Roman* Law *Pubertas*, that is, 14 Years compleat in Males, and 12 Years compleat in Females: For thoſe that have not accompliſhed this Age cannot make a Will *b*. And altho even one that had made his Teſtament before he had attained fourteen Years of Age, ſhould not die till a long time after, ſo that it might be ſaid, that being of Age ſufficient, and capable of making a Teſtament, he had approved of that which he had made when he was under Age by not altering it; yet this Teſtament being null in its Origin, would not be made valid by this Circumſtance *c*.

b Teſtamentum facere non poſſunt impuberes quia nullum eorum animi judicium eſt. §. 1. *inſt. quib. non eſt perm. fac. teſtam.*

It ſeems to have been a Doubt heretofore in the Roman *Law, whether Eunuchs could make a Will, becauſe they could never attain to a true Puberty: And they were allowed to make a Will only at the Age of eighteen Years.* Spadones eo tempore teſtamentum facere poſſunt quo plerique pubeſcunt; id eſt, anno decimo octavo. *Paulus* 3. *Sent.* 4. 2. *But the Emperor* Conſtantine *allowed them to make their Wills at the ſame time that others did.* Eunuchis liceat facere teſtamentum, componere poſtremas exemplo omnium voluntates, conſcribere codicillos, ſalva teſtamentorum obſervantia. *l.* 5. *Cod. qui teſt. fac. poſſ.*

A qua ætate teſtamentum vel maſculi vel fœminæ facere poſſunt, videamus. Verius in maſculis quidem quartum decimum annum ſpectandum: in fœminis verò duodecimum completum. Utrum autem exceſſiſſe debeat quis quartum decimum annum ut teſtamentum facere poſſit, an ſufficit compleſſe? propone aliquem Kalendis Januariis natum, teſtamentum ipſo natali ſuo feciſſe, quarto decimo anno, an valeat teſtamentum? Dico valere. Plus arbitror, etiam ſi pridie Kalendarum fecerit, poſt ſextam horam noctis, valere teſtamentum. Jam enim compleſſe videtur annum quartum decimum, ut Marciano videtur. *l.* 5. *ff. qui teſt. fac. poſſ. v. l.* 1. *ff. de manumiſſ.*

c Si filius familias aut pupillus tabulas teſtamenti fecerit, ſignaverit, ſecundum eas bonorum poſſeſſio dari non poteſt. Licet filius familias ſui juris, aut pupillus pubes factus deceſſerit. Quia nullæ ſunt tabulæ teſtamenti, quas is fecerit, qui teſtamenti faciendi facultatem non habuerit. *l.* 19. *ff. qui teſtam. fac. poſſ.*

¶ We have ſaid in the Article, that it is neceſſary to have this Age complete, *annum completum*, as is ſaid in the ſecond of the Texts quoted here: But the Words following raiſe a Difficulty which we ought not to paſs over in ſilence: For altho the natural Senſe of theſe Words, *fourteen Years complete*, ſeems to require that the laſt Moment of the fourteenth Year ſhould be expired, ſince it is only at that Moment that it is accompliſhed, yet what follows in the ſaid

Law

Law appears to be contrary to it. For theſe Words, *utrum exceſſiſſe debeat, an ſufficit compleſſe*, and the reſt that follows, purporting that the Teſtament is good, if it is made on the Birth-Day, or even on the Eve thereof, intimate ſufficiently that the Year is held for accompliſhed before the laſt Moment of it is expired, in what manner ſoever we underſtand the Eve of the Birth. For that may be underſtood two Ways: The one is, in counting the Eve of the Birth-Day according to the Computation of the Days of the Year; ſo that in the Caſe of one born the 1ſt Day of *January*, which is the Caſe of this Law, the Eve of the Birth-Day would be the laſt Day of *December*. The other Way is, in taking for the Eve of the Birth-Day the four and twenty Hours which precede the Moment of the ſaid Birth.

It ſeems to be the firſt of theſe two Ways, to which this Law determines the Eve of the Birth-Day, ſince it ſuppoſes a Teſtament made in the Morning of the ſaid Eve, without diſtinguiſhing at what Hour the Teſtator was born. So that ſince, according to the *Roman* Uſage, the Day begins at Midnight *a*, it ſeems, that according to this Rule, a Teſtament might be good, altho it ſhould precede the Moment of the Teſtator's Birth more than four and twenty Hours. For if we ſuppoſe, according to this Law, that the Birth-Day is the Firſt of *January*, and that the Eve of the ſaid Day begins from the Midnight of the foregoing Day, that is, at Midnight between the 30th and 31ſt of *December*; and that the Teſtator, born in the Afternoon of the Firſt of *January*, makes his Will in the Morning of the 31ſt of *December*; it would ſeem that, according to the Terms of this Law, this Teſtament ought to be good, altho it preceded more than a whole Day the Moment of the Teſtator's Birth, ſince it would be true that it had been made on the Eve of the ſaid Birth. But this ſeems neither to be regular, nor conformable to our Uſage; as ſhall be ſhewn hereafter.

It may be obſerved, with reſpect to this way of holding the Year for accompliſhed in the beginning of the laſt Day, that it was not ſo in all ſorts of Caſes: For not only Preſcriptions require the entire Accompliſhment of the Year, as has been ſaid in its Place; but even as to the Age which excuſes one from being Tutor, it is neceſſary that the laſt Moment of the laſt Year ſhould be expired *b*. In relation to which it may be ſaid, that there would be as much or more Reaſon for excuſing one from being Tutor in the laſt Day of his ſeventieth Year, as for granting leave to one to make a Teſtament on the laſt Day of his fourteenth Year. And as to what concerns the full Age for making a Teſtament, it ſeems that the Senſe of this Word, of a *Year complete*, is underſtood according to our Uſage of a Year expired, eſpecially in the Cuſtoms: For thoſe which fix the Age for making a Will, require the Years to be accompliſhed, altho thoſe which mention any thing of the Matter, do none of them almoſt allow of the making of a Will before the Age of twenty Years in Sons, and eighteen in Daughters, even as to what other Eſtate they may have beſides what has come to them by Deſcent; and as to what Eſtate they have inherited by Deſcent, they require five and twenty Years. So that the Spirit of theſe Cuſtoms is not to favour a Diſpenſation in point of Time: And likewiſe they do not inſinuate, as this Law does, that the Year ſhould be held for accompliſhed at the beginning of the laſt Day, and much leſs the Eve of it. Therefore we have reſtrained our ſelves in the Article, ſaying that it is neceſſary that the Age ſhould be accompliſh'd, that is, that they ſhould have the Age which the Law requires: For this Expreſſion might be accommodated even to thoſe Uſages, which ſhould only demand that the laſt Day ſhould be begun, taking it in the Senſe of theſe Words of the ſecond of the Texts quoted on this Article, *Utrum exceſſiſſe debeat, an ſufficit compleſſe*. The Difficulty which has engaged us to make this Remark might be placed among the Number of thoſe which may require ſome Regulation.

a V. l. 8. ff. de feriis.

b Exceſſiſſe oportet 70 annos. *l. 2. ff. de excuſ. l. un. Cod. qui ætat.*

[*Altho by the Law of* England *Males after* 14 *Years compleat, and Females after* 12, *may make a Teſtament of their Goods and Chattels*; *yet it is provided by the Statutes of the Realm, that no Perſon, whether Male or Female, ſhall have power to make a Teſtament of any Mannors, Lands, Tenements, or other Hereditaments, within the Age of* 21 *Years.* Stat. 34 Hen. 8. cap. 5. §. 14.]

III.

Sons who are ſtill under their Fathers Power and Authority, not having been emancipated, cannot make a Teſtament *d*, unleſs it be to diſpoſe of thoſe forts

3. *Sons who are ſtill under their Fathers Authority cannot make a Will.*

d Qui in poteſtate parentis eſt, teſtamenti faciendi jus non habet. *l. 6. ff. qui teſt. fac. poſſ.*

ſorts of *Peculiar* Goods of which they are wholly and ſolely Maſters, and which we have ſpoke of in its proper place *e*.

Nemo ex lege quam nuper promulgavimus in rebus quæ parentibus acquiri non poſſunt, exiſtimet aliquid eſſe innovandum, aut permiſſum eſſe filiis familias cujuscumque gradus vel ſexus teſtamenta facere, ſive ſine patris conſenſu bona poſſideant ſecundum noſtræ legis diſtinctionem, ſive cum eorum voluntate. *l. penult. C. qui teſt. fac. poſſ.*

e Omnes omnino quibus quaſi caſtrenſia peculia habere ex legibus conceſſum eſt, habeant licentiam in ea tantummodo ultima voluntate condere. *l. ult. C. eod.*

This Rule, with the Exception for theſe Peculiar Goods, is obſerved in ſome Cuſtoms.

See, touching theſe Peculiar Goods, and touching Emancipation, what has been ſaid thereof in the Preamble of the iid *Section*, How Fathers ſucceed, *and in the* iiid *Article of the ſame Section.*

Altho it may ſeem that this Rule, which renders Sons who are ſtill under the Paternal Power, uncapable of making a Teſtament, was in the Roman *Law a Conſequence of this, that the Son who was ſtill under his Father's Juriſdiction could acquire nothing but what belonged immediately to his Father, excepting thoſe Peculiar Goods which are mentioned in the Article* *; *yet it appears by the ſecond Text cited on this Article, that* Juſtinian, *who gave to Sons living ſtill under the Fathers Power, the Property of the Goods which they might happen to acquire, leaving only to the Fathers the Uſufruct of them, did not grant to them however the Power to diſpoſe of any other Goods by Teſtament, beſides thoſe* Peculiums : *Which ſhews us that the Emperor* Juſtinian *was of opinion, that the Liberty of diſpoſing of the ſaid Peculiar Goods was not ſo much an Effect of the Right of Property, as of the Merit of the Son, who having rendered himſelf worthy of ſuch an Acquiſition, had likewiſe the Privilege to diſpoſe thereof. And as for the other Goods, he could not become capable of diſpoſing of them, but by Emancipation.*

* Filius familias teſtamentum facere non poteſt, quia nihil ſuum habet, ut de eo teſtari poſſit. Sed Divus Auguſtus Marcus conſtituit ut filius familias miles, de eo peculio quod in caſtris acquiſivit teſtamentum facere poſſit. *Ulpian. tit.* 20. §. 10.

[*In* England, *a Son, altho ſtill living under his Father's Power and Juriſdiction, may make a Will, and thereby diſpoſe of his Perſonal Eſtate, if he is paſt fourteen Years of age.* Swinburn of Teſtaments, Part. 2. Sect. 23.]

IV.

4. Madmen cannot make a Teſtament, except in a lucid Interval.

Thoſe who are in a State of Madneſs cannot make a Teſtament, unleſs it be that they have Intervals of Reaſon, which may ſuffice for ſuch a Diſpoſition, and that the Teſtament be begun and accompliſhed, in all its Formalities, in an Interval where the uſe of Reaſon has been perfectly free *f*.

f In eo qui teſtatur, ejus temporis quo teſtamentum facit, Integritas mentis, non corporis ſanitas exigenda eſt. *l.* 2. *ff. qui teſt. fac. poſſ.*

Furioſum in ſuis judiciis ultimum condere elogium poſſe, licet ab antiquis dubitabatur, tamen & retro principibus, & nobis placuit. Nunc autem hoc decidendum eſt, quod ſimili modo antiquos animos movit : Si cœpto teſtamento furor eum invaſit. Sancimus itaque tale teſtamentum hominis qui in ipſo actu teſtamenti adverſa valetudine tentus eſt, pro nihilo eſſe : Si vero voluerit in dilucidis intervallis aliquod condere teſtamentum, vel ultimam voluntatem, & hoc ſana mente inceperit facere & conſummaverit, nullo tali morbo interveniente, ſtare teſtamentum, ſive quamcunque ultimam voluntatem cenſemus : ſi & alia omnia acceſſerint quæ in hujuſmodi actibus legitima obſervatio requirit. *l.* 9. *C. qui teſt. fac. poſſ.* §. 1. *inſt. quib. non eſt perm. fac. teſt.*

V.

5. Old Men, ſick and infirm Perſons, may make a Will.

The Infirmities of old Age, and Diſeaſes which do not take away the Uſe of Reaſon, are no hinderance to thoſe who are in that Condition to make their Will *g*.

g Senium quidem ætatis, vel ægritudinem corporis ſinceritatem mentis tenentibus teſtamenti factionem certum eſt non auferre. *l.* 3. *C. qui teſt. fac. poſſ.*

In eo qui teſtatur, ejus temporis quo teſtamentum facit, integritas mentis non corporis ſanitas exigenda eſt. *l.* 2. *ff. eod.*

There are ſome Cuſtoms where Diſpoſitions made in view of Death are null, if the Perſons who have made them have not ſurvived three Months after making the ſaid Diſpoſitions. See the Preface to this ſecond Part, num. vii.

VI.

6. A Prodigal cannot make a Teſtament.

Prodigals who are interdicted, being incapable of adminiſtring their Goods during their Life, are likewiſe incapable of diſpoſing of them in view of Death. For the ſame Cauſe which deſerves the Puniſhment of Interdiction, deſerves likewiſe that of the Incapacity of making a Teſtament. And whether we conſider the bad uſe that a Prodigal who is interdicted, may make of the Liberty to make a Will, or the Conſequence of puniſhing him for his bad Conduct by depriving him of this Liberty, altho he might even make a good uſe of it, it is for the Intereſt of private Families, and alſo of the Publick, that a Perſon of ſo bad a Conduct as a Prodigal that is interdicted, ſhould not have power to make a Will *h*.

h Is cui lege bonis interdictum eſt, teſtamentum facere non poteſt. Et ſi fecerit, ipſo jure non valet. Quod tamen interdictione vetuſtius habuerit teſtamentum, hoc valebit. *l.* 18. *ff. qui teſt. fac. poſſ.* §. 2. *inſt. quib. non eſt perm. fac. teſt.*

[*As the Interdiction of Prodigals is not in uſe in* England, *ſo we have no ſuch Incapacity of making a Teſtament, as this of a Prodigal.* Swinburn of Teſtaments, Part. 2. §. 23.]

¶ With reſpect to this Matter of a Prodigal's Teſtament, we may diſtinguiſh between that which he makes after his Interdiction, and that which he may have made before. And the Emperor *Leon*, in his 39th *Novel*, makes even a Diſtinction of the Teſtaments which Prodi-

Prodigals make after their Interdiction, approving thoſe which are reaſonable, and rejecting the others. But beſides that the *Novels* of the Emperor *Leon* are not receiv'd in *France*, this Diſtinction ſerves only to raiſe Law-Suits: And it is eaſier and more equitable to annul without diſtinction every Teſtament made by a Prodigal after his Interdiction. But as to the Teſtament made before the Interdiction, there is greater difficulty to know if it ought to ſubſiſt. And altho the Queſtion be decided by the Texts cited on this Article, which determine that this Teſtament ſhould have its Effect; yet it will not be amiſs to conſider ſome Inconveniencies that may follow from this Rule. For as it is certain that Prodigals are interdicted only for their bad Conduct, which has preceded the Interdiction, and that it is becauſe of this bad Conduct that they are incapable of making a Teſtament; ſo the ſame Reaſon which requires that the Teſtament made after the Interdiction ſhould be annulled, ſeems likewiſe to demand that the Teſtament made before the Interdiction ſhould alſo be annulled. For it is natural to preſume, that ſince a Prodigal never thinks of making a Teſtament, unleſs he is put upon it by other Perſons; ſo he would not have made his Will but by the Influence of his Accomplices in his Debaucheries, and in their Favour. And it might likewiſe happen, that a Teſtament which ought to be altered becauſe of the Changes that may have happened in the Family of the Prodigal after his Interdiction, could not nevertheleſs be reformed, becauſe the Prodigal after his Interdiction being incapable of making a Will, he could not make any new Diſpoſitions.

VII.

7. He who is both deaf and dumb cannot make a Will.

He who is both deaf and dumb, whether from his Birth or otherwiſe, and who can neither write or read, being incapable of giving any Sign of his Will, is incapable of making a Teſtament. But if one, who during the time that he was neither deaf nor dumb, had made a Teſtament in due Form, happens afterwards to fall under theſe two Infirmities, altho this Accident renders him incapable of confirming his Will, or altering it if he would, yet the Teſtament which he had made in the time that he was capable of doing it, would ſtill ſubſiſt *i*.

i Surdus, mutus teſtamentum facere non poſſunt. Sed ſi quis poſt teſtamentum factum valetudine, aut quolibet alio caſu mutus, aut ſurdus eſſe cœperit, ratum nihilominus permanet teſtamentum. *l.* 6. §. 1. *ff. qui teſt. fac. poſſ.*

Sancimus ſi quis utroque morbo ſimul laboret, id eſt, ut neque audire, neque loqui poſſit, & hoc ex ipſa natura habeat, neque teſtamentum facere, neque codicillos, neque fidei commiſſum relinquere, neque mortis cauſa donationem celebrare concedatur. *l.* 10. *C. qui teſt. fac. poſſ.*

It appears from the firſt of theſe two Texts, that by the antient Law he who was only deaf without being dumb, and he who was only dumb without being deaf, could not make a Teſtament. Becauſe he that was deaf could not hear the Perſons whoſe Preſence was neceſſary to the making of his Teſtament, and he that was dumb could not explain his Intention to the Witneſſes. But they might make a Teſtament if they obtained leave from the Prince. V. l. 7. eod. *See the three following Articles.*

VIII.

8. *If he knows how to write, he may make a Teſtament.*

He who not having been born both deaf and dumb, ſhould become ſo by ſome Accident after having learned to write, might make his Teſtament: For he might explain his Will, by writing it himſelf, and obſerving in it the Formalities which ſhall be explained in the third Section *l*.

l Surdus, mutus teſtamentum facere non poſſunt. *l.* 6. §. 1. *ff. qui teſt. fac. poſſ.* Ubi autem & hujuſmodi vitii non naturalis ſive maſculo ſive fœminæ accidet calamitas, ſed morbus poſtea ſuperveniens & vocem abſtulit, & aurem concluſit: ſi ponamus hujuſmodi perſonam literas ſcientem, omnia quæ priori interdiximus, hæc ei ſua manu ſcribenti permittimus. *l.* 10. *C. qui teſt. fac. poſſ.* See the xviith and xxth Articles of the iiid Section, and the Remark on the xviith Article.

IX.

9. *The deaf Man who can ſpeak may make a Will.*

Thoſe who are only deaf without being dumb, as if their Deafneſs happened only after they had acquired the Uſe of Speech, may make a Teſtament: For they are capable of explaining their Intentions; and much more, if they know how to write *m*.

m In eo cui morbus poſtea ſuperveniens auditum tantummodo abſtulit, nec dubitari poteſt quin poſſit omnia ſine aliquo obſtaculo facere. *l.* 10. *C. qui teſt. fac. poſſ.* See the xxth Article of the iiid Section, and the Remark on the xviith Article of the ſame Section.

X.

10. *Dumb Perſons who are not deaf may make a Will, if they know how to write.*

Dumb Perſons, altho they are ſo from their Birth, yet if they are not deaf, and know how to write, ſince they are able to explain their Will, they are capable of making a Teſtament. But if they cannot write, not being able to explain themſelves but very imperfectly and by Signs, they have not the liberty of making a Teſtament *n*.

n Sin vero aures quidem apertæ ſint, & vocem recipientes, lingua autem ejus penitus prepedita, licet a veteribus auctoribus ſæpius de hoc variatum eſt, attamen

attamen si hunc peritum litterarum esse proponamus, nihil prohibet eum scribentem, hæc omnia facere, sive naturaliter, sive per interventum morbi hujus infortunium ei accesserit. Nullo discrimine neque in masculis, neque in fœminis in omni ista constitutione servando. *l.* 10. *C. qui test. fac. poss.* See the xviith and xxth Articles of the iiid Section.

XI.

11. *Blind Persons may make a Testament.*

Persons that are blind, whether they be such from their Birth or otherwise, may make their Testament, observing therein the Formalities which shall be explained in the third Section *o*.

o See the xx*th Article of the* iiid *Section.*

XII.

12. *Strangers cannot make a Testament.*

Strangers, who are called Aliens and Foreigners, cannot make a Testament, or other Disposition in view of Death *p*.

p See the xi*th Article of the* iid *Section of Persons, the* ix*th Article of the* iid *Section of Heirs and Executors in general, and the other Articles which are there cited.*

We must except from this Rule the Case which has been observed on the iiid *Article of the* iv*th Section of Heirs and Executors in general.*

[By the Law of *England*, an *Alien* that is a Subject to a Prince who is in league and Amity with the King of *Great Britain*, may trade and traffick, buy and sell, maintain personal Actions, and may dispose of his Goods and Chattels by Will. But no Man can have any Property of Lands in *England* before he be a free Denizen; for whatsoever is purchased by an *Alien*, is forfeited to the King. *Coke* 1. *Inst. fol.* 129. *Cowel's Inst. Book* 2. *tit.* 1. *Sect. ult.*]

XIII.

13. *A Monk may make a Will before his Profession.*

Professed Monks are incapable of making a Testament after they have taken upon'em the Vows. But they may make their Will at any time before they take the Vows, even altho they wear the religious Habit, during the time of their Probation or Noviciat; and their Testament will have its Effect as soon as they have made their solemn Profession. For it is considered as a civil Death; which stripping them of all their Goods, has the same effect, with respect to their Testament, as a natural Death *q*.

q See the xiii*th Article of the* iid *Section of Persons, the* x*th Article of the* iid *Section of Heirs and Executors in general, and the other Articles which are there cited.*

[By the antient Law of *England*, the Profession of Religion, or Entry into a religious Order, was accounted a Civil Death, and did work a Disability in the Person that was professed, to atquire the Property in any temporal Goods, or to dispose of them, as much as if he had been naturally dead. But my Lord *Coke*, in his 1*st Inst. fol.* 132. *b.* says, that this Profession must be made in some House of Religion within the Realm, which may be certified by the Ordinary; becaus, of foreign Professions the common Law taketh no Knowledge. So that according to this Doctrine, we can have no such Incapacity now in *England*, there being no religious Houses within the Realm where a Profession can be made. And yet it cannot but seem strange, that in *England* we should allow a Capacity in Persons to inherit, and make Wills, who have by a most solemn Vow renounced and divested themselves of all Right and Property in temporal Goods; and who, by the Laws of all other Countries, are deemed incapable, by reason of their said Profession, of making Wills, or inheriting to others.]

XIV.

14. *Persons condemned to Death cannot make a Testament.*

Persons condemned to Death, or to other Punishments which import Civil Death, and Confiscation of Goods, cannot make a Testament. And this State annulls even the Testament which they may have made before their Condemnation, and before they committed the Crime *r*. But if he who having appealed from his Condemnation, and having made afterwards his Testament, happens to die before the Appeal has been determined, this Testament, or any other which he had made before his Condemnation, would have its effect. For in Criminal Matters the Appeal extinguishes the Sentence. And seeing after the Death of the Party accused there can be no further Condemnation, his Condition remains the same that it was before he was condemned *s*. But we must except from this Rule those who are condemned for, or accused of those sorts of Crimes which may be prosecuted after the Death of the Criminal: For in these Cases the Validity of the Testament depends on the Event of the Accusation *t*.

r Si cui aqua & igni interdictum sit, ejus nec illud testamentum valet quod ante fecit, nec id quod postea fecerit. *l.* 8. §. 1. *ff. qui test. fac. poss. l.* 1. §. 2. *ff. de leg.* 3. *l.* 6. §. 8. *ff. de inj. rupt.*

s Si quis post accusationem in custodia fuerit defunctus indemnatus, testamentum ejus valebit. *l.* 9. *ff. qui test. fac. poss. l.* 1. §. 3. *ff. de leg.* 3.

Si quis in capitali crimine damnatus appellaverit, & medio tempore, pendente appellatione, fecerit testamentum, & ita decesserit, valet ejus testamentum. *l.* 13. §. 2. *ff. qui test. fac. poss.*

Provocationis remedio condemnationis extinguitur pronunciatio. *l.* 1. §. *ul. ff. ad Senat. Turpill.*

t Ex judiciorum publicorum admissis non alias transeunt adversus hæredes pœnæ bonorum ademptionis, quam si lis contestata & condemnatio fuerit secuta, *excepto repetendarum & majestatis judicio, quæ etiam mortuis reis tum quibus nihil actum est adhuc exerceri placuit, ut bona eorum fisco vindicentur.* Ex quo quis aliquod ex his causis crimen contraxit, nihil ex bonis suis alienare, aut manumittere eum posse. *l.* 20. *ff. de accus. & inscript.* See the xith Article of the iid Section of Heirs and Executors in general, and the other Articles which are there quoted.

XV.

15. *Bastards may make a Testament.*

The Incapacity of Bastards is limited to exclude them only from succeeding to

to Inteſtates; and does not hinder them from diſpoſing of their Effects by a Teſtament *u*.

u See the viiith *Article of the* iid *Section of Heirs and Executors in general, and the Articles there cited.*

XVI.

16. Difference between the Incapacity of Foreigners, of condemned Perſons, and that of others.

There is this Difference to be remarked among the ſeveral Incapacities which we have juſt now explained, that the Incapacity under which Foreigners are, and that of Perſons condemned to Death, do not only annull the Teſtaments of thoſe who are under either of theſe two Incapacities at the time that they make their Teſtament; but if they ſhall happen to him who had made his Teſtament when he was under no Incapacity, and if he chances to be under either the one or the other of theſe two Incapacities at the time of his Death, his Teſtament will be annulled. For all thoſe who die in this State can have no Heirs or Executors. But the other Incapacities which may happen to a Teſtator after that he has made his Teſtament, altho they ſhould continue to the moment of his Death; yet they make no change in his Teſtament. Thus Profeſſion in Religion, after a Teſtament, is a kind of Civil Death; but which is ſo far from annulling the Teſtament, as the Incapacity of a condemned Perſon does, that it has the quite contrary effect, to confirm it, and to lay the Succeſſion open, and to call thereto the Perſon that is named Heir or Executor. Thus Madneſs, and the other Infirmities which happen to a Teſtator after his Teſtament, and which render him incapable of making a new one, fix his Will to what it was at the laſt moment that he had the free uſe of it *x*.

x Si cui aqua & igni interdictum ſit, nec illud teſtamentum valet quod ante fecit, nec id quod poſtea fecerit. *l.* 8. §. 1. *ff. qui teſt. fac. poſſ. l.* 1. §. 2. *ff. de legat.* 3. *l.* 6. §. 8. *ff. de injuſt. rupt. irr.*

¶ It is in the Senſe of the Rule explained in the Beginning of this Article, that we ought to underſtand that other vulgar Rule, which ſays, that a Teſtament which was valid in the beginning, becomes null, if afterwards things happen to be in ſuch a condition, that if the Teſtament were then made, it would be of no force. *Quæ in eam cauſam pervenerunt, a qua incipere non poterant, pro non ſcriptis habentur, l.* 3. §. *ult. ff. de his quæ pro non ſcript. Quia in eum caſum res pervenit a quo incipere non poteſt. l.* 19. *ff. ad leg. Aquil.* But this laſt Rule, if it were applied without diſtinction, would miſlead us often: For it frequently happens, that an Act ſubſiſts, altho he who made it afterwards falls into a State in which he could not make it. Thus a Marriage is not annull'd by the Husband or Wife's becoming mad; nor a Contract of Sale, altho the Seller is afterwards interdicted as a Prodigal. And it is the ſame thing with reſpect to Teſtaments in the other Caſes explain'd in this Article. And it is likewiſe ſaid in another Rule, that it is no new thing for that which has once been valid not to ceaſe to be ſo, altho the Caſe happens that one is in ſuch a Condition, that if he did it at that time it would be invalid. *Non eſt novum, ut quæ ſemel utiliter conſtituta ſunt, durent, licet ille caſus extiterit a quo initium capere non potuerunt. l.* 85. §. 1. *ff. de reg. jur.*

XVII.

17. The ſubject Matter of the following Articles.

We have explained in the foregoing Articles what relates to the Capacity or Incapacity of making a Will; and it now remains that we ſhould enquire who are the Perſons that may be named Heirs or Executors, or receive any Benefit by a Teſtament: Which depends on knowing who are the Perſons that have not this Right; for beſides them, all others have it. And there are two ſorts of Perſons who have it not; thoſe who are incapable, and thoſe who are unworthy of it *y*.

y See the Articles which follow.

XVIII.

18. Difference between the Incapacity of making a Will, and that of receiving Benefit by one.

The Incapacities of making a Will, and thoſe of receiving Benefit by one, are not the ſame; for there are Perſons incapable of making a Teſtament, who are not incapable of receiving Benefit by one. But there is no Perſon who is capable of making a Will, who is not likewiſe capable of receiving Benefit by a Will. And there are ſome who are incapable both of the one and the other, as we ſhall ſee by the following Articles *z*.

z See the following Articles.

We may remark on what is ſaid in this Article, that all thoſe who are incapable of making a Teſtament, are likewiſe incapable of receiving any Benefit under a Teſtament, that altho all Strangers are incapable of receiving any Benefit by a Teſtament, yet it may happen that a Stranger may be capable of making a Teſtament in the caſe that has been obſerved on the iiid *Article of the* ivth *Section of Heirs and Executors in general. But this Caſe does not hinder the Rule from being true in general;*

ral; for that Stranger cannot make a Teſtament but by virtue of a Diſpenſation which ſuſpends his Incapacity, but does not make it to ceaſe totally.

XIX.

19. *Perſons incapable of making a Teſtament, but capable of receiving Benefit by one.*

Perſons who have not the Age required for making a Will, Madmen, thoſe who are both deaf and dumb from their Birth, Prodigals that are interdicted, and thoſe whom ſome Infirmity renders uncapable of making a Teſtament, are not for that incapable of being named Heirs, or Executors, or of receiving any other Advantage by a Teſtament. For altho they may be incapable of alienating their Goods, and diſpoſing of them, yet nothing hinders them from being capable of acquiring and poſſeſſing Goods *a*.

a See the viith *Article of the* iid *Section of Heirs and Executors in general.*

XX.

20. *Perſons uncapable both of the one and the other.*

Foreigners, profeſſed Monks, and Perſons condemned to Death, are incapable of receiving Benefit by a Teſtament, whilſt they remain under theſe Incapacities, as has been explained in its Place *b*.

b See the ixth, xth, *and* xith *Articles of the* iid *Section of Heirs and Executors in general, and the other Articles there cited.*

XXI.

21. *Baſtards capable of receiving Benefit by a Teſtament.*

Altho Baſtards are incapable of ſucceeding to Inteſtates, yet they may be inſtituted Heirs or Executors, and may receive any other Benefit by a Teſtament, except in ſome Caſes which are explained in their proper Places *c*.

c See the viiith *Article of the* iid *Section of Heirs and Executors in general, and the Articles there quoted, and the Remarks on that* viiith *Article.*

XXII.

22. *Children which are not born.*

Children who are not yet born may be inſtituted Heirs or Executors, in a Teſtament, not only by their Fathers and Mothers, but by any other Perſon, and even by Strangers. They are likewiſe capable of receiving Legacies, or any other Benefit by a Teſtament *d*.

d See the xiiith *Article of the* iid *Section of Heirs and Executors in general.*

XXIII.

23. *Children which are not conceiv'd.*

We muſt reckon among the number of thoſe who are capable of receiving Benefit by a Teſtament, Children which are not as yet conceived, and who ſhall be born. For not only may the Parents of thoſe Children inſtitute them Heirs or Executors, or ſubſtitute them to others; but every other Perſon that is capable of making a Will, may name for his Succeſſor a Child which ſhall be born of the Marriage of ſuch Perſons whom he is deſirous to gratify in this manner, altho he is no ways related to the ſaid Perſons. And this Inſtitution will have its effect, if at the time of the Teſtator's Death there is a Child conceived of this Marriage, altho it is born only after the ſaid Death *e*. And one may likewiſe ſubſtitute Children which ſhall be born only a great many Years after the Death of the Perſon who makes the ſaid Diſpoſition *f*.

e Poſthumus alienus recte hæres inſtituitur. *Inſt. de bonor. poſſ.* See the xiiith Article of the iid Section of Heirs and Executors in general.

Such an Inſtitution would be as it were conditional, in caſe the ſaid Child ſhould be conceiv'd at the time of the Teſtator's Death.

It is very uſual in favour of Contracts of Marriage, to make ſuch Inſtitutions of Children which ſhall be born of the ſaid Marriage, or to give ſome Advantages to the Males, or to the eldeſt Children, who ſhall be born of the ſaid Marriages.

f See the iiid *Title of the* vth *Book.*

XXIV.

24. *One may inſtitute an Heir or Executor, without naming him expreſly, deſigning him only by ſome diſtinguiſhing Quality.*

It is not neceſſary for the inſtituting of an Heir or Executor, that he be named by his Name in the Teſtament, for the Inſtitution will have its effect, if he is deſigned by his Quality, or with ſuch Circumſtances as may diſtinguiſh him, and make him ſo well known, that there can be no doubt of the Inſtitution's being in his Favour. As if the Teſtator had named for his Heir or Executor, a Biſhop, a Firſt Preſident, an Attorney General, the Dean of a Chapter, or ſome other Perſon who may be diſtinguiſhed, and marked out preciſely by ſome particular Quality in a certain Place *g*.

g Si quis nomen hæredis quidem non dixerit, ſed indubitabili ſigno eum demonſtraverit, quod pene nihil a nomine diſtat, non tamen eo quod contumeliæ cauſa ſolet addi, valet inſtitutio. *l.* 9. §. 8. *ff. de hæred. inſtit.*

¶ What is ſaid in this Text of an Inſtitution which ſhould be made in Terms reproachful to the Heir or Executor, to deſcribe him by that Diſtinction, has not been ſet down in the Article. For beſides that in all appearance it never happens, at leaſt among us, that a Teſtator ſhould be willing to affront his Heir, or Executor, at the ſame time that he leaves him his Eſtate; it might ſo fall out, that a Father juſtly irritated againſt his Son becauſe of his diſorderly Life, and yet not being willing, or even

even not able, to diſinherit him, but being only deſirous to ſhew the juſt occaſion he has had in his Life-time to be diſſatisfied with this Son, and to make him ſenſible of his Anger in order to bring him back to his Duty, ſhould declare in his Teſtament, that altho his Son had render'd himſelf unworthy of his Succeſſion by his diſorderly Life, yet for all that he names him his Heir or Executor: And this Diſpoſition would not be null *. But if the Heir or Executor, not being Son to the Teſtator, was inſtituted with ſome reproachful or injurious Expreſſion or Deſcription, it is by the Circumſtances, that we ought to judge whether ſuch an Inſtitution may have any Cauſe which ought to make it to ſubſiſt, the Heir or Executor being willing to accept of the Succeſſion, or whether the Inſtitution is ſo far contrary to Reaſon and good Manners, that it ought to be annulled.

* Illa inſtitutio valet, filius meus impiiſſimus male de me meritus hæres eſto. Pure enim hæres inſtituitur cum maledicto, & omnes ejuſmodi inſtitutiones receptæ ſunt. *l.* 48. *Sect.* 1. *ff. de hæred. inſt.*

XXV.

25. *The Heir or Executor may be a Perſon unknown to the Teſtator.*

One may likewiſe name for his Heir or Executor an unknown Perſon, provided that the Teſtator, who perhaps has never ſeen the ſaid Heir or Executor, points out his Perſon by ſuch Circumſtances as may make him eaſily known: As, if it is the Son of one of his Brothers, or other near Relation, whom he had never ſeen becauſe of a long Abſence; or even a Stranger diſtinguiſhed by ſome Mark, ſuch as ſome particular Favour which the Teſtator may have received from him, and which he explains in ſuch a manner, that altho the Author of this Kindneſs was unknown to him, yet this Circumſtance may afterwards make him eaſily known *h*.

h Extraneum, etiam penitus ignotum, hæredem quis inſtituere poteſt. *l.* 11. *C. de hæred. inſt.* ii quos numquam teſtator vidit hæredes inſtitui poſſunt. Veluti ſi fratris filios peregrinantes, ignorans qui eſſent, hæredes inſtituerit. Ignorantia enim teſtantis inutilem inſtitutionem non facit. §. *ult. inſt. eod. v. l.* 46. *ff. eod.*

See the following Article.

XXVI.

26. *The Inſtitution null, by reaſon of the Uncertainty of the Heir or Executor.*

If the Teſtator in naming of his Heir or Executor, ſhould expreſs himſelf in ſuch an obſcure and equivocal manner, that it were not poſſible to know whom he intended to name for his Heir or Executor, it being impoſſible that ſuch an Inſtitution can have its effect, it would remain null. Thus, for example, if there were two Perſons of the ſame Name, who were equally Friends to the Teſtator, and he ſhould name one of them to be his Heir or Executor, but in ſuch a manner that it were not poſſible to diſtinguiſh which of the two he meant, this Uncertainty would exclude both the one and the other from the Succeſſion *i*: For it could not be ſaid that both thoſe Perſons ſhould be Heirs or Executors, ſince the Teſtator intended only one of them; and it could not be ſaid of any one of the two that he was the Perſon whom the Teſtator had made choice of. Thus, in this Caſe, if it were poſſible that it could happen, it would be juſter to leave the Succeſſion to the next of kin, than to hazard the giving of it to one of the two whom the Teſtator was not willing to have for his Succeſſor; and this Event ought to be imputed to the Teſtator's want of Exactneſs.

i Quoties non apparet quis hæres inſtitutus ſit, inſtitutio non valet. Quippe evenire poteſt, ſi teſtator complures amicos eodem nomine habeat; & ad deſignationem nominis ſingulari nomine utatur: niſi ex aliis apertiſſimis probationibus fuerit revelatum pro qua perſona teſtator ſenſerit. *l.* 62. §. 1. *ff. de hæred. inſt.* See the xxvth Article of the xith Section of Legacies.

¶ If the Caſe of this Article could fall out, and the two Perſons of the ſame Name ſhould agree among themſelves to divide the Succeſſion, could the next of kin hinder the ſame by reaſon of the Nullity ariſing from the Uncertainty, which makes it impoſſible to diſcover which of the two is the Heir or Executor? Or, might they ſay that one of them is certainly the Perſon whom the Teſtator had called to his Succeſſion, and that therefore they both yielding to one another reciprocally the Right that each of them might have to it, their Agreement among themſelves would have the Effect of rendring the Succeſſion common to them? ſince one of the two is certainly called to the Succeſſion, and gives a Share of it to the other, and that it ought to be indifferent to the next of Kin, who is deprived of the Succeſſion by the Teſtament, whether it remain entire to one alone, or whether it be divided among two. But ſince the Quality of Executor, or teſtamentary Heir cannot be acquired but by the Will of the Teſtator, the Agreement of theſe two Perſons cannot make them both Heirs, or Executors: For beſides that the Perſon whom the Teſtator had a mind ſhould be his Heir or Executor, cannot be ſure himſelf

ſelf that he has this Quality; it is moſt certain as to the other, that not only he cannot be Heir or Executor, but likewiſe that he cannot be Co-Heir or Co-Executor, ſince altho the Perſon from whom he derives his Right ſhould be acknowledged for the true Heir or Executor, yet he cannot make a Co-Heir or Co-Executor, who ſhall immediately ſucceed to the Teſtator in one Half of the Succeſſion. And the ſaid Conveyance or Aſſignment would only make him a Purchaſer of that Moiety of the Succeſſion, and not an Heir or Executor choſen by the Teſtator. Thus, ſince neither of the two can be certainly Heir or Executor, nor by any means Co-Heir or Co-Executor, ſuch a Diſpoſition, which is impoſſible to be executed, ought to remain null.

XXVII.

27. *Perſons unworthy cannot receive any benefit by a Teſtament.*

We may reckon in the Number of Perſons who cannot receive any benefit by a Teſtament, thoſe who have render'd themſelves unworthy of it. And ſince the Cauſes, which may have this Effect, have been explained in their proper Place *l*, and that there is nothing neceſſary to be repeated here, it is ſufficient for the Order of the Subject-matter of this Section, that we have here taken notice of it.

l See the iiid *Sect. of Heirs and Executors in general.*

SECT. III.

Of the Forms and Formalities neceſſary in Teſtaments.

WE call thoſe Things Forms or Formalities of an Act, which the Laws have eſtabliſhed to be Proofs of its Verity, and thereby to eſtabliſh its Validity. Thus, to make a Sale, an Exchange, a Leaſe, a Loan, or other Covenant, which may have its Effect, it is neceſſary to make an Act of it, that is, a Writing which may explain the Intention of the Parties, to be ſigned by them; or if one or other of them cannot write their Names, that it be made in the Preſence of a Notary Publick and two Witneſſes, or of two Notaries without Witneſſes *a*. Thus, to have a Right of Mortgage according to our Uſage, a Covenant ſigned only by the Parties would not be ſufficient; but it is neceſſary that the Act, which is to give the Mortgage, ſhould be paſt either in a Court of Juſtice, or before two Notaries, or before one Notary and two Witneſſes. Thus, for the Validity of a Donation that is to have its Effect in the Life-time of the Donor, it is not enough that the Act thereof be writ and executed in the Preſence of Notaries Publick, but it is moreover neceſſary that it be inrolled *b*.

We ſee, in all theſe ſorts of Acts, that theſe Formalities have been invented in order to make them valid, that is, to make them have their Effect by the Proof which they make of their Truth. But if it is neceſſary in all ſorts of Acts, that they ſhould have ſome Formality to prove their Truth, in order to give them the Effect which they ought to have, there is as much or more Neceſſity that an Act ſo ſerious, and of ſo great Importance, as is a Teſtament, ſhould be accompanied with Proofs of the Will of the Teſtator, which may not only remove all Suſpicion of the forging of another Will than his, but which may give alſo his Teſtament the Character of a Will well concerted, by the Firmneſs and Authority of which the Peace and Quiet of the Families that are intereſted in it, may be eſtabliſhed.

It was upon theſe Conſiderations, that in the *Roman* Law, which allowed the making of a Teſtament by Word of Mouth, and without Writing, it was ordained, that it could not be made without the Preſence of ſeven Witneſſes above fourteen Years of Age, and Citizens of *Rome*. And the ſame Number of Witneſſes was likewiſe made neceſſary for written Teſtaments.

This Uſage, as to the Number of 7 Witneſſes, is preſerv'd in the Provinces of *France* which are governed by the written Law: but in the other Provinces, no more Witneſſes are required to Teſtaments than to Contracts; and 2 Witneſſes ſuffice, with a Notary Publick, or 2 Notaries without other Witneſſes. And there are even ſome Places, where they are governed by the written Law, where the ſame Formality ſuffices for Teſtaments. But inſtead of this great Number of Witneſſes, ſome Cuſtoms have preſcribed other Forms; ſuch as, That the Teſtators ſhall read over and over the Teſtaments which they have dictated to the Notaries Publick; and that expreſs mention be therein made that this Formality hath been obſerved. We

a See, touching the Neceſſity of making Acts in Writing, the Remark that has been made on the xiith *Article of the Firſt Section of Covenants, and the Preamble of the Second Section of Proofs.*

b See the xvth *Article of the Firſt Section of Donations.*

may

may add, as to what concerns the Formalities of Teſtaments, that by the Ordinances of *Orleans*, *Art.* 27. and of *Blois*, *Art.* 63. one may make a Teſtament before a Curate, or a Vicar, inſtead of a Notary Publick, obſerving therein the uſual Formalities.

We have thought fit not to ſet down among the Rules of this Section, that Rule of the *Roman* Law, which requires that the Witneſſes ſhould be called expreſly for that end. This Formality was judged neceſſary for Teſtaments that were not written *c*: But according to the Uſage in *France*, which requires that the Teſtament be in Writing, it ſuffices if the Witneſſes are preſent at the reading and ſigning of the Teſtament. And altho the Notaries uſually make mention in the Teſtaments, that the Witneſſes have been expreſly called for that purpoſe, yet it ſeems that the Teſtament ought not to be null, altho this Formality were omitted: For it is always certain that the Witneſſes have been deſired to do this Office: And this Truth is ſufficiently proved by their Preſence and Signing. And we ſee even in the *Roman* Law, that altho the Witneſſes had not been called expreſly for the Teſtament, yet it was ſufficient to acquaint them that their Teſtimony was deſired in that Affair. *Licet ad aliam rem ſint rogati, vel collecti, ſi tamen ante teſtimonium certiorentur ad teſtamentum ſe adhibitos, poſſe eos teſtimonium ſuum recte perhibere.* l. 21. §. 2. ff. qui teſt. fac. poſſ.

c See the Remarks on the only Article of the Fourth Section.

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I.

IT is neceſſary, for the Validity of a Teſtament, that the Teſtator make it to be read in the Preſence of a publick Notary, and of ſeven Witneſſes that ſign it with him. And if the Teſtator or Witneſſes know not, or are not able to write, it is neceſſary that mention be made thereof in the Teſtament.

1. *Seven Witneſſes are neceſſary to a Teſtament.*

a Septem teſtibus adhibitis, & ſubſcriptione teſtium. §. 3. *inſt. de teſt. ord.* Si unus de ſeptem teſtibus defuerit, vel coram teſtatore omnes eodem loco teſtes ſuo, vel alieno annulo non ſignaverint, jure deficit teſtamentum. *l.* 12. *C. de teſtam.* Septem teſtium præſentia in teſtamentis requiratur, & ſubſcriptio à teſtatore fiat. *l.* 28. §. 1. *cod.* See the following Article.

Inſtead of ſealing by the Witneſſes, which is mentioned in this Law, and which is not in uſe with us, except in ſome Places, it is only the Signing of the Witneſs that is required, who is to write his Name, if he can, and is able to ſign; and if not, the Notary ought to make mention of it, according as it has been directed by the Ordinance of Orleans, *Art.* 84. *and that of* Blois, *Art.* 165. *See another Form of a Teſtament in the* xviith *Article.*

The Rule explained in this Article, is to be underſtood according to the Uſage of the Provinces which are governed by the written Law. For in the Cuſtoms, ſo great a Number of Witneſſes is not required, as has been explained in the Preamble of this Section. As to which, it is to be obſerved in general on the Formalities of Teſtaments, that we ought to obſerve thoſe that are in uſe in the Place where the Teſtament is made: For the Formalities being different in divers Places, every Place keeps to its own; and one ought not to ſet them aſide in order to make uſe of thoſe of other Places, which perhaps may not be known there, and may be ſuch that the Notaries Publick either would not, or could not ſubſtitute in the room of thoſe they had been accuſtomed to. Thus, every Place having a Right to keep to its own approved Uſage, and which has paſt into a Law, it is ſufficient, for the Validity of a Teſtament, to obſerve therein the Formalities that are uſed in the Place where it is made. V. l. 9. Cod. de teſtam.

[In *England*, the Number of Witneſſes required to a Teſtament, is only two, when it contains the Diſpoſition only of Perſonal Eſtate. But all Deviſes and Bequeſts of any Lands or Tenements, muſt be in Writing, and ſigned by the Party ſo deviſing the ſame, or by ſome other Perſon in his Preſence, and by his expreſs Directions, and muſt be atteſted and ſubſcribed in the Preſence of the

ſaid Deviſor by three or four credible Witneſſes, or elſe they are utterly void, and of none effect. Swinb. *of Teſtaments*, p. 1. §. 10. *Stat.* 29 *Car.* 2. *cap.* 3. §. 5.]

II.

2. *The Witneſſes ought to be preſent, and ſign, if they can.*

All the Witneſſes ought to be preſent at the ſame Time, and in the ſame Place where the Teſtament is made, ſo as to hear the whole Tenour of the Teſtament. And altho the Teſtament had been writ before, and in their Abſence, yet it is ſufficient that they all be preſent to hear the Teſtament read in preſence of the Teſtator; and that he declare to them that the ſaid Teſtament contains his Will, of which the ſaid Writing, together with their uniform Teſtimony, is to make the Proof; and that at the ſame time, without being interrupted by other Buſineſs, the Witneſſes ſee the Teſtator ſign the Teſtament, and they ſign it with him *b*. For it is by the ſigning that the Teſtament is to be accompliſhed, and to have its Form *c*.

b In omnibus autem teſtamentis, quæ præſentibus vel abſentibus teſtibus dictantur, ſuperfluum eſt uno eodemque tempore exigere teſtatorem & teſtes adhibere, & dictare ſuum arbitrium, & finire teſtamentum. Sed licet alio tempore dictatum, ſcriptumve proferatur teſtamentum, ſufficit uno tempore, eodemque die, nullo actu extraneo interveniente, teſtes omnes videlicet ſimul, nec diverſis temporibus ſcribere ſignareque teſtamentum. *l.* 21. *C. de teſtam.*

c Finem autem teſtamenti ſubſcriptiones, & ſignacula teſtium eſſe decernimus. *d. l. See, as to the ſigning by the Teſtator and Witneſſes, what has been ſaid thereof in the firſt Article.*

III.

3. *The Witneſſes ought to be above fourteen Years of Age.*

The Witneſſes ought to be above fourteen Years of Age, and to have none of the Defects, or other Cauſes, which may make their Teſtimony null *d*; as ſhall be explained by the following Rules.

d Rogatis teſtibus ſeptem numero, civibus Romanis, *puberibus omnibus. l.* 21. *C. de teſtam.* §. 6. *inſt. de teſt. ord.*

IV.

4. *Women cannot be Witneſſes.*

Altho Women may bear Witneſs in Matters of Fact, of which the Proofs depend on the Declarations of Perſons who may happen to have any Knowledge of them, even in Crimes, yet they cannot be Witneſſes to a Teſtament *e*. For there is this Difference between voluntary Acts where it is neceſſary to have Witneſſes, and the other Caſes of the Proofs of Facts; that in theſe we are not at liberty to chuſe whom we will to be Witneſſes, whereas in Teſtaments and other Acts, the Choice of the Witneſſes is altogether voluntary; and therefore the Function of bearing witneſs in theſe Matters being more natural to Men, it is not ſo proper to take in Women among them.

e Neque mulier. §. 6. *inſt. de teſtam. ord.* Mulier teſtimonium dicere in teſtamento quidem non poterit: alias autem poſſe teſtem eſſe mulierem, argumento eſt lex Julia de adulteriis, quæ adulterii damnatam teſtem produci, vel dicere teſtimonium vetat. *l.* 20. §. 6. *ff. qui teſtam. fac. poſſ.*

[*In* England *Women are allowed to be good Witneſſes to a Will.* Swinb. of Teſtaments, part 4. §. 21.]

V.

5. *Mad Men, Deaf and Dumb Perſons, and Prodigals, cannot be Witneſſes.*

Mad Men, Deaf and Dumb Perſons, and Prodigals who are interdicted, cannot be Witneſſes in a Teſtament *f*.

f Neque furioſus, neque mutus, neque ſurdus, neque is cui bonis interdictum eſt..... poſſunt in numerum teſtium adhiberi. §. 6. *inſt. de teſt. ord.* Merito (qui bonis interdictus eſt) nec teſtis ad teſtamentum adhiberi poteſt, cùm neque teſtamenti factionem habeat. *l.* 18. *ff. qui teſtam. fac. poſſ.*

VI.

6. *Nor Perſons noted with Infamy.*

Perſons noted with Infamy cannot be Witneſſes in a Teſtament, no more than in other Acts *g*. Thus all thoſe who have been condemned to any Puniſhment that renders them infamous, whether it be that the Sentence of Condemnation expreſſes the Note of Infamy, or that this Note is a Conſequence of it, cannot be Witneſſes. And thoſe whoſe Profeſſion may render them infamous are under the ſame Incapacity *h*.

g Neque ii quos leges jubent improbos inteſtabilēſque eſſe, poſſunt in numerum teſtium adhiberi. §. 6. *inſt. de teſtam. ord.* Cum lege quis jubetur improbus inteſtabiliſque eſſe eo pertinet ne ejus teſtimonium recipiatur. *l.* 26. *ff. qui teſt. fac. poſſ.*

h See the iiid *and* vth *Articles of the* iiid *Section of Proofs.*

VII.

7. *Nor Strangers who are called Aliens.*

Strangers who are called Aliens, cannot be Witneſſes in a Teſtament *i*. For the Laws extend the Incapacity of making a Teſtament, and of receiving benefit by a Teſtament, to that of being Witneſs to one. And it might happen that the Stranger, who is taken to be a Witneſs, might be under ſome Incapacity which was not known.

i Rogatis teſtibus ſeptem numero, *Civibus Romanis. l.* 21. *de teſtam.* Teſtes adhiberi poſſunt ii cum quibus teſtamenti factio eſt. §. 6. *inſt. de teſt. ord.*

By the reaſon of the Rule explained in this laſt Text, Perſons condemned to any Puniſhment which imports Civil Death, cannot be Witneſſes; which is likewiſe extended, by the Uſage in France, *to profeſſed Monks.*

[As

[As to Witneſſes to a Teſtament, the Law in *England* makes no Diſtinction between Foreigners and Natives.]

VIII.

8. *The Capacity of the Witneſs is conſidered at the Time of making the Teſtament.*

The Quality of the Witneſs, by which we are to judge if his Teſtimony ought to be received, is conſidered only at the time of making the Teſtament; for it is ſufficient that he was then capable of being a Witneſs: And the Incapacity, which had preceded the Teſtament, but which had then ceaſed, or which happened only after the making of the Teſtament, would be no Hinderance why his Teſtimony ought not to ſubſiſt; for it was only at the time that the Teſtament was made that he performed the Function of a Witneſs *l*.

l Conditionem teſtium tunc inſpicere debemus, cùm ſignarent, non mortis tempore. Si igitur tunc cùm ſignarent tales fuerint, ut adhiberi poſſint, nihil nocet, ſi quid poſtea eis contigerit. *l.* 22. §. 1. *ff. qui teſtam. fac. poſſ.*

IX.

9. *The Heir or Executor cannot be a Witneſs.*

The Heir or Executor named in a Teſtament, cannot be Witneſs to it: For it is his own Affair; and he is the principal Perſon intereſted in the Validity of the ſaid Teſtament *m*.

m Qui teſtamento hæres inſtituitur, in eodem teſtamento teſtis eſſe non poteſt: quod in legatario contra habetur. *l.* 20. *ff. qui teſtam. fac. poſſ. l.* 14. *ff. de reb. dub. l.* 22. *C. de teſtam.* §. 11. *inſtit. de teſt. ord.*

¶ If it were a private and ſecret Teſtament, made in the Manner which ſhall be explained in the xviith Article, and if the Teſtator had cauſed it to be ſigned by the Perſon whom he had named in it his Heir or Executor, taking him for one of the Witneſſes, the better to conceal the Contents of his Will; would this Teſtimony be rejected? and would the Teſtament upon this account be null? The ground of doubting of it is, becauſe that in theſe Kinds of Teſtaments the Witneſſes do not bear Teſtimony to the Diſpoſitions made by the Teſtator, which are unknown to them, but only to the Declaration which he made to them that they were contained in the Writing or Paper ſealed up, which he only ſhewed them, without reading it to them. Thus the Heir or Executor, who ſhould know nothing of his being inſtituted by this Teſtament, to which he was called to be a Witneſs, would not bear Teſtimony to his being named therein Heir or Executor, for that he could not know; but only to the bare Declaration of the Teſtator, that his Will was contained in that ſecret Writing or Paper ſealed up; and which he might bear witneſs to, without being ſuſpected of Partiality in his Teſtimony by reaſon of his Intereſt under the Will. So that it would ſeem that the Motive of the Law, which rejects the Teſtimony of the Heir or Executor, would ceaſe in ſuch a Caſe as this, unleſs there were ſome particular Circumſtances which might make ſome Alteration; and that therefore this Inſtitution might upon theſe Conſiderations have its Effect.

We have not inſerted in the Article, that the Legataries may be Witneſſes to a Teſtament, as the Text bears from whence it is taken. For beſides that it ſeems that this Law, among the *Romans*, was a Conſequence of the Cuſtom which they had, to give always ſomething to the Witneſſes of a Teſtament, as a Recompence for the Favour they did in bearing Witneſs, which nevertheleſs would extend only to very ſmall Legacies *a*; the Liberty of taking indifferently for Witneſſes Legataries in conſiderable Sums, ſeems contrary to the general Rule, that no one can be a Witneſs in a Caſe where his Intereſt is concerned, as has been explained in its proper Place *b*; neither would our Uſage approve the procuring of Witneſſes with Money: For altho the Integrity of Witneſſes to a Teſtament would not be liable to Suſpicion for having received ſome Acknowledgement, as would be the Integrity of Witneſſes that bear Teſtimony in other Matters, for which Teſtimony it is prohibited by the *Roman* Law, as well as by ours, to take or give any thing *c*; yet it is not decent that we ſhould purchaſe with Money Witneſſes to a Teſtament. It is becauſe of theſe Conſiderations, and of the Rule which requires that no Man bear witneſs in his own Affair, that in many Cuſtoms we find it expreſly ordained, that Legataries, and others intereſted in the Teſtament, cannot be Witneſſes to it. And altho there be this Difference between the Cuſtoms and the written Law, that in the greateſt part of the Cuſtoms there is required only the Preſence of two Witneſſes, with a Notary Publick, to make a Teſtament valid, whereas ſeven Witneſſes are required by the written Law; it is ſo eaſy a matter every where to find Witneſſes, that there is no occaſion to en-

a *V. d. l.* 14. *ff. de reb. dub. l.* 22. *C. de. teſt.*
b *See vith Article of the* iiid *Section of Proofs.*
c *l.* 1. §. 1. *ff. de leg. Cornel. de falſ. & de Senat. Libon.*

gage

gage them to it by Legacies, or other Advantages. And it might even happen more readily in the Provinces which are governed by the written Law, than in the Cuſtoms, that a Teſtator ſhould exhauſt his Eſtate, whether by a Teſtament, or even by a Codicil, in giving many conſiderable Legacies; and therefore it would ſeem to be of too great a Conſequence to admit the Teſtimony of Legataries indifferently. And ſince the Validity or Nullity of the Teſtimony of Legataries ought not to depend on particular Circumſtances, ſo as to leave it to the Diſcretion of the Judge to admit or reject it; and that it would be neceſſary to have a fixed Rule, which ſhould either admit or reject without Diſtinction the Teſtimony of all Legataries; it would ſeem more juſt to reject their Teſtimony, ſince there can be no Inconvenience in it, and that there might be ſome in admitting it; and that beſides, it is juſt, that if the Teſtator will deprive the Heirs of Blood of what they have a natural Right to, he ought to take proper Meaſures for doing it.

X.

10. *Nor his Children, Father, or Brothers.*

The ſame Reaſon which makes the Teſtimony of the Heir or Executor to be rejected, is the Cauſe likewiſe why we do not receive the Teſtimony of his Children, his Father, nor his Brothers; for the Teſtament being the Affair of the Heir or Executor, it is neceſſary to have other Witneſſes to it than Perſons who are ſo nearly related to him, and who of themſelves may be intereſted in the Validity of an Inſtitution, which may in ſeveral ways turn to their Advantage *n*.

n Sed neque hæres ſcriptus, neque is qui in poteſtate ejus eſt, neque pater ejus qui eum habet in poteſtate, neque fratres qui in ejuſdem patris poteſtate ſunt, teſtes adhiberi poſſunt. Quia hoc totum negotium quod agitur teſtamenti ordinandi gratia, creditur hodie inter teſtatorem & hæredem agi. §. 10. *inſt. de teſtam. ordin.*

¶ Altho this Text is reſtrained to Children that are not emancipated, who are ſtill under the Authority of the ſame Father; yet it ſeems that this Diſtinction would not be agreeable to our Uſage. And if the Rule did not extend to Children that are emancipated, as well as to thoſe who are not, it might very eaſily happen, that ſince by the Rule which ſhall be explained in the xiith Article, ſeveral Witneſſes may be taken out of the ſame Family, all the Witneſſes, or the greateſt part of them, ſhould be the Father, the Children, or Brothers of the Heir or Executor.

If the Witneſſes were Uncles, firſt Couſins, or other near Relations of the Heir or Executor, would their Teſtimony be received? It ſeems that the Law having made mention only of Brothers, and of Brothers only who are not emancipated, that it has not rejected the Teſtimony of other near Relations. As to which Matter, we may take notice of a Difference between the Effect of the Proof by Witneſſes in an Inqueſt, or in an Information, and the Effect of the Proof by Witneſſes in a Teſtament, in a Donation, in a Sale, in a Tranſaction, or other Contract. In Inqueſts and Informations there is often only the bare Faith of the Witneſſes which makes the Proof; and therefore they reject in them the Witneſſes who are Relations, as has been explained in the viiith Article of the iiid Section of *Proofs*. But in Teſtaments, and in Contracts, the principal Proof conſiſts in the Writing ſigned by the Perſons who make the ſaid Acts, if they can write, and by the Notary: So that the Proximity, which in Inqueſts and Informations makes the Teſtimony of Relations to be rejected, ſeems not to be of the ſame Conſequence in Teſtaments, nor in Contracts. But if all the Witneſſes to a Teſtament were Uncles, or Couſin-Germans of the Heir or Executor to a Teſtator, who could neither read nor write, would the Validity of the ſaid Teſtament be without Diſpute? It would ſeem to be ſo by this Law which rejects only the Teſtimony of Brothers: And on the contrary, it would ſeem to be otherwiſe by the general Rule which rejects the Teſtimony of near Relations; and that in this Caſe the Will of the Teſtator not being proved by his Sign manual, it is the more neceſſary that the Fidelity of the Witneſſes ſhould be unexceptionable. So that this is a Difficulty which deſerves to be adjuſted by ſome Rules, unleſs we might extend to it that of the Ordinance which rejects the Teſtimony of Relations *. But this Ordinance relates only to Inqueſts, and excludes from giving their Teſtimony in them, even Children of ſecond Couſins.

We may likewiſe remark on the ſame Subject another Difference between Teſtaments and Contracts, which conſiſts in this, That in Contracts the Parties are preſent; and that their mutual Con-

* *See the Ordinance of* 1667. *Tit.* 22. *Art.* 11.

ſent

ſent is ſufficiently proved by their Preſence and Signature, if they are Perſons that know how to write, or by the ſigning of the Notaries; ſo that the Witneſſes are not very neceſſary, unleſs the Truth of the Contract be called in queſtion. But in Teſtaments the Heirs of Blood, who are the Parties concerned, are not preſent, and the Teſtator diſpoſes of his Effects by himſelf as he thinks good; which the Law does not allow him to do, unleſs he obſerves much greater Formalities than thoſe which are ſufficient for the Proof of Contracts. Thus it ſeems to be agreeable to the Spirit and Intention of the Law, that the Fidelity of Witneſſes to a Teſtament ſhould be without all manner of Suſpicion; and that the Motive of the Law which requires a greater number of Witneſſes in Teſtaments, than what is neceſſary for any other Proof, ſeems likewiſe to demand, that the Fidelity of the Witneſſes ſhould not be liable to Suſpicion by reaſon of their being too near of kin to the Heir or Executor; as to which Matter it is to be wiſhed that there were ſome fixed and certain Rule.

XI.

11. The Father, Children, and Brothers of the Teſtator cannot be Witneſſes.

Seeing the Teſtament is the Affair of the Teſtator as well as of the Heir, or Executor, the Father, the Children, and the Brothers of the Teſtator cannot ſerve as Witneſſes to his Teſtament. And in this matter, is rejected the domeſtick Teſtimony of thoſe Perſons, who compoſe all of them together only one Family *o*.

o Hoc totum negotium quod agitur teſtamenti ordinandi gratia creditur hodie inter teſtatorem & hæredem agi. §. 10. *inſt. de teſt. ordin.*

In teſtibus autem non debet eſſe is qui in poteſtate teſtatoris eſt. Sed ſi filius familias de caſtrenſi peculio, poſt miſſionem, faciat teſtamentum, nec pater ejus recte adhibetur teſtis, nec is qui in poteſtate ejuſdem patris eſt: reprobatum eſt enim in ea re domeſticum teſtimonium. §. 9. *inſt. de teſtam. ord.*

Since all the Diſpoſitions of Teſtaments are to the prejudice of the lawful Heirs, it is not very natural that a Teſtator ſhould call to be Witneſſes to his Teſtament thoſe Perſons whom he deſigns to exclude from his Succeſſion. But if it ſhould happen that a Son ſhould complain of the Teſtament of his Father, to which his Brothers, who had great Advantage by the ſaid Teſtament, had been called to be Witneſſes, the Rule with reſpect to him would be juſt. But if the next Heirs were Brothers to the Teſtator, and had been Witneſſes to a Teſtament of their Brother, made after the Death of their Father, it would ſeem that they ought not to complain of a Teſtament which they had approved of in this manner.

XII.

12. Many Perſons of the ſame Family may be Witneſſes.

Several Perſons of one and the ſame Family may be Witneſſes to a Teſtament. Thus the Father and ſeveral of his Children may render this Office to a Teſtator *p*: For if they are all equally capable of this Function, their Relation among themſelves is no Obſtacle to it.

p Pater, nec non is qui in poteſtate ejus eſt, item duo fratres qui in ejuſdem patris poteſtate ſunt, utique teſtes in uno teſtamento fieri poſſunt: Quia nihil nocet ex una domo plures teſtes alieno negotio adhiberi. §. 8. *inſt. de teſt. ordinand.* Ad teſtium numerum ſimul adhiberi poſſumus ego & pater, & plures qui fuimus in ejusdem poteſtate. *l.* 22. *ff. qui teſt. fac. poſſ.*

XIII.

13. A Teſtament may be made at any Hour.

There is no Hour unſeaſonable for making a Teſtament, and it may be made at all Hours either of the Day or Night *q*.

q Poſſe & nocte ſignari teſtamentum nulla dubitatio eſt. *l.* 22. §. 6. *ff. qui teſt. fac. poſſ.*

XIV.

14. Different Formalities for divers ſorts of Teſtaments.

Of all the Rules which we have juſt now explained, the two firſt belong to Teſtaments that are made in the ordinary way, where the Teſtator declares his Will in preſence of all the Witneſſes: And all the other Rules are common to all the kinds of Teſtaments. We ſhall now in the next place explain the Formalities peculiar to each of them *r*.

r In order to know the Validity of the ſeveral ſorts of Teſtaments, it is neceſſary to examine each kind of Teſtament according to the Formalities that are peculiar to it.

XV.

15. Military Teſtaments.

Officers of the Army, and Soldiers who are actually in an Expedition, and not in a Condition to obſerve all the Formalities which the Law requires in Teſtaments, are diſpenſed with from obſerving thoſe which their preſent State does not allow them to do. And they may declare their Will in ſuch manner as the Conjuncture in which they happen to be makes it poſſible for them to do it, provided that their Intention appear by good Proofs. And it is this kind of Diſpoſition which we call military Teſtaments; which ſubſiſt, or do not ſubſiſt, according as the Circumſtances of the Time, and of the Place, give them occaſion or not to uſe this Privilege, and according as the Formalities

lities which are there obſerved may be ſufficient to eſtabliſh their Validity, by the Proof which reſults from them of the Intention of the Perſons to whom theſe kinds of Teſtaments are permitted *s*.

s Secutus animi mei integritudinem erga optimos fideliſſimoſque commilitones, ſimplicitati eorum conſulendum exiſtimavi: ut quoquo modo teſtati ſuiſſent, rata eſſet eorum voluntas. Faciant igitur teſtamenta quomodo potuerint: ſufficiatque ad bonorum ſuorum diviſionem faciendam nuda voluntas teſtatoris. *l.* 1. *ff. de teſtam. milit. l. un. ff. de bon. poſſ. ex teſt. mil.*

Id Privilegium quod militantibus datum eſt, ut quoquo modo facta ab his teſtamenta rata ſint, ſic intelligi debet, *ut utique prius conſtare debeat teſtamentum factum eſſe.* Si ergo miles de cujus bonis apud te quæritur, convocatis ab hoc hominibus ut voluntatem ſuam teſtaretur, ita locutus eſt, ut declararet quem vellet ſibi eſſe hæredem, & cui libertatem tribuere, poteſt videri ſine ſcripto hoc modo eſſe teſtatus: & voluntas ejus rata habenda eſt. Cæterum, ſi, ut plerumque ſermonibus fieri ſolet, dixi alicui, *Ego te hæredem facio*, aut *tibi bona mea relinquo*, non oportet hoc pro teſtamento obſervari. Nec ullorum magis intereſt quam ipſorum quibus id privilegium datum eſt, ejuſmodi exemplum non admitti: Alioquin non difficulter poſt mortem alicujus militis teſtes exiſtent, qui affirmarent ſe audiſſe dicentem aliquem relinquere ſe bona cui viſum ſit: & per hoc judicia vera ſubvertuntur. *l.* 24. *ff. de teſtam. milit.*

Lucius Titius miles Notario (ſuo) teſtamentum ſcribendum notis dictavit, & antequam litteris perſcriberetur, vita defunctus eſt. Quæro, an hæc dictatio valere poſſit? Reſpondit, militibus quoquo modo velint, & quoquo modo poſſint teſtamentum facere conceſſum eſſe: ita tamen ut hoc ita ſubſecutum eſſe legitimis probationibus oſtendatur. *l.* 40. *eod.*

Ne quidam putarent in omni tempore licere militibus teſtamentum quoquo modo voluerint componere, ſancimus, his ſolis qui in expeditionibus occupati ſunt memoratum indulgeri circa ultimas voluntates conficiendas beneficium. *l.* 17. *C. eod.*

Supradicta diligens obſervatio in ordinandis teſtamentis militibus, propter nimiam imperitiam eorum, conſtitutionibus principalibus remiſſa eſt. Nam quamvis ii neque legitimum numerum teſtium adhibuerint, neque aliam teſtamentorum ſolemnitatem obſervaverint, recte nihilominus teſtantur: videlicet cum in expeditionibus occupati ſunt: quod merito noſtra conſtitutio introduxit. *inſt. de milit. teſt.*

Illis autem temporibus per quæ citra expeditionum neceſſitatem in aliis locis vel ſuis ædibus degunt, minime ad vindicandum tale privilegium adjuvantur. *ibid.*

The Reader will be able to judge by the following Remark, why we have thought it proper to quote all theſe Texts here.

¶ The Favour of Military Teſtaments is agreeable to our Uſage, confirmed by the Edicts of 1576. Art. 31. and that of 1577. Art. 32. which being made for the Pacification of the Troubles, did confirm the Military Teſtaments which had been made on one ſide or other purſuant to the Diſpoſition of the Law. Theſe are the Terms which are uſed, that is to ſay, after the manner in which it was allowed to make theſe Teſtaments by the *Roman* Law.

We could have wiſhed to have been able to ſet down more diſtinct and exact the Rule explained in this Article, and to mark how far the diſpenſing with the Formalities in Military Teſtaments ought to extend: But it was not poſſible to fix a certain Form to be obſerved in them, and without which theſe kinds of Teſtaments ſhould have no effect: For we have no Rules in this matter, which determine what ought to be the Form of Military Teſtaments. And the Rules of the *Roman* Law ariſing from the Texts quoted on this Article, and from ſome others, are ſo indefinite, that it may be ſaid that our Uſage would not receive them without diſtinction. Thus, for example, it would ſeem that we ſhould hardly confirm a Teſtament which a Soldier had writ upon the Sand with his Sword, altho ſuch a Teſtament is approved in the 15th Law, *Cod. de Teſt. milit.*

In this Uncertainty of the Law concerning this Matter, we may reduce all ſorts of Military Teſtaments to three kinds. The firſt is of thoſe that are not in Writing, and which he who is inſtituted Heir or Executor, or the Legataries, ſhould pretend to prove by Witneſſes to whom the Teſtator had declared his Will. The ſecond kind is of a Teſtament written and ſigned with the Teſtator's hand, whether it be in the Form of a Teſtament, or of a Memorandum containing his Intentions, or written by another hand, and ſigned by the Teſtator. And the third ſort is of a Teſtament reduced into Writing, in the Preſence of Witneſſes.

As to the firſt of theſe three kinds of Teſtaments, which was uſed under the *Roman* Law by all ſorts of Perſons, as has been remarked in the Preamble of this Section, it would ſeem that it ought not to be received, becauſe of the Inconveniencies ariſing from the Facility of forging a Teſtament of this kind; and that it would be contrary to our Uſage, founded upon the Ordinances that have been taken notice of in the Preamble.

The ſecond kind of a Teſtament written and ſigned by the Teſtator, or written by another hand, and only ſigned by him, has not the ſame Inconveniencies in it. For the Writing is a ſort of an authentick Proof in its own nature, and which would be ſufficient to oblige a Perſon even beyond his Eſtate. So that if a Military Teſtament ought to be diſpenſed with as to the Forms, it

would ſeem to follow from this Principle, that it may be ſufficient to obſerve therein a Formality which of its own nature is a perfect Proof, that he who writes and ſigns any Act, wills and approves that which he has ſigned; and this is ſuch a Proof as ſuffices in many Places for ordinary Teſtaments.

As to the third manner of a Military Teſtament reduced into Writing in the Preſence of Witneſſes, there may happen two kinds of Difficulties in it. One is, to know what number of Witneſſes may be ſufficient in this Teſtament; and the other is, whether the Witneſſes alone are ſufficient, without a Publick Notary, Vicar, or Curate, or any other publick Officer.

As to the ordinary number of Witneſſes, the Law diſpenſes therewith, but does not determine how many are abſolutely neceſſary. *Quamvis ii neque legitimum numerum teſtium adhibuerint a.* Ought there to be five Witneſſes in the Places where ſeven are required in any other Teſtament beſides a Military one? or would two be ſufficient in all Places, as they are in many? The ſame Reaſon which we have remarked on written Teſtaments, ſeems to prove that two would be ſufficient, ſeeing that number ſuffices regularly to make a Proof *b*.

As for the other Difficulty, whether the Preſence of a Notary, or any other publick Perſon, be neceſſary; it would ſeem that ſince in Proofs by Witneſſes, whether it be in Inqueſts for Civil Matters, or in Informations for Crimes, it is neceſſary that the Witneſſes do give their Teſtimony in the Preſence of the Judge, ſo likewiſe it ſhould be neceſſary that the Teſtimony of thoſe who are called to be Witneſſes to a Teſtament, ſhould be in the Preſence of a Publick Notary, Curate, or Vicar, or ſome other Perſon exerciſing theſe Functions, unleſs that the Teſtament were ſigned by the Teſtator: For otherwiſe it would be as eaſy to find out two Witneſſes to ſign a Writing which might be eaſily forged, as to find Witneſſes to depoſe to a Will that is not written.

We do not pretend to give here theſe Remarks for Rules, but only as Reflections upon the Principles on which the Law touching this matter ſeems to depend, and to give a reaſon why we have conceiv'd this Article in general Terms, without marking preciſely what are the Formalities required in Military Teſtaments. For on one ſide, ſeeing theſe Teſtaments are in uſe with us, it was neceſſary to take notice of the Rule concerning them; and on the other ſide, we could not pretend to fix the Formalities required in them, ſince that cannot be done but by a Law: and it were to be wiſhed that ſome Proviſion were made therein.

a Inſtit. de milit. teſtam.

b See the xiiith *Article of the* iiid *Section of Proofs.*

XVI.

16. Of a Teſtament made in the time of a Plague.

The particular Hinderances which may happen to Teſtators, and which may make it impoſſible for them to obſerve the Formalities required in Teſtaments, are not ſufficient to diſpenſe with the Obſervance of them, and to make the Teſtaments valid where they are wanting; for this Pretext would have two miſchievous Conſequences. But in caſe of the common Calamity of a Plague, where the juſt Fear of Danger is an invincible Obſtacle to the Formality of bringing together the Witneſſes and the Teſtator, the Law diſpenſes therewith: And it is ſufficient, without aſſembling the Witneſſes together, to communicate to them ſeparately the Will of the Teſtator, and to make them ſign it likewiſe apart. But as to the number of Witneſſes, the time of a Plague does not diſpenſe therewith *t*.

t Caſus majoris ac novi contingentis ratione adverſus timorem contagionis, quæ teſtes deterret, licet aliquid jure laxatum eſt, non tamen prorſus reliqua teſtamentorum ſolemnitas perempta eſt. Teſtes enim hujuſmodi morbo oppreſſos, eo tempore jungi atque ſociari remiſſum eſt: non etiam conveniendi numeri eorum obſervatio ſublata eſt. *l.* 8. *C. de Teſtam.*

¶ Altho this Text marks preciſely enough that thoſe who make their Teſtament in a time of Plague are diſpenſed with only as to the Formality of aſſembling the Witneſſes together, and not as to their number; yet ſeveral Interpreters have been of opinion that five Witneſſes were ſufficient in theſe ſorts of Teſtaments, and that ſome other Formalities might be diſpenſed with therein; which has occaſioned ſeveral Law-Suits. But we have thought proper to fix this Rule in the Senſe of the Law; for when the Diſpoſition of a Law appears to be certain and preciſe, it wants no Interpretation: And it is not to interpret a Law, but to make a new one, to diſpenſe with the number of Witneſſes which the Law has not diſpenſed with; altho nothing would have been more natural and more neceſſary than to have expreſſed therein the

Liberty of making a Teſtament with five Witneſſes, if it had not been judged neceſſary to have ſeven. The giving way to ſuch Interpretations, according as every one might imagine to be juſt, would take away all Force from the Rules, and would throw every thing into the greateſt Uncertainty. It is enough to give unto Equity that Extent which the Senſe and Spirit of the Law might require; eſpecially when it concerns arbitrary Laws, and thoſe which have regulated the preciſe Formalities which are to be obſerved in Teſtaments *. For there is much leſs Inconvenience in not favouring Teſtaments contrary to the Rules which preſcribe the Formalities of them, than in ſlighting theſe Forms; ſeeing in general the Nullities of Teſtaments have no other Inconvenience in them, than to leave things in the natural Order, which calls the Heirs of Blood to the Succeſſions, and to oblige the Teſtators to take their Meaſures aright, when they ſhall have a mind to change the ſaid Order.

* *See the* ivth *Article of the* iid *Section of the Rules of Law.*

XVII.

17. *Secret Teſtaments.*

The great Conſequence it is of to Teſtators, and to their Families, that the Diſpoſitions which they may make by their Teſtaments ſhould remain ſecret and unknown to every body beſides themſelves, till after their Death, if they deſire it, has given occaſion to the inventing of a ſort of Teſtament which has this Effect, and where the Witneſſes give a certain Teſtimony to the Will of the Teſtator, altho the Contents of the Will are unknown to them. And it is this ſort of Teſtament that is called private or ſecret; the Form of which is after this manner, That the Teſtator who knows how to read and write, or only to read, writes his Teſtament himſelf, or gets it writ by another, and he reads it over, and finding all the Contents thereof to be conformable to his Intentions, he preſents this Writing folded up, and ſealed, to a Publick Notary, and to ſeven Witneſſes aſſembled together at the ſame time, declaring to them that that is his Teſtament, but without ſuffering them to read it, or telling them what are the Contents of it; and having ſigned it in their Preſence upon the Back, or upon the Cover, if he knows how or is able to ſign, he gets the Witneſſes, or the Notary, to ſign it; obſerving what has been ſaid in the firſt Article with reſpect to the Teſtator and Witneſſes who cannot, or are not able to ſign *u*.

u Hac conſultiſſima lege ſancimus, licere per ſcripturam conficientibus teſtamentum, ſi nullum ſcire volunt ea quæ in eo ſcripta ſunt, conſignatam, vel ligatam, vel tantum clauſam involutamque proferre ſcripturam, vel ipſius teſtatoris, vel cujuſlibet alterius manu conſcriptam, eamque rogatis teſtibus ſeptem numero civibus Romanis, puberibus omnibus, ſimul offerre ſignandam & ſubſcribendam: dum tamen teſtibus præſentibus teſtator ſuum eſſe teſtamentum dixerit, quod offertur, eique ipſe coram teſtibus ſua manu in reliqua parte teſtamenti ſubſcripſerit, quo facto, & teſtibus uno eodemque die ac tempore ſubſcribentibus & conſignantibus, teſtamentum valere. Nec ideo infirmari quod teſtes neſciant quæ in eo ſcripta ſunt teſtamento. Quod ſi literas teſtator ignoret, vel ſubſcribere nequeat, octavo ſubſcriptore pro eo adhibito eadem ſervari decernimus. *l.* 21. *C. de teſtam.*

In this Article we have made uſe of the Words folded and ſealed, *which are the ſame with thoſe in the Text. For altho it would ſeem by the following Words of the Text, that it is enough if the Teſtament is folded up, or put under a Cover, yet it is uſual to ſeal it. And it is neceſſary ſo to do, when the Teſtament is put into a Cover ſign'd by the Notary and the Witneſſes; for otherwiſe it would be eaſy to put another Teſtament under the ſame Cover.*

¶ Altho the laſt Words of this Text ſeem to include the Teſtators who cannot read, yet we have not thought fit to give them this Senſe; and that upon two Conſiderations: The firſt is, that theſe Words, *Si literas Teſtator ignoret*, being followed by theſe, *vel ſubſcribere nequeat*, they may be naturally underſtood of him who cannot write, altho he can read. And taking them in this Senſe, this Text may be applied to two Caſes; one where the Teſtator does not know how to write, altho he knows how to read; and the other, where the Teſtator can write, but is hindered from ſigning by ſome Indiſpoſition, which is pointed at by theſe Words, *vel ſubſcribere nequeat*. And ſince it is ſaid in the Text, that the Teſtator may get his Teſtament writ by ſome other Perſon, this Clauſe ſhews clearly enough that it is not neceſſary for the Teſtator to know how to write, provided he can read. The ſecond Conſideration is, that there would be too many Inconveniencies in confirming the ſecret Teſtaments of Perſons who cannot read; ſince it may happen that the Perſon who writes their Teſtament for them may abuſe the Truſt that is put in him, and write things quite different from their Will; and it might be ſaid that ſuch a Teſtament would be without any Proof. For the Teſtator himſelf

himſelf would not be perfectly ſure that it were his Will which had been written, and the Witneſſes would have no manner of Knowledge of it. Thus, ſuch a Teſtament would be contrary to the Spirit and Intention of the Laws. For they require Formalities in Teſtaments for no other Reaſon, but to give a perfect Aſſurance, that what they contain is the Will of thoſe who make them. It is true, that a Teſtator who knows neither how to write nor read, might chuſe for the writing of his Teſtament a Perſon of ſuch Integrity, that there might be no manner of Doubt but his Will was writ very faithfully; but there would ſtill remain the Conſequence of the Inconveniencies for thoſe Perſons who could not make, or had not made ſo good a Choice: and in general, ſuch a Teſtament as this would be without any manner of Proof, ſince it would depend on the Fidelity of one only Witneſs, that is, of the Perſon who had writ it.

Seeing there are Deaf and Dumb Perſons who know how to write, there is nothing hinders why they may not make their Teſtament after the Manner explained in this Article.

XVIII.

18. *The Manner of opening of a ſecret Teſtament.*

Since the Proof of a Teſtament made in the Manner explained in the foregoing Article, is drawn from the Declaration that the Teſtator has made to the Witneſſes, that his Will is contained in the Writing, which he produced to them; it is neceſſary for this Proof, that after the Death of the Teſtator the ſecret Writing, in which the Teſtament ought to be contained, ſhould be put into the hands of the Judge, that he may open it, after the Witneſſes and Notary have been ſummoned before him to acknowledge their Hand-writing, and to bear Teſtimony that it is the ſame Writing which the Teſtator declared to them to be his Teſtament. And after it has been verified in this manner, it is then opened *x*.

x Cùm ab initio aperiendæ ſint tabulæ, prætoris id officium eſt. Cogat ſignatores convenire, & ſigilla ſua recognoſcere, vel negare ſe ſignaſſe. Publicè enim expedit, ſuprema hominum judicia exitum habere. *l.* 4, & 5. *ff. teſtam. quemad. aper.*

XIX.

19. *Verification of the Signatures before the Opening.*

If any of the Witneſſes had not ſigned, or if ſome of thoſe who did ſign, are either dead or abſent, the Teſtament ought to be verified and opened in the Preſence of ſuch of the Witneſſes as are to be found, and who have ſigned it, and of the Notary, if he is not dead or abſent. And if either the Notary, or ſome of the Witneſſes, could not appear before the Judge, becauſe of ſome lawful Impediment, ſuch as Sickneſs, the Verification, with reſpect to them, would be made on the Place where they are. But if all of them were either dead or abſent, and it were neceſſary to open the Teſtament without delay, the Judge might call before him ſome Perſons of Probity, who were well acquainted with the Hand-writing of the Notary and Witneſſes; and after Proof made of their Hand-writing, he might open the Teſtament. And this Verification might afterwards be confirmed, by getting the Notary and Witneſſes, who had been abſent when the Teſtament was opened, to own and acknowledge their own Hands *y*.

y Sed ſi major pars ſignatorum fuerit inventa, poterit ipſis intervenientibus reſignari teſtamentum, & recitari. *l.* 6. *ff. teſtam. quemadmod. aper.*

Si forte omnibus abſentibus cauſa aliqua aperire tabulas urgeat, debet Proconſul curare ut intervenientibus optimæ opinionis viris aperiantur. *l.* 7. *eod.* Tunc deinde eò mittantur ubi ipſi ſignatores ſint, ad inſpicienda ſigilla ſua. *d. l.* 7. *in f.*

We have taken no more of this ſeventh Law than what agrees with our Uſage, which does not eaſily diſpenſe with the Appearance of the Witneſſes; and this laſt Text is to be underſtood only of the Caſe, where the Witneſs can by no means appear before the Judge.

XX.

20. *Teſtament of a Blind Man.*

Altho Blind Men can neither write nor read, nor ſee the Perſons who are preſent at the making of their Teſtament, they may notwithſtanding make a Will, as well as other Perſons who can neither write nor read. For they may ſignify their Will, and get it put down in Writing, and declare in preſence of ſeven Witneſſes and a Notary, that what they have got reduced into Writing, and which ſhall be read in preſence of the Witneſſes and Notary, is their Teſtament; which ſhall have its effect, being ſigned by the Witneſſes who are able to ſign, and by the Notary. And if there are Witneſſes who cannot or are not able to ſign, the Notary ſhall make mention of it, as has been ſaid in the firſt Article *z*.

z Hac conſultiſſima lege ſancimus, ut carentes oculis, ſeu morbo vitiove, ſeu ita nati, per nuncupationem ſuæ condant moderamina voluntatis. Scilicet præſentibus teſtibus ſeptem, quos aliis quoque teſtamentis intereſſe juris eſt; tabulario etiam: ut cunctis ibidem collectis, primùm ad ſe convocatos omnes, ut ſine ſcriptis teſtentur, edoceant. *l.* 8. *C. qui teſt. fac. poſſ.* At cùm humana fragilitas,

mortis præcipuè cogitatione perturbata, minus memoria poſſit res plures conſequi; patebit eis licentia voluntatem ſuam, ſive in teſtamenti, ſive in codicilli tenore compoſitam, cui velint ſcribendam credere, ut in eodem loco poſtea convocatis teſtibus & tabulario, &c. *d. l.*

We ſee in this Text the two Ways of making a Teſtament, in Writing, or without Writing. But ſeeing by the Uſage in France, *all Teſtaments ought to be in Writing, and in preſence of a Notary, Blind Men may with much more Reaſon make their Teſtament after the Manner explained in this Article.*

XXI.

21. *A ſort of Teſtament fit for all Perſons.*

All Perſons who are capable of making a Teſtament, may make it by writing it themſelves, or getting it writ by whom they will, and declaring in the preſence of a Notary and ſeven Witneſſes, who are under no Incapacity of performing this Function, that the Writing which ſhall be read in their Preſence, and in Preſence of the Teſtator, is his Teſtament, and ſigning it himſelf, and getting it to be ſigned; as has been ſaid in the two firſt Articles. And it is this ſort of Teſtament that is the moſt common, and which may ſuit the Blind, the Deaf, and the Dumb, and thoſe who know neither how to write nor read *a*.

a See the Texts cited on the iſt and iid Articles.

XXII.

22. *The Teſtament is null, if it wants any of the Formalities.*

We may diſcern, by the Rules explained in this Section, what are the Formalities neceſſary in the ſeveral ſorts of Teſtaments, and conſequently what are the Defects which may render them null. And there remains only to obſerve, as a laſt Rule concerning theſe Formalities, that every Teſtament, in which any of the Formalities preſcribed by the Laws is wanting, ought to be annulled; ſince otherwiſe it would be to no purpoſe to ordain them *b*. Thus, a Teſtament would be null, if it had only ſix Witneſſes, in Places where ſeven are required, or if it was not ſigned by the Teſtator, or by the Witneſſes who could ſign. And the Favour of the Perſons who are called to the Succeſſion, or to a Legacy, is of no conſideration at all to diſpenſe with the Formalities: For it would be neceſſary in this Caſe to have an expreſs Diſpenſation from the Laws; and they have on the contrary expreſly declared, that the Prince himſelf can receive no Benefit by a Teſtament that is not made in due Form of Law *c*.

b Teſtamentum non jure factum dicitur, ubi ſolemnia juris defuerunt. *l.* 1. *ff. de injuſt. rupt. irr. fact. teſt.*

c Cum hæredes inſtituuntur Imperator ſeu Auguſta, jus commune cum cæteris habeant. Quod & in codicillis, & fideicommiſſariis epiſtolis jure ſcriptis obſervandum erit. *l.* 7. *C. qui teſt. fac. poſſ.*

Ex imperfecto teſtamento, nec Imperatorem hæreditatem vindicare poſſe, ſæpè conſtitutum eſt. Licèt enim lex imperii ſolennibus juris imperatorem ſolverit, nihil tamen tam proprium imperii eſt, quàm legibus vivere. *l.* 3. *C. de teſtam.*

Ex imperfecto teſtemento legata vel fideicommiſſa Imperatorem vindicare, inverecundum eſt. Decet enim tantæ majeſtatis eas ſervare leges, quibus ipſe ſolutus eſſe videtur. *l.* 23. *ff. de legat.* 3.

¶ Some Interpreters have been of opinion, that the Rule explained in this Article, ought to be diſpenſed with in Legacies left to pious Uſes, and that they ought to ſubſiſt even in a Teſtament that has only two Witneſſes, and even altho one of the two Witneſſes was only a Woman. And they have likewiſe extended the Favour of theſe Kinds of Legacies ſo far, as to make valid Teſtaments, that are null by reaſon of other Defects, much more eſſential than Formalities. But how great ſoever the Favour of Legacies for pious Uſes may be, yet the Laws not having excepted them from this Rule, they are neceſſarily ſubject to it, as well as other Legacies that are as favourable, ſuch as Legacies to Servants, to poor Relations, or to other indigent Perſons, or Legacies left in conſideration of Reſtitutions, which the Teſtator thought himſelf bound to make. The Liberty of making ſuch Exceptions to Rules, exceeds the Bounds of Interpretation; and there would ariſe too many Inconveniencies from this Licence, which ſerves only to multiply Law-Suits, of which we have ſtore enough from other Sources. So that it ſeems more juſt and more natural to keep to the Law, and to prefer to the Liberty of breaking in upon it, the Neceſſity of having fixed Rules, and to wait till a Proviſion is made by ſome other Law in favour of Legacies to pious Uſes, if it is neceſſary; and the rather, becauſe Teſtators, if they are afraid leſt ſome Nullities ſhould deſtroy the Legacies which they have left in their Teſtaments to pious Uſes, have two Ways to provide againſt it; one, which is the ſureſt Way, is, for themſelves to execute their good Intentions, and to give their Charity in their Life-time, rather than to leave it to be taken after their Death out of an Eſtate which will be no longer theirs; and the other Way is, to take good Advice in making their Teſtaments.

SECT. IV.

Of the Codicillary Clauſe.

1. Definition and Uſe of the Codicillary Clauſe.

SEEING the moſt skilful Teſtators may ſometimes doubt, and have Reaſon to fear leſt there be Nullities in their Teſtaments; as, if any one of the Witneſſes ſhould happen to be under any Incapacity of bearing Teſtimony, which the Teſtator was ignorant of, or for other Cauſes; many Teſtators therefore uſe this Precaution, for the greater Security of having their Wills executed, to add to their Teſtaments this Clauſe, which is called *Codicillary*, whereby they ordain, *That if their Will cannot be valid as a Teſtament, it may be valid as a Codicil, or otherwiſe in the beſt Form that it can be valid a.* And this Clauſe, expreſſed in a Teſtament, hath this Effect, That whereas, were it wanting and there ſhould happen to be in the Teſtament ſome Nullity, it would not be valid even as a Codicil *b*; this Clauſe being added to the Teſtament, gives it the Nature and Validity of a Codicil, provided that it have all the Formalities neceſſary in Codicils, and that, for example, if there were ſome Witneſſes, whoſe Teſtimony ought to be rejected, there ſhould remain five, at leaſt, whoſe Teſtimony ought to be received; becauſe, as ſhall be ſaid in its proper Place, five Witneſſes are neceſſary to a Codicil *c*.

a Plerique pagani ſolent cum teſtamenta faciunt per ſcripturam adjicere; *velle, hoc etiam vice codicillorum valere.* l. 3. ff. de teſtam. mil.

Si non valuit teſtamentum, ea ſcriptura, quam teſtamentum eſſe voluit, codicillos non facit, niſi hoc expreſſum eſt, *l.* 41. §. 3. *ff. de vulg. & pupill. ſubſt. l.* 8. §. 1. *C. de codicill.*

b Sæpiſſime reſcriptum & conſtitutum eſt, eum qui facere teſtamentum opinatus eſt, nec voluit quaſi codicillos id valere, videri nec codicillos feciſſe. Ideoque quod in illo teſtamento ſcriptum eſt, licet quaſi in codicillis poterit valere, tamen non debetur. *l.* 1. *ff. de jure codicill. l.* 8. §. 1. *C. de codicill.*

c See the xiyth *Article of the iſt Section of Codicils.*

¶ Altho it is not ſaid in the Laws, cited on this Article, that to make a Teſtament valid as a Codicil, it ought to have the Formalities requiſite to a Codicil; yet it cannot be doubted, that if the Formalities requiſite to a Teſtament are wanting, it ought to have thoſe that are neceſſary to a Codicil; becauſe otherwiſe it would not be as a Codicil, that would be valid: But it might be ſaid, that however defective the Teſtament might be, it ought to ſubſiſt; which is neither equitable nor conformable to the Spirit and Intention of the Laws, which have received this way of ſupplying the want of Formalities in a Teſtament; for theſe Laws are not made to give Teſtators the Liberty of making their Teſtaments valid, altho they be defective in the Forms, by ſaying only that they will have them to have their Effect ſuch as they are. But the principle of theſe Laws is, that ſince it is free for every Perſon that can make a Will, to make it either in the Form of a Teſtament, or of a Codicil, it is conſequently free for them to give to an Act which cannot be valid as a Teſtament, the Validity of a Codicil, if it can have the Effect of one. But this muſt agree with that other general Principle in the Matter of Teſtaments and Codicils, that in theſe two ſorts of Diſpoſitions it is neceſſary to obſerve the Formalities preſcribed by the Laws. From whence it follows, that no Act can be valid as a Codicil, unleſs it has the Formalities of one. Thus, ſince the Uſe of the Codicillary Clauſe, preſuppoſes on one ſide the Liberty of making either a Teſtament or a Codicil, and on the other ſide the Neceſſity of making a Diſpoſition in due form, the ſaid Clauſe implies two Intentions that the Perſon has, who puts it into his Teſtament. The firſt, which is pure and ſimple, is the Intention to make a Teſtament; the other is conditional, that if this Act, which he makes as a Teſtament, cannot have the Effect of one, it may be a Codicil. And it is by this ſecond Will that the Act, which without this Clauſe would be a null Teſtament, for want of the Formalities neceſſary to a Teſtament, will ſubſiſt as a Codicil, provided that it have the Nature of one, that is, that it have the Formalites requiſite to one: Becauſe theſe Formalities, joined to this ſecond Will of the Teſtator, make this Act to be in effect a true Codicil; whereas if a Teſtator, having a mind to make a Teſtament without this Clauſe, had called only five Witneſſes to it, or having a mind to make a Codicil, had called only four, he would have made neither Teſtament nor Codicil. For in the firſt Caſe, having a mind to make only a Teſtament, he would have made it null; and having no mind to make a Codicil, it could not be ſaid that he had made what he had no Intention to make. And in the ſecond Caſe, the Act which ſhould be atteſted only by four Witneſſes, would be neither Teſtament nor Codicil.

It

It is upon these Considerations that the Invention of the Codicillary Clauses has been founded. And if their Use were now-a-days limited to the giving the Validity of Codicils to Testaments, in which these Clauses are expres'd, this Matter would be plain and easy. But the different Provisions that we see concerning this Matter in the *Roman* Law, and the Comments of Interpreters, have occasioned a great deal of Confusion and Uncertainty in it, and have given rise to many Difficulties, which for many Ages past have occasioned many Law-Suits in the Provinces which are governed by the written Law. And since it is impossible to understand aright these Difficulties without an exact Explication of all that is essential in this Matter of the Codicillary Clauses, we shall endeavour, for the giving some Light to it, to explain here the Rise and Progress of the Use of these Clauses, in order to discover in these Sources the Causes of the Difficulties which perplex this Matter, and the Principles which may put an end to them.

The Origin of the Codicillary Clauses has been a natural Consequence of the intricate Formalities which the *Roman* Law required in the making of Testaments; and these Formalities proceeded from the Liberty they had at *Rome* to make a Testament without Writing *a*. For since it was necessary that the Remembrance of the Testator's Will should be preserv'd without Writing, and only by the Fidelity of the Witnesses whom he had called to be present at his declaring it; it was but reasonable not to suffer such a serious Act to be made cursorily in the Presence of two Witnesses, met with by chance; and it was for this Reason that it was ordained, that there should be seven Witnesses, Citizens of *Rome*, called on purpose, and that they should be present at the making of the Testament, and during the whole Time of the Act, and without Interruption. And to make the Testament more authentick, they had added to these Formalites, that the Testator could not institute an Heir or Executor, nor leave Legacies, but by using certain Expressions, and that the said Dispositions in other Terms should be null *b*. And altho these Formalities were less necessary in written Testaments, yet they were observed likewise in them by a kind of Tradition or Custom, as well as in those which were made by Word of Mouth, and without Writing, and which were called *Nuncupative Testaments*; for they kept the Use of these two sorts of Testaments, written and unwritten.

Seeing therefore the Number of Witnesses, and these other Formalities, made the Way of making a Testament very difficult, and that those who made their Testaments with the greatest Exactness, might be easily deceived in them; an Expedient was thought of to supply the want of Formalities, by adding to the Testamant a Codicillary Clause. And the Effect of this Clause was given even to some Testaments, where it was judged that the Expressions of the Testators might supply the want of it; and this gave occasion to several Rules. For on one side we see, in some Laws, that the defective Testament cannot be valid as a Codicil, but in the Cases where the Testator declares expresly that that is his Intention. *Si non valuit (testamentum) ea scriptura quam testamentum esse voluit, Codicillos non faciet, nisi hoc expressum est, l.* 41. §. 3. *ff. de vulg. & pupill. substit. Nisi id ille complexus sit, ut vim etiam Codicillorum scriptura debeat obtinere. l.* 8. §. 1. *C. de Codic.* And this Expression was so necessary, that it is said in one Law, that the Legacy even of Liberty to a Slave was null, if the Nullity of the Testament was not repaired by the Expression of the Codicillary Clause. *Si pure non subsistit testamentum, in hoc nec Libertates (cum non fuisse adjectum, ut pro Codicillis scriptum valeret, proponas) recte datas constabit. l.* 11. *C. de test. manum.* But on the other side, there are other Laws which give the Effect of Codicils to Testaments defective in point of Form, altho the Codicillary Clause was not therein inserted. Thus we see in a Law, that a Testator having declared in his Testament, that he had written it without the Help of any Lawyer, to assist him in observing the Formalities, chusing rather to follow what his Reason dictated to him, than to subject himself to the Trouble of a nice Observation of all these Formalities, and judging that if he erred in any one of them, yet the Will of a Person in his right Senses ought to be held for just and lawful; it was decided that these Expressions should have the same Effect as an expres Codicillary Clause: *Lucius Titius hoc meum testamentum scripsi sine ullo Jurisperito, rationem animi mei potius secutus, quam nimiam & miseram diligentiam. Et si minus aliquid*

a §. *ult. inst. de testam. ord. l.* 21. §. 2. *C. de testam.*

b V. Ulp. Tit. 1. *l.* 15. *C. de test. l.* 26. *eod. l.* 21. *C. de legat. l.* 2. *C. commun. de leg.*

† *legitime,*

legitime, minuſve perite fecero, pro jure legitimo haberi debet hominis ſani voluntas; deinde heredes inſtituit. Quæſitum eſt, inteſtati ejus bonorum poſſeſſione petita, an portiones adſcriptæ ex cauſa fideicommiſſi peti poſſunt? reſpondi, ſecundum ea quæ proponerentur, poſſe. l. 88. §. *ult. ff. de legat.* 2. Thus we ſee, that other Laws give the Effect of Codicillary Clauſes to Expreſſions that mark the Teſtator's Deſire that his Will ſhould be executed: As, for example, if it was ſaid in a Teſtament, that the Teſtator deſired it might ſubſiſt in whatever manner it could have its Effect. *Ex his verbis, quæ ſcriptura pater familias addidit,* τάυτην τὴν διαθήκην βουλομαι εἶναι κυρίαν ἐπὶ πάσης ἐξουσίας. *Hoc teſtamentum volo eſſe ratum quacunque ratione poterit; videri eum voluiſſe omnimodo valere ea quæ reliquit, etiamſi inteſtatus deceſſiſſet. l.* 29. §. 1. *ff. qui teſt. fac. poſſ.* Or if a Teſtator had ſaid, that in caſe his Diſpoſitions could not be valid as a Teſtament, he entreated thoſe who ſhould ſucceed to him as dying inteſtate to execute his Intention. *Ex teſtamento quod jure non valet, nec fidei commiſſum quidem, ſi non ab inteſtato quoque ſuccedentes rogati probentur, peti poteſt. l.* 29. *C. de fidei com.* It may be further added on the ſame Subject, that we ſee in another Law, that the bare Conſideration of the ſingular Affection of the Teſtator towards a Legatary, and of the Quality of a Legacy that is favourable in its own Nature, makes the Codicillary Clauſe to be ſupplied in a Teſtament that is null, in order to oblige the Children of the Teſtator, his Heirs, to acquit this Legacy. *In teſtamentum quod perfectum non erat, alumnæ ſuæ libertatem & fidei commiſſa dedit: cum omnia ut ab inteſtato egiſſent, quæſit imperator, an ut ex cauſa fidei commiſſi manumiſſa fuiſſet? & interlocutus eſt. Etiamſi nihil ab inteſtato pater petiiſſet, pios tamen filios debuiſſe manumittere eam quam pater dilexiſſet. Pronunciavit igitur recte eam manumiſſam: & ideo fidei commiſſa etiam ei præſtanda. l.* 38. *ff. de fidei comm. libert.*

All theſe Examples, and ſome others that are to be met with in other Laws, have given occaſion to the Interpreters to ſupply in many Caſes the Codicillary Clauſe; and ſome of them, even thoſe of the firſt Rank, have been of opinion, that this Codicillary Clauſe may be ſupplied in all Teſtaments, as being implied in them, becauſe it is inſerted in the greateſt part of them, and it is the Intention of all Teſtators, that their Wills ſhould have their effect as much as is poſſible.

Theſe firſt Remarks are ſufficient to let us ſee from whence the uſe of the Codicillary Clauſes has ſprung, what has been the Progreſs thereof, and that this Progreſs was not made without having many Law-Suits upon the bare Queſtions, whether Teſtaments, in which are found ſome Nullities, may ſubſiſt; whether by the effect of any Expreſſion which may ſerve as a Codicillary Clauſe, or in conſideration of the Quality of the Legacies, or other Circumſtances. But beſides theſe kinds of Difficulties or Queſtions, there are others of another ſort, which relate to the Effect that Codicillary Clauſes ought to have when there are any in Teſtaments. And for the right underſtanding of the Nature of theſe Queſtions, we muſt in the firſt Place remark what has been ſaid in the Preamble of the Title of Teſtaments, concerning the Difference which is made in the *Roman* Law between Teſtaments and Codicils; which conſiſts in this, that in a Teſtament one may inſtitute an Heir or Executor, and give Legacies, and that in a Codicil one can only bequeath Legacies, but not inſtitute an Heir or Executor *c*. And we muſt likewiſe obſerve a ſecond Uſe of Codicils in the *Roman* Law, which conſiſts in this, that altho' one cannot inſtitute an Heir or Executor by a Codicil, yet in it the Teſtator may diſpoſe indirectly of the Succeſſion, by entreating or requiring his next of kin, who has right to ſucceed *ab inteſtato*, to reſtore it to the Perſon whom he names in the Codicil; which hath this effect, that the next of kin, who are deſired or required by a Codicil to reſtore the Succeſſion to another Perſon, are obliged to reſtore it to him, reſerving to himſelf a fourth part of the Eſtate which the Law gives to Heirs or Executors, who are overburden'd with Legacies and Fiduciary Bequeſts *d*. So that according to the *Roman* Law one may, and may not make an Heir or Executor by a Codicil, which depends on the manner in which he expreſſes himſelf therein. For if the Teſtator ſhould make uſe of thoſe Terms which the *Roman* Laws call *direct and imperative*, as when one ſays, *Titius hæres eſto*, *That ſuch a one be my Heir or Executor*, this kind of Expreſſion, which was proper only in Teſtaments, would be of no uſe in a Codi-

c V. §. 2. *inſt. de codicill. l.* 2. *C. eod.*

d l. 2. §. *ult. ff. de Jur. codicill.* §. 2. *inſt. de codicill idem. v. l.* 12. §. 1. *ff. de injuſt. rupt. irr. fact. teſt. l.* 2. *C. de codic.*

cil.

cil. But if the Teſtator in his Codicil ſhould make uſe of thoſe Expreſſions which the ſame Laws call *oblique* or *indirect*, which are in Terms of Intreaty or Requeſt *e*, as if one ſhould ſay, *I entreat my Heir to reſtore my Inheritance to ſuch a one*; this Turn of Expreſſion which does not inſtitute directly for Heir or Executor, the Perſon to whom the Teſtator is deſirous to leave his Eſtate, but which is addreſſed to the Heir to entreat him to reſtore it, makes a Fiduciary Bequeſt, that is, a Diſpoſition which he who expreſſes himſelf in this manner, recommends to the Faith and Integrity of his Heir at Law, or next of kin, and which obliges him to execute this Will.

By the opening of this Gap, which gave to theſe *oblique* or *indirect* Words, the Virtue of making an Heir or Executor in a Codicil, there remained no other Difference between an Inſtitution in *direct* Terms by a Teſtament, and this Inſtitution in *indirect* Terms by a Codicil, except that the Heir or Executor named in the Codicil being to receive the Succeſſion from the Hands of the Heir at Law, who is deſired to reſtore it to him, he had only three fourth Parts of the Eſtate *f*; whereas he that was inſtituted Heir or Executor directly by the Teſtament, had the whole. Thus there might ariſe from all theſe Principles a Doubt whether the Codicillary Clauſe being in a Teſtament that is null, and which calls to the Succeſſion another than the Heir of Blood, it could have the Effect of making this Teſtament to be conſider'd as a Codicil which ſhould contain a Fiduciary Bequeſt of the Inheritance: That is, whether this Clauſe would give to the ſaid Teſtament the ſame Effect that a Codicil would have had, in which the Teſtator had intreated his Heir at Law to reſtore the Inheritance to the Perſon that is inſtituted Heir or Executor in this Teſtament that is null; or whether this Clauſe ought to have no other Effect than to make the Teſtament valid as a bare Codicil, which ſhould contain no manner of Fiduciary Bequeſt of the Inheritance, and whether it would make the Teſtament valid only as to the Legacies, and other particular Diſpoſitions that may be made by a Codicil, ſince with reſpect to the Inheritance, there was wanting in this Teſtament the Expreſſion of the Intreaty to the Heir at Law to reſtore it to him that was inſtituted, in caſe the Teſtament ſhould be found null: But it was judged that the Codicillary Clauſe ſupplied the want of this Expreſſion. And we ſee in many Laws, that this Clauſe had the Effect of making the Teſtament that was null to be conſidered as a Codicil which ſhould contain the Fiduciary Bequeſt of the Inheritanee, and that the Heir at Law was obliged to reſtore it to him who was named Heir or Executor by the Teſtament that was null, but which ſubſiſted by virtue of the Codicillary Clauſe. And the ſaid Heir at Law had only his fourth part of the Inheritance, together with that other Advantage regulated by the Emperor *Theodoſius*, that the Perſon who was inſtituted Heir or Executor by the Teſtament which contained the Codicillary Clauſe, was obliged to take his choice of one of the two Ways in which he might demand the Inheritance; the one by founding his Demand on the Codicillary Clauſe, and the other, by inſiſting on the Inſtitution contained in the Teſtament. For if he had begun by making his choice of this ſecond way, and the Teſtament ſhould appear to be null, he could not afterwards have recourſe to the Codicillary Clauſe *g*, unleſs that the Perſon inſtituted in the Teſtament was a Deſcendant or Aſcendant of the Teſtator's, the Law giving to the Heirs of this Quality the Right of having recourſe to the Codicillary Clauſe, if the Teſtament were annulled, provided that the ſaid Perſon inſtituted, who was in the Line either of Deſcendants or Aſcendants, was in the Rank eſtabliſhed by the ſaid Law *h*.

In fine, we muſt obſerve on the Principles of the *Roman* Law touching this Matter of the Formalities of Teſtaments, which were become ſo difficult and perplexed, and in which they had confined the Expreſſions of the Teſtators to certain Terms, as has been already remarked; that the Diſtinction of *direct* Words, and of Words *indirect* for the Inſtitution of an Heir or Executor was aboliſhed by the Emperor *Conſtantine i*, in the ſame manner as he had aboliſh'd the ſet Forms for Actions *l*, that is, certain Words which thoſe who were to make any demand in a Court of Juſtice, were obliged to make uſe of,

e Verba directa, §. 2. *inſt. de codic.* verba inflexa. *l.* 15. *C. de teſtam.* verba precaria. *l.* 41. §. 3. *ff. de vulg. & pup. l.* 2. *C. comm. de legat.*

f *See the* ivth *Title of the* vth *Book.*

g *l. ult. C. de codic.*

h *d.l. ult.* §. 2. *C. de codic.*

i *l.* 15. *C. de teſtam.*

l *l.* 1. *C. de formul.*

upon

upon the Penalty of loſing what they had to demand. And the Emperor *Juſtinian* did likewiſe afterwards aboliſh the ſame Diſtinction of *direct* and *indirect* Words in Legacies and Fiduciary Bequeſts, giving to theſe two ſorts of Diſpoſitions, the ſame Nature and the ſame Form *m*. From whence it follows, that theſe Emperors had aboliſh'd that which formerly made the Difference between a Teſtament and a Codicil, as to the manner of inſtituting an Heir or Executor in the one and the other. For that which made this Difference was, that direct Words were uſeful for inſtituting an Heir or Executor in a Teſtament, and that the ſame Words were altogether uſeleſs for making an Heir or Executor in a Codicil. Thus, ſeeing the antient Law had permitted the Inſtitution of an Heir or Executor in a Codicil by oblique and indirect Words, it would ſeem that if after theſe Laws there had happen'd a Law-Suit, in which the Queſtion had been, to know whether the Inſtitution of an Heir or Executor in direct Words in a Codicil could be valid; he who being inſtituted Heir or Executor in this manner, ſhould have pretended that this Inſtitution ought to ſubſiſt, would not have argued amiſs, if he had ſaid, that truly according to the antient Law, his Inſtitution was null, becauſe it was in direct Terms in a Codicil; but that ſince by the ſame antient Law it would have been valid if it had been in indirect Words, it ought now to have its effect after theſe Laws that had aboliſhed the Difference between theſe direct and oblique Expreſſions, without reſerving the Uſe of indirect Words for Codicils. And if this Cauſe had been argued before the Emperor *Conſtantine*, in all appearance he would have either given it in favour of the Perſon that was inſtituted in this manner; or if he had had a mind to preſerve the Diſtinction between Teſtaments and Codicils, as to the Inſtitution of an Heir or Executor, he would have aboliſhed the Inſtitution of an Heir or Executor by a Codicil, in whatſoever Terms it had been made; or, in fine, he would have made a Reſtriction to his Law, and have declared the Uſe of indirect Words to be neceſſary in the Inſtitution of an Heir or Executor by a Codicil: which does not ſeem to be very agreeable to the Spirit and Intention of his Law, ſeeing it aboliſhed the Difference between the two ſorts of Expreſſions direct and oblique.

m l. 2. C. comm. de legat.

It is true, that it does ſeem that this Senſe has not been given to that Law of *Conſtantine*, ſeeing the Compilers of the Digeſt and Code have inſerted therein ſeveral Laws which preſerve this antient Law of the Neceſſity of indirect Words to make an Heir or Executor in a Codicil. But it is known that they have inſerted there a great many other Laws, which ought to have been left out, if care had been taken not to inſert any thing that had been changed. And whatever Senſe we give to this Law, there remains always in the Laws relating to this Matter as well as others, a great deal of Confuſion, Uncertainty and Obſcurity.

We could have wiſhed to have been able to abſtain from making here all theſe Remarks, and to have excuſed our ſelves from explaining all theſe particular Niceties of the *Roman* Law, ſince they ſeem not to agree with our Uſage, which demands Rules that are more ſimple and more natural. But ſeeing theſe Niceties are the Sources of the Matter of Codicillary Clauſes, which are in uſe in many Provinces, and that they contain the Principles of the Law concerning theſe Clauſes; it was neceſſary to explain all theſe Particulars, in order to diſcover perfectly the Nature and the Difficulties of the Queſtions that ariſe in this Matter.

Theſe Queſtions, as has been already ſaid, are of two ſorts; ſome of them relate to the Effect that Codicillary Clauſes ought to have; and the others concern the Diſtinction of Diſpoſitions which may or may not have the Effect of a Codicillary Clauſe. Thus, for a firſt Example of the Difficulties which concern the Effect of Codicillary Clauſes, there are ſome Interpreters who have made it a queſtion, whether one who is inſtituted Heir or Executor by a former Teſtament made in due form, would be obliged to reſtore the Inheritance to one that ſhould be inſtituted by a ſecond Teſtament that is null, but having in it a Codicillary Clauſe, in the ſame manner as the Heir at Law would be obliged to do it; and in caſe that he ſhould be obliged to reſtore it, whether he ſhould retain the fourth Part, as the Heir at Law has right to do, or whether he ſhould have nothing at all. Thus, for a ſecond Example, ſome Interpreters have ſtarted the Queſtion, whether a Codicillary Clauſe in an undutiful Teſtament would have the Effect to oblige the Son that is diſinherited, and who had got the Teſtament to be annulled,

to reſtore the Inheritance to the Perſon who is inſtituted Heir or Executor, reſerving to himſelf his Legitime, or Child's Part. And they have been of opinion as to the firſt of theſe two Caſes, that the Codicillary Clauſe ought to make the Teſtament that is null for want of Formalities, to ſubſiſt, leaving the fourth part of the Eſtate to the Perſon inſtituted by the firſt Teſtament; and that in the ſecond Caſe, the Codicillary Clauſe ought to make even the undutiful Teſtament to ſubſiſt; and that altho it were annulled, yet the Codicillary Clauſe obliged the Son who was unjuſtly diſinherited to reſtore the Succeſſion to the Perſon inſtituted Heir or Executor by the ſaid Teſtament. And they have founded their Deciſion of the firſt Caſe upon the Virtue of the Codicillary Clauſe, which they have judged to be of equal force to take away the Succeſſion from the Teſtamentary Heir inſtituted in a former Teſtament made in due Form, as well as from the Heir at Law. And as to the Deciſion of the ſecond Caſe, they have founded it on the 115th Novel of *Juſtinian*, chap. 3. becauſe it is there ſaid, that if in a Teſtament that is null by reaſon of the diſinheriting, or making no mention therein, of the Teſtator's Children, there were ſome Legacies, or ſome Fiduciary Bequeſts, *quædam legata vel fideicommiſſa*, they would nevertheleſs ſubſiſt, and muſt be paid, *dari illis quibus fuerint derelicta*. From whence theſe Commentators infer, that a general Fiduciary Bequeſt being more favourable than a particular one, this Word of Fiduciary Bequeſt in this Novel ought to comprehend the univerſal Fiduciary Bequeſt of the whole Inheritance; as if this Teſtator diſinheriting his Son, had charged him, in caſe his Teſtament ſhould be annulled, to reſtore the Succeſſion to the Perſon inſtituted Heir or Executor therein: And that therefore if this Son procures the Teſtament to be annulled, he ſhall be bound to reſtore the Inheritance to the ſaid Heir or Executor, retaining only his Legitime, or Child's Part, out of it.

We ſee in theſe Queſtions, and in the Deciſions of them by the ſaid Doctors, the Uſe and the Conſequences of theſe Niceties; and that in the ſecond of theſe Queſtions their Interpretation goes on one ſide to an extreme Hardſhip againſt a Son that is unjuſtly diſinherited, and that on the other ſide it is contrary to the very Letter of the ſaid Novel of *Juſtinian*, the natural Meaning of which is in relation to Legacies and particular Fiduciary Bequeſts, which are of the ſame Nature with Legacies; but has no relation to an univerſal Fiduciary Bequeſt of the whole Inheritance, which he could not mean in that Place.

As to the other ſort of Difficulties, where the Point in queſtion is, whether the Expreſſion of the Teſtator ought to have the effect of a Codicillary Clauſe, or whether it ought to have no ſuch Effect; as we have ſeen that ſome of the Laws which have been remarked on this Subject, have given the Effect of Codicillary Clauſes to Expreſſions which ſhewed a ſtrong Deſire in the Teſtator that his Teſtament ſhould be executed, and that other Laws have even confirmed Legacies, in conſideration of the Perſons of the Legataries, which might render the Bequeſts of the Teſtator favourable: Theſe Examples have been the cauſe that there remains an indefinite Liberty of giving the Effect of Codicillary Clauſes to Diſpoſitions that have nothing in them which expreſly carries the Senſe of theſe Clauſes.

It is eaſy to imagine that according to theſe Principles there ought to happen many Queſtions concerning Wills, which may be pretended either to have Expreſſions in them that are equivalent to Codicillary Clauſes, or that they ought to be excepted from the Rules of Formalities for particular Reaſons. And if the bare Conjecture of a ſtrong Deſire in the Teſtator to have his Will executed, may have the effect of a Codicillary Clauſe, it is eaſy to ſupply the Want of it for this reaſon in every Teſtament, as the moſt able Interpreters have been of opinion ought to be done, as has been already remarked. For it may be ſaid with Aſſurance, that every Teſtator deſires as earneſtly as he can, that his Will ſhould be executed. And beſides, there would be no Inconvenience if the Teſtaments, which for want of ſome Formality are null, ſhould have the Effect of Codicils, if they have the Formalities neceſſary thereto.

Neither does it ſeem to be any ways inconvenient, if the Forms of Teſtaments were the ſame in all Places, whether they be to be made in the Preſence of one Notary Publick, and two Witneſſes, or of two Notaries; which would make the uſe of Codicillary Clauſes to be quite laid aſide, as we ſee by Experience in the Cuſtoms which require no other Formalities. For ſeeing no more are required than theſe few, and that they are eſſential, none of them ought to be omitted: And if there

were only one ſingle Witneſs inſtead of two which are neceſſary, or only one Notary inſtead of two, without any Witneſs; theſe Nullities would not be ſubſtantiated by a Codicillary Clauſe. So that of all the Law-Suits which might ariſe on account of Defects in point of Form, and of theſe Subtilties and various Effects of the Codicillary Clauſes, there is ſcarcely one ever heard of in the Cuſtoms, and that thro the bare Effect of this Plainneſs and Simplicity in the Formalities of Diſpoſitions made in proſpect of Death, and without any manner of Inconveniency attending it.

Some Perſons may imagine, that ſeeing the Cuſtoms do not permit the Inſtitution of an Heir or Executor; and that they knowing no other Heirs beſides thoſe of Blood, one ought not to give the Name of Teſtament, but only that of Codicil, to Diſpoſitions in proſpect of Death that may be made in the Cuſtoms; and that therefore the Liberty of diſpoſing of one's Goods by a Teſtament, being leſs in the Cuſtoms than in the Provinces which are governed by the written Law, where Heirs may be made by a Teſtament, fewer Formalities are there required. But it may be ſaid on the contrary, that there is more Reaſon to multiply theſe Formalities in the Cuſtoms, than in the Places which are governed by the written Law. For beſides that in general the Diſpoſitions which tranſmit the Goods to others than the Heirs of Blood, are odious in the Cuſtoms, ſeeing one may in ſome of them diſpoſe by Will of all the Acqueſts, and of all the Moveables, the Perſon inſtituted Heir or Executor, who is called univerſal Legatee, carries away all the Goods, if there be only theſe two ſorts. So that there would be as much, or rather more Reaſon to require many more Formalities for Teſtaments in the Cuſtoms, than in the Provinces which are governed by the written Law. And we ſee likewiſe that ſome Cuſtoms have invented another kind of Formality more troubleſome in one reſpect than thoſe of the *Roman* Law, but however more proper to prevent more eſſential Defects in Teſtaments than that of the Formalities. For in order to guard againſt Importunities and other evil Practices on the Weakneſs of Teſtators, who make their Teſtaments in their laſt Sickneſſes, thoſe Cuſtoms declare the Teſtaments null which have not been made before the Death of the Teſtator a certain Time limited by the ſaid Cuſtoms, as has been obſerved in other Places *n*. And this Precaution hath this Effect, that whereas thoſe who do not make their Teſtaments till they are ſick, and in fear of Death, have not all of them that Freedom of mind, nor the Firmneſs that is neceſſary to make Diſpoſitions that are well concerted, and are expoſed to the Flatteries and Importunities of Perſons who beſiege them, and who often hinder thoſe from Admittance to them who might give wholeſome Advice, but contrary to their Intereſt; thoſe who make their Teſtaments when they are in full Strength of Body and Mind, are not expoſed to any one of all theſe Inconveniencies: And no body can complain, that if he will make a Teſtament, the Law obliges him, for his own proper Intereſt, to take Precautions which are both prudent and eaſy.

It is not therefore the greater or the leſſer Liberty to diſpoſe of one's Goods by Teſtament, that diſtinguiſhes the Uſage of the Cuſtoms from that of the written Law, in what relates to the Formalities of Teſtaments. And we know likewiſe, that in ſome Places, where the *Roman* Law is obſerved with the greateſt Exactneſs, only two Witneſſes are required to a Teſtament, and that by the Canon Law a greater Number is not neceſſary *o*. But ſeeing in all Places it is neceſſary that Teſtaments, as well as all other Acts, ſhould be made with ſuch Formalities as may make a Proof of the Verity, and that that Proof may be made many Ways by ſeveral ſorts of Formalities, it was free for thoſe who made the Laws to make Choice of the ſaid Formalities. Therefore in the *Roman* Law they had Reaſon to require that great Number of Witneſſes, and the other Formalities which have been mentioned, to make Proof of a Teſtament which might be made without any Writing, and the Remembrance of which could not conſequently be preſerv'd but by the Help of ſuch Precautions. Thus, on the contrary, in all the Provinces of this Kingdom, it being required that every Teſtament ſhould be in Writing, this great Number of Witneſſes is the leſs neceſſary; and we do not find any Inconveniencies in the Places where two Witneſſes ſuffice for Teſtaments, as well as for all other Acts. But altho it ſhould be neceſſary that there ſhould be ſeven Witneſſes to a Teſtament, yet at leaſt

n See the Preface to this Second Part, Numb. 7. See the vth Article of the ſecond Section of this Title, and the Remark that is there made on it.

o C. 10. de teſtam.

we might be without that Diſtinction of the different Ways of making Heirs or Executors, either by a Teſtament in direct Words, or by a Codicil in Terms of a Fiduciary Bequeſt. Thus it would be an eaſy Matter to remove all theſe Difficulties by plain and ſimple Rules, which ſhould ſubſtitute in the place of theſe troubleſome and uſeleſs Subtilties the natural Order of an uniform way of making Diſpoſitions: Which would be agreeable even to the Spirit of the *Roman* Law, where it is owned that Plainneſs and Simplicity is a Character that is eſſential to Laws *p*. But if this Truth is common to all Laws, it is more eſpecially peculiar to thoſe which concern Matters, where the multiplying of Rules may multiply Inconveniencies.

We have made here all theſe Remarks, and all theſe Reflections on the Codicillary Clauſe, and on the different Ways of making an Heir or Executor by a Teſtament, or by a Codicil, in order to explain what it is that makes the Difficulties in this Matter, and to give a Reaſon why we have inſerted in this Section one only Rule of the Nature and Uſe of the Codicillary Clauſe when it is expreſſed, and why we have omitted to ſet down among the Number of Rules thoſe which we meet with in the Body of the *Roman* Law, which do not appear to be ſo very natural, and which are ſo little agreeable to that Plainneſs and Simplicity that is eſſential to Laws, and which are on the contrary very proper to multiply Difficulties.

But if any Reader ſhould be of opinion that we ought to have inſerted here ſuch of the ſaid Rules of the *Roman* Law as are received in ſome of the Provinces; we think that this may be enough to ſatisfy them, that in a Matter that is ſo arbitrary, and where the Rules of it are ſo full of Difficulties, we have explained what is to be found relating thereto in the *Roman* Law, ſeeing they have in theſe Remarks what might have been reduced into Rules, and that this way of treating a Matter of this kind, explaining what are the Principles thereof, and what the Difficulties, may ſuit with the Uſages of all Places, and not break in on any of them; but only ſhews the great Occaſion there is to have Rules that are more plain and ſimple.

p Nobis in legibus magis ſimplicitas quam difficultas placet. §. 7. *Inſt. de fideicom. haredit.* Lex duodecim tabularum ſimplicitatem legibus amicam amplexa. §. 3. *Inſt. de legit. agn. ſucc.* *To which we may add theſe Words of* Juſtinian *in another ſort of Difficulties, which did ariſe from the Subtilty of the Laws relating to a Matter of much leſs Importance than this is.* Tales itaque ambiguitates veterum imo magis quod melius dicendum eſt ambages, nobis decidentibus in tanta rerum difficultate ſimplicior ſententia placuit. *l.* 22. §. 1. *C. de furt. & ſerv. corr.*

[*In* England, *this Codicillary Clauſe is not uſed in Teſtaments, neither is there any occaſion for it: For the Law is ſo favourable to ſupport the laſt Wills and Teſtaments of dying Perſons, that it always preſumes an earneſt Deſire in the Teſtator to have his Will to take effect in ſome manner or other, if not as a Teſtament, yet as a Codicil, or Teſtamentary Schedule, altho ſuch his Deſire be not expreſly mentioned in the Will; that all Wills relating to Perſonal Eſtates, altho deſtitute of the uſual Formalities, are adjudged to be good and valid, if there be ſufficient Proof of the Teſtator's Intention to have the ſame ſtand as his laſt Will and Teſtament. But in Deviſes of Lands and Tenements, unleſs the Formalities preſcribed by Law be ſtrictly obſerved therein, the ſame are null and void to all Intents and Purpoſes.*]

SECT. V.

Of the ſeveral Cauſes which may annul a Teſtament in whole, or in part, altho it be made in due Form; and of the Derogatory Clauſes.

ALTHO the Uſe of Derogatory Clauſes is a Matter which comes within the Order of thoſe of this Section, and that Mention is made thereof in the Title of the Section, yet we have not thought fit to put down among the Rules of this Section any Rule concerning theſe Clauſes; and that it would be ſufficient to mark here their Order, and to give the Reaſons that have obliged us to ſpeak of them no where elſe but in this Preamble.

We call thoſe Derogatory Clauſes, which Teſtators put in their Teſtaments, when they fear leſt they ſhould be obliged afterwards to make other Diſpoſitions againſt their Will, upon Conſiderations that may oblige them thereto, and are willing to annul the ſaid Diſpoſitions before-hand, and to make thoſe to ſubſiſt which they had made in the firſt Teſtament. It is with this View that thoſe Teſtators, who are deſirous that their firſt Teſtament ſhould not be revoked by a ſecond, put into the firſt Teſtament a Clauſe, by which they ordain, that if afterwards they ſhould happen to make another Teſtament, it may have no Effect, unleſs it contain certain Words which they expreſs in the firſt, and which they put there for a Mark, that if they are repeated in the ſecond, it ſhall ſubſiſt, and that it ſhall be null if it does not contain them. Theſe Clauſes are called *Derogatory*, becauſe they

they derogate from the Validity of the ſecond Teſtament, if they are not expreſs'd in it. And it is no matter what theſe Words are, nor whether they have any Senſe, or not, no more than the Watch-word.

We have thought fit not to inſert among the Rules of this Section any thing concerning theſe Derogatory Clauſes; becauſe altho they are very much in uſe, yet they are altogether unknown in the *Roman* Law; and thoſe who firſt invented them have built only upon Conſequences drawn from ſome Laws, which have nothing in them that expreſly countenances theſe ſorts of Clauſes; and on the contrary, the Effect that is given them is altogether oppoſite to the Principles and Diſpoſitions of the *Roman* Law, which do not allow that we ſhould deprive our ſelves of the Liberty of making new Diſpoſitions, and of changing or revoking the firſt whenever we pleaſe.

The Authors of the Derogatory Clauſes have gone upon this, that it is ſaid in one Law *a*, that if a Teſtator had declared in the beginning of his Teſtament, that he does not give to ſuch a one, that which he ſhall give him in the latter part of his Teſtament, *Quod Titio infra legavero, id neque do, neque lego*; the Legacy left to ſuch a Perſon in the latter part of this Teſtament would be null by the Effect of this firſt Will. From whence theſe Doctors have drawn this Conſequence, That a Teſtator may annul a ſecond Teſtament by ſuch a Clauſe as this in a former. They add upon the ſame Subject what is ſaid in another Law *b*, that if a Teſtator had ſaid in his Teſtament, *That if there were found therein two Legacies to one and the ſame Perſon, his Will was, that there ſhould be only one of them due*, and that in the ſame Teſtament he had left two Legacies to one Legatary, there would be only one of them that ſhould ſubſiſt. And they likewiſe make uſe of an Addition of *Tribonian*'s to another Text *c*. It is in the Caſe where the Teſtator having ſaid in the beginning of his Teſtament, *That if in the Sequel of it he ſhould leave two Legacies to one and the ſame Perſon, there ſhould be due only one of them*, and he had left ſeveral Legacies to the ſame Legatary, the Law decides that they ſhould be all due; becauſe this Teſtator could not put himſelf under the Neceſſity of not being able to change his former Diſpoſition. But by this Addition it is ſaid, that this Legatary ſhall not have all thoſe Legacies, unleſs the Teſtator has ordered it ſo by a ſecond Diſpoſition in expreſs Terms, which derogates from the former. From whence theſe Doctors have drawn this Conſequence, That when the Teſtator annuls the ſecond Teſtament by a former, as by a Derogatory Clauſe, this ſecond Diſpoſition remains null, unleſs the Teſtator ſhould declare, that his Will and Intention is, that notwithſtanding the Derogatory Clauſe his ſecond Will ſhould be executed. But ſince the Exception added to this Law is an Addition of *Tribonian*'s, eaſy to be known by the Style, it may be ſaid that this Law proves rather that the ſecond Diſpoſition revokes the former. And this is likewiſe a certain Principle in the Matter of Teſtaments, as ſhall be explained in its proper Place *d*. And beſides, this Addition of *Tribonian*'s has no relation to two Teſtaments, to have the Effect of annulling the ſecond by a Derogatory Clauſe in the former; but it is limited to the making valid the firſt Diſpoſition of a Teſtament which annuls other Diſpoſitions of the ſame Teſtament, or of a Codicil, which in the *Roman* Law makes a part of the Teſtament, and draws from it all its Force *e*. Thus this Law, as well as the others, which we have juſt now remarked, is in the Caſe of one only Teſtament which contains two oppoſite Diſpoſitions, one of which ought neceſſarily to hinder the Effect of the other; which has no preciſe relation to the Diſpoſitions of two Teſtaments made at different Times. So that none of theſe Laws prove that we may, by the *Roman* Law, make a Diſpoſition in a former Teſtament, which ſhall annul thoſe of a ſecond. And on the contrary, thoſe very Laws, and all the others that may have any relation to this Matter, prove two Truths quite oppoſite to the Uſe of Derogatory Clauſes in a former Teſtament, to annul thoſe which the Teſtator might happen afterwards to make. One is, that it is always the laſt Will which annuls the former, when it is contrary to them *f*. And the other is, that no Man can deprive himſelf of the Liberty to diſpoſe, and to revoke former Diſpoſitions *g*.

a l. 12. §. 3. *ff. de legat.* 1.
b l. 14. *ff. eod.*
c l. 22. *ff. de legat.* 3.

d See the firſt Article, and the following Articles of the vth *Section.*
e l. 2. §. 2. *l.* 3. §. 2. *ff. de jure Codicill.*
f Suprema voluntas potior habetur. *d. l.* 22. *ff. de leg.* 3.
g Nemo enim eam ſibi poteſt legem dicere, ut à priore ei recedere non liceat. *d. l.*

It

It is in Conformity to these two Principles, that it is decided in the sixth Law, §. 2. *ff. de jure Codicill.* That if a Testator, having declared that he desired that no regard might be had to any Codicil he should make, unless it was written and signed with his own Hand, should happen afterwards to make a Codicil, which he had neither written nor signed with his Hand, this Codicil would nevertheless be confirmed, because, as it is said in that Law, the last Wills of Testators derogate from the former, *Quæ postea geruntur prioribus derogant h.* Thus it may be said, that the Use of Derogatory Clauses is not agreeable to the Spirit of the *Roman* Law, nay that it is directly contrary to it. And it has been so determined by one of the Interpreters, who best understood the Law relating to this Matter.

As for other Reasons besides the Authority of the Laws, we see on one hand, that the Use of the Derogatory Clauses consists in giving to Testators the Means of making a second Testament, which they would have to serve for nothing, after that they have made a former which they are desirous may be executed; that this second Testament may serve to amuse the Persons in whose Favour it has been made, the Testator thinking within himself at the same time, that nothing is more remote from his Intention than this second Testament, which is already annulled before-hand in his Mind. We know that there have been Pagans that would not have had the Conscience to make use of an Expedient of this Nature. But even altho this Expedient could be of any good Use, yet it is not without a great many Inconveniencies: For it may happen that he who has a mind to engage a Testator to make a Testament in his Favour, may take his Measures, accordingly before any other Testament has been made, and may get the Testator to make a secret Testament, sealed up, and put into his Custody, and in which he may have procured a Derogatory Clause to be inserted, of which the Testator perhaps is not capable to comprehend the Consequence, or which he may have forgot; so that any second Testament which he should make might be of no effect. And it might likewise so fall out, that the Persons who should engage the Testator to make a second Testament, having already made a former with a Derogatory Clause in it, might get him to add in the second a Clause which might derogate from the Derogatory Clause of the former, getting the Testator to declare that he had forgot the Terms of the said Clause, or to make use of other Expressions which might render ineffectual the Precaution of the Derogatory Clause in the former Testament. It may likewise so happen, that a Testator who is desirous, and that for good Reasons, to change a former Testament, may have forgot that he had put in it a Derogatory Clause, as if the Testament had been made many Years before, or he had even forgot that he had made any at all; and thus the second Testament he should have a mind to make, would be useless. It might likewise happen, that a Testator had made a former Testament out of some Passion that had disgusted him with his Relations, and had moved him to leave his Estate to some Stranger, who had taken the Precaution to get a Derogatory Clause put into the Testament; and that this Testator should afterwards repent himself of it, and being desirous to leave his Estate to his nearest Relations, Brothers, or others, he should make a second Testament with this Intention; but that he had omitted, either through Forgetfulness or Ignorance, to make mention of the Derogatory Clause of the former Testament; so that the Effect of the said Clause would be in this Case, to prefer an unjust and angry Will, to a Disposition that is most just and equitable. Thus, it may be said that this Precaution of the Derogatory Clauses is much more inconvenient than it is useful, without reckoning that of the many Law-Suits which the Invention of these Clauses has added to the great Number of others, which are already more than the Judges can well decide, and disturb the Peace and Quiet of Families.

All these Considerations have induced us to think, that altho it be true that the Derogatory Clauses are generally used, yet that we might, without transgressing the Authority of the said Usage, forbear setting down here any Rule concerning this Matter. And altho there were no Inconvenience in the Use of the said Derogatory Clauses, yet this Matter has two Characters which exclude it from coming within the Design of this Book. One is, that it is no part of the *Roman* Law; and that not only it is not a part thereof, but is directly contrary to it: And the other is, that it is no more a part of the Law of Nature.

h See the like Decision, l. ult. ff. de legat. 2.

ture. And beſides, the Remarks which we have juſt now made, contain all the Principles of this Matter.

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I.

1. A firſt Teſtament is annulled by a ſecond.

BEſides the Want of Formalities which may annul a Teſtament, there are other Cauſes which may have the ſame Effect. And we may reckon as the firſt of them a ſecond Will of the Teſtator who makes another Teſtament. For as every Teſtament implies the Diſpoſal of the whole Eſtate, two different Teſtaments cannot ſubſiſt together, but the ſecond annuls the firſt *a*; as ſhall be explained in the following Articles.

a Poſteriori teſtamento quod jure perfectum eſt, ſuperius rumpitur. §. 2. *inſt. quib. mod. teſt. infirm.* Teſtamentum rumpitur alio teſtamento. *l.* 1. *ff. de inj. rupt.* See the ivth Article of the iſt Section of Codicils.

II.

2. Altho the ſecond make no mention of the firſt.

Altho the ſecond Teſtament make no mention of the firſt, yet nevertheleſs it revokes it by the bare Effect of the Will of the Teſtator, who being at liberty to change his Diſpoſitions to the Moment of his Death, declares ſufficiently by thoſe which he makes in his ſecond Teſtament, that his Will is, that the firſt ſhould remain without effect *b*. But if in the ſecond Teſtament, the Teſtator makes only ſome Additions, ſome Deductions, and ſome Alterations in the former, whether it be in the naming of the Heir or Executor, or in the Legacies; whatever he confirms of the firſt Teſtament ſhall have its effect as making a part of the ſecond.

b Ambulatoria enim eſt voluntas defuncti, uſque ad vitæ ſupremnm exitum. *l.* 4. *ff. de adim. vel transfer. legat.* Non omnes tabulas prætor ſequitur hac parte edicti; ſed ſupremas, hoc eſt, quæ noviſſime ita factæ ſunt, poſt quas nullæ factæ ſunt *l.* 1. §. 1. *ff. de bon. poſſ. ſec. tab.* See the xiiith and xivth Articles.

III.

3. Provided that the ſecond be in due Form, altho it remain without Execution.

A firſt Teſtament made in due Form cannot be annulled by a ſecond, unleſs the ſame be likewiſe in due Form: For otherwiſe this ſecond Will having for its Proof only an Act that is null, would be null likewiſe, and would not have ſo much

much as the Effect to revoke the former Diſpoſitions which ſhould ſtill be in being *c*. But if the ſecond Teſtament has all the neceſſary Formalities, it is no matter altho it remain without Execution, whether it be that the Heir or Executor, and Legataries, if there are any, renounce the Right they have by it, or that they die before the Teſtator, or that they are become uncapable, ſo that this Teſtament has no effect. For this ſecond Will being in due form, does nevertheleſs annul the former. Thus the Teſtator dies without a Teſtament, the firſt being annulled by the ſecond, and the ſecond failing to have its effect *d*.

c Tunc autem prius teſtamentum rumpitur, cum poſterius rite perfectum eſt. *l.* 2. *ff. de injuſt. rup. irr. fact. teſt.*

d Poſteriore quoque teſtamento, quod jure perfectum eſt, ſuperius rumpitur. Nec intereſt extiterit aliquis hæres ex eo, an non. Hoc enim ſolum ſpectatur, an aliquo caſu exiſtere potuerit. Ideoque, ſi quis aut noluerit hæres eſſe, aut vivo teſtatore, aut poſt mortem ejus antequam hæreditatem adiret, deceſſerit, aut conditione ſub qua hæres inſtitutus eſt, defectus ſit: in his caſibus pater familias inteſtatus moritur. Nam & prius teſtamentum non valet ruptum a poſteriore: & poſterius æque nullas habet vires, cum ex eo nemo hæres extiterit. §. 2. *inſt. quib. mod. teſt. infirm.*

IV.

4. A Teſtament which may ſubſiſt with fewer Formalities, revokes a former.

We muſt not reckon in the number of Teſtaments that would not be ſufficient to revoke a former Teſtament, thoſe in which the Laws diſpenſe with a part of the Formalities, ſuch as Military Teſtaments, and thoſe which are made in a time of Plague. For if theſe Teſtaments which want ſome Formalities, have thoſe which are ſufficient to render them valid, they revoke the former Teſtaments *e*.

e Tunc prius teſtamentum rumpitur cum poſterius rite perfectum eſt. Niſi forte poſterius jure militari ſit factum——Tunc enim & poſteriore non perfecto ſuperius rumpitur. *l.* 2. *ff. de injuſt. rupt. irr. fact. teſtam.*

Altho this Text ſpeaks only of the Military Teſtament, yet a Teſtament made in a time of Plague, according to the Rule explained in the xvith *Article of the* iiid *Section, will have the ſame Effect, ſince it will ſubſiſt.*

V.

5. A Teſtament in favour of the Heir of Blood, atteſted by five Witneſſes, revokes the former which called a Stranger to the Succeſſion.

It muſt likewiſe be remarked on this Rule, that we ought to except from it the Caſe where the Teſtator having by a former Teſtament named for his Heir or Executor another Perſon than him who had right to ſucceed to him if he had died inteſtate, had inſtituted for his Teſtamentary Heir or Executor, his Heir at Law by the ſecond Teſtament: For in this caſe this ſecond Teſtament, altho null, revokes the former, provided only that it have five Witneſſes, and the Favour of the Heir of Blood makes it to ſubſiſt *f*.

f Tunc prius teſtamentum rumpitur, cum poſterius rite perfectum eſt. Niſi forte poſterius vel jure militari ſit factum, vel in eo ſcriptus eſt qui ab inteſtato venire poteſt. Tunc enim & poſteriore non perfecto ſuperius rumpitur, *l.* 2. *ff. de injuſt. rupt. irr. fac. teſtam.*

Si quis teſtamento jure perfecto poſtea ad aliud venerit teſtamentum, non alias quod ante factum eſt infirmare decernimus quam ſi id quod ſecundo facere teſtator inſtituit, jure fuerit conſummatum: niſi forte in priori teſtamento ſcriptis his qui ab inteſtato ad teſtatoris hæreditatem vel ſucceſſionem venire non poterant, in ſecunda voluntate teſtator eos ſcribere inſtituit, qui ab inteſtato ad ejus hæreditatem vocantur. Eo enim caſu, licet imperfecta videatur ſcriptura poſterior, infirmato priore teſtamento ſecundam ejus voluntatem, non quaſi teſtamentum, ſed quaſi voluntatem ultimam inteſtati valere ſancimus. In qua voluntate quinque teſtium juratorum depoſitiones ſufficiunt. Quo non facto valebit primum teſtamentum, licet in eo ſcripti videantur extranei. *l.* 21. §. 3. *C. de teſt.* See in the Preface to this ſecond Part, num. viii. and the iiid Article of the viith Section of this Title.

VI.

6. The Birth of a Child annuls the Teſtament.

A Teſtament made with all the Formalities is nevertheleſs annulled by the Birth of a Child whom the Teſtator had not inſtituted his Heir or Executor *g*: For ſince the Inheritance is due to the Children both by Law and by Nature, if they have not deſerved to be diſinherited *h*, the Child which is born to the Teſtator after the making of his Teſtament, is his Heir. And it is preſum'd that the reaſon why he did not revoke this Teſtament, was becauſe he was prevented by Death.

g Teſtamentum rumpitur agnatione ſui hæredis. *l.* 1. *ff. de inj. rupt. irr. fac. teſt. l. un. C. de ordin. judic.* See the xvth Article touching Legacies in this Teſtament.

h Ratio naturalis, quaſi lex quædam tacita, liberis parentium hæreditatem addicit, velut ad debitam ſucceſſionem eos vocando. Propter quod & in jure civili ſuorum hæredum nomen eis indictum eſt. Ac ne judicio quidem parentis, niſi ex meritis de cauſis, ſummoveri ab ea ſucceſſione poſſunt. *l.* 7. *ff. de bon. damn.* See the Preface to this iid Part, num. iii.

VII.

7. Unleſs the ſaid Child dies before the Teſtator.

If in the Caſe of the preceding Article, the Child born after the Teſtament ſhould happen to die before the Death of the Teſtator its Father, the ſaid Teſtament would have its effect: For ſince it is the Death of the Teſtator that gives the Teſtament its effect, and that at the time of the ſaid Death the Cauſe which ought to annul the Teſtament of this

this Father would not be any more in being, nothing would hinder its Validity. And all the Diſpoſitions thereof would be executed upon this juſt Preſumption, that the Teſtator not having revoked them after the Death of the ſaid Child, had confirmed them *i*.

i Poſtumus præteritus vivo teſtatore natus, deceſſit: licet juris ſcrupuloſitate nimiaque ſubtilitate teſtamentum ruptum videatur: attamen ſi ſignatum fuerit teſtamentum bonorum poſſeſſionem ſecundum tabulas accipere hæres ſcriptus poteſt, remque obtinebit, ut & Hadrianus, & Imperator noſter reſcripſerunt. Idcircoque legatarii & fideicommiſſarii habebunt eaquæ ſibi relicta ſunt, ſecuri. *l.* 12. *ff. de inj. rup. irr. f. teſt.*

VIII.

8. *The Teſtament in which the Children are omitted is null.*

The Teſtament of him who having Children, or Parents if he has no Children, makes no mention of them therein, is annulled with reſpect to the Inſtitution of the Heir or Executor: For he ought to have named them his Heirs or Executors; or if he had a mind to diſinherit them, he ought to have mentioned the Reaſons for which he did it *l*, as ſhall be explained in the Second Title.

l Teſtamentum aut non jure factum dicitur, ubi ſolennia juris defuerunt, aut nullius eſſe momenti, cum filius qui fuit in patris poteſtate præteritus eſt. *l.* 1. *ff. de injuſt. rupt. irrit. fat. teſt. Nov.* 115. *c.* 3. & 4. See the following Article, and the xvith Article, with the Remark that is there made on it.

This Omiſſion of the Father or Mother who make no mention of their Children in their Teſtaments, is called in the Roman *Law* Preterition, *diſtinguiſhed from* Diſheriſon, *for in this the Children are named and diſinherited.*

IX.

9. *The unjuſt diſinheriting of Children annuls the Teſtament.*

If the Teſtator who has Children diſinherits any of them without juſt Cauſe, his Teſtament will be annulled as to the Inſtitution of the Heir or Executor. And it would be the ſame thing if the Teſtator who had no Children had diſinherited without juſt Cauſe his Father, or Mother, or other Aſcendants *m*, as ſhall be ſhewn in the iid Title of this Book.

m Si ex cauſa de inofficioſi cognoverit judex, & pronuntiaverit contra teſtamentum, nec fuerit provocatum; ipſo jure reſciſſum eſt. Et ſuus hæres erit ſecundum quem judicatum eſt. *l.* 8. §. *penult. ff. de inoff. teſt. l.* 30. *ff. de liber. & poſt hared. inſt.* V. Nov. 115. c. 3 and 4. and the xvith Article of this Section.

X.

10. *The Inſtitution is of no effect, if the Teſtamentary Heir renounces.*

When the Perſon who is inſtituted Heir or Executor by a Teſtament renounces the Inheritance, the Inſtitution of the Teſtamentary Heir having no effect, the next of kin is called in the place of him who was named by the Teſtament *n*.

n In irritum conſtituitur teſtamentum non adita hæreditate, *l.* 1. *ff. de inj. rupt. irr. fact. teſt.* Si nemo ſubiit hæreditatem, omnis vis teſtamenti ſolvitur. *l.* 181. *ff. de reg. jur.*

We have not ſaid in the Article, that the Teſtament will be null without Diſtinction as to all the Diſpoſitions it may contain, concerning which it will be neceſſary to ſee the xixth *Article, with the Remark made on it.*

[In *England* the Uſage is, in the Caſe mentioned in this Article, when the Executor renounces the Execution of the Will, if the Reſidue be therein diſpoſed of, to grant Adminiſtration with the Will annexed to the Reſiduary Legatee, preferable to the next of kin. *Swinb. of Teſtaments, Part* vi. §. 3.]

XI.

11. *The Teſtament is annulled, if the Teſtator dies incapable of making one.*

If he who had made a Teſtament happens afterwards to fall into a State that renders him incapable of having Heirs or Executors; as if he happens to loſe his Right of Naturalization, or is condemned to ſome Puniſhment that carries with it a Civil Death, as has been explained in its Place, and that he remains in that Condition till his Death, the Teſtament which he had made before will be annulled. For ſince every Teſtament hath its effect only at the moment of the Death of the Teſtator, he who at the time of his Death cannot leave his Goods to Heirs or Executors, cannot by conſequence leave any uſe of a Teſtament from which no body can reap any Profit *o*.

o Irritum fit teſtamentum quoties ipſi teſtatori aliquid contigit: puta, ſi civitatem amittat. *l.* 6. §. 5. *ff. de inj. rupt. irr. f. teſt.*

Sed & ſi quis fuerit capite damnatus, vel ad beſtias, vel ad gladium, vel alia pœna, quæ vitam adimit, teſtamentum ejus irritum fiet. *d. l.* §. 6. See the xvith Article of the iid Section of this Title, the Texts which are there cited, and the Remarks made thereon, and the xxth Article of this Section.

This Article is to be underſtood only of the Caſe mentioned in it, where the Teſtator is at the time of his Death incapable of having Heirs or Executors, for if he was only incapable of making a Will, as if after having made his Teſtament he had profeſſed himſelf a Monk, or was fallen into a State of Madneſs, or under ſome other Infirmity which render'd him incapable of making a Teſtament, yet his Teſtament would nevertheleſs have its effect, becauſe he would not be incapable of having for his Heirs or Executors thoſe whom he had made choice of when he was capable of doing it.

XII.

12. *The other Changes, or the length of time do not annul a Teſtament.*

All the other Changes that might happen between the time of making the Teſtament, and the Death of the Teſtator, even thoſe which might make us preſume ſome Change of his Will, would not annul it. And altho there may have paſt a great number of Years in the ſaid Interval, and that during that long time the Teſtator's Eſtate had been much

much augmented or diminiſhed, that ſome of the Legataries were dead, that the Perſon whom he had choſen to be his Heir or Executor, becauſe he was poor, and had many Children, ſhould happen to be rich, and to have no Children, or that there had happened other Changes of the like Nature; his Teſtament would nevertheleſs be executed, unleſs that he had revoked it either by ſome contrary Diſpoſition made in due form, or in the manner explained in the 21ſt Article. For it ought to be preſumed that he had perſevered in the ſame Will, having made no Change in his Teſtament, being able to have done it, and that his Intention was that this Teſtament ſhould be executed in what manner it could, according to the Condition that Matters ſhould be in at the time of his Death *p*.

p Sancimus ſi quis legitimo modo condidit teſtamentum & poſt ejus confectionem decennium profluxerit, ſi quidem nulla innovatio, vel contraria voluntas teſtatoris apparuerit, hoc eſſe firmum. Quod enim non mutatur, quare ſtare prohibetur? Quemadmodum enim qui teſtamentum facit, & nihil voluit contrarium, inteſtatus efficitur? *l.* 27. *C. de teſtam.*

¶ We have not ſet down in this Article the Words that follow in this Text, that if the Teſtator revoke his Teſtament, either in the Preſence of three Witneſſes, or by an Act in a publick Regiſtery, this Revocation, together with the Duration of ten Years after the Teſtament, will make it to be null. *Sin autem teſtator tantummodo dixerit*, non voluiſſe prius ſtare teſtamentum, *vel aliis verbis utendo contrariam aperuit voluntatem, & hoc vel per teſtes idoneos non minus tribus, vel inter acta manifeſtaverit, & decennium fuerit emenſum; tunc irritum eſt teſtamentum, tam ex contraria voluntate, quam ex curſu temporali.* And inſtead of this way of revoking a Teſtament, we have put down only in the Article, that the Teſtator may revoke it, either by an Act made in due form, or in the manner explained in the 21ſt Article, that is, by tearing, raſing, or defacing it. For it ſeems that that which in the *Roman* Law made the uſe of thoſe other Ways of revoking a Teſtament neceſſary, either by an Act in the Publick Regiſtery, or by a Declaration in preſence of Witneſſes, was, that Teſtaments, as well as all other Acts, might be made without any Writing *a*; and that therefore as Teſtaments made after this manner did ſubſiſt in the Memory of the Witneſſes, a contrary Act was neceſſary to annul thoſe that were not written. And it was perhaps for the ſame reaſon, in that Teſtaments did ſubſiſt without Writing, that before *Juſtinian*'s Reign the Laws which that Emperor aboliſhed by the Law quoted on this Article, had regulated that a Teſtament ſhould be null after ten Years from the Day of its date *b*. Which may have been founded upon this, that the Memory of a Teſtament which was not written, could not be ſo eaſily preſerved after ſo long a time, whether becauſe of the Death of all the Witneſſes, or ſome of them, or their Forgetfulneſs. And this Revocation of Teſtaments by the courſe of ten Years, may have been extended to thoſe that were written, in the ſame manner as they extended the Formalities of Teſtaments that were not written; as has been remarked in other Places *c*. But *Juſtinian* did not content himſelf with the bare effect of the ſpace of ten Years, to revoke even Teſtaments that were not written; and he ordained, without making any diſtinction by this Law, that to revoke a Teſtament there ſhould be neceſſary both the Courſe of ten Years, and likewiſe a Declaration of the Teſtator in the preſence of three Witneſſes, or an Act in the publick Regiſtery: From whence it follows, that without the Circumſtance of this time, an Act before three Witneſſes would not be ſufficient, and that it would be neceſſary to have an Act more authentick to revoke the Teſtament; ſo that it would ſeem that *Juſtinian* looked upon the Revocation of a Teſtament as an Act of the ſame nature with the making of a Teſtament, becauſe it implies a Diſpoſition of the Inheritance: So that one might conjecture from this Law, that to revoke a Teſtament within the ten Years from its date, the ſame number of Witneſſes ſhould be neceſſary as in making a Teſtament. And as to the manner of revoking a Teſtament by the effect of time, as by this Law of *Juſtinian* the Time alone is not ſufficient to annul it, ſo it is ſtill leſs ſufficient with us, where every Teſtament ought to be in writing. But altho every Teſtament ought to be in writing, yet a contrary Act is not always neceſſary to revoke it, for the Teſtator needs only to tear or cancel his Teſtament, ſo that the uſe of an expreſs Revocation cannot be neceſ-

a See the xiith *Article of the iſt Section of Covenants*, *l.* 9. *l.* 10. *Cod. de fide inſtr. l.* 21. §. 2. *Cod. de teſtam. l.* 26. *eod.*

b *V. l.* 6. *Cod. Theodoſ. de teſtam. & codicill.*

c *See the Preamble of the* iiid *and* ivth *Sections.*

ſary

ſary, except in the Caſe where a Teſtator cannot have the Original Teſtament in his power, either by reaſon of Abſence, or for other Cauſes: And in this Caſe the Difficulty would remain, to know, whether it would be neceſſary to have an Act with the ſame number of Witneſſes that are required to a Teſtament, as it ſeems to follow from this Law of *Juſtinian*, who is not contented with three Witneſſes, except in the Caſe where the ten Years are elapſed after the Date of the Teſtament. But as we have ſeen in the fifth Article, that a Teſtament with five Witneſſes in favour of the Heir at Law, annuls a former Teſtament in which a Stranger was inſtituted Heir or Executor; and that he who has a mind to revoke his Teſtament without making another, cannot but know, that if he die without a Teſtament he leaves his Eſtate to his next of Kin; ſo therefore five Witneſſes ought to ſuffice to make the Revocation of his Teſtament valid. And this Revocation ought to have the ſame Effect, as if he inſtituted his Heir at Law by a ſecond Teſtament. For one may ſay of him who revokes his Teſtament without making another, that he inſtitutes for his Heir or Executor him who ought to ſucceed to him if he died inteſtate, not by an Inſtitution in expreſs Terms, but which is tacit in the Expreſſion, and expreſs in the Intention; and likewiſe with this Advantage in favour of the ſaid Heir at Law, that he is willing to leave him the Eſtate without any Diminution by Legacies, or other Bequeſts. And if this Revocation were made in a Place where only two Witneſſes are required to a Teſtament, the ſame Number would be ſufficient; ſince in Teſtaments, and other Acts, we ought to obſerve the Formalities that are uſed in the Places where they are made; as has been remarked on the firſt Article of the third Section.

But if there were only two Witneſſes to ſuch a Revocation, in a Place where a greater Number of Witneſſes is neceſſary to a Teſtament, and the Teſtator had perſevered in the ſaid Will to his Death, altho he had not ſurvived ten Years after the making of it, the Proof which would reſult from an Act of this Nature, joined with the Favour of the Heir at Law; would it not be ſufficient to annull the Teſtament, as well as in all other Acts, and even in a Donation of one's whole Eſtate to take effect in the Life-time of the Donor, two Witneſſes are ſufficient with a Notary, or two Notaries without any Witneſs? This Queſtion might be ranked in the Number of thoſe which demand Rules for deciding them. And without deciding it, it ſeems reaſonable to believe, that ſince *Juſtinian* required only three Witneſſes with the Space of ten Years, and judged in this Caſe the Revocation of the Teſtament juſt and favourable, altho without the Formality required in a Teſtament, an Act made before two Publick Notaries, or one Notary and two Witneſſes, ſetting forth in an authentick Manner the Will of the Teſtator to revoke his Teſtament, might have this Effect; eſpecially ſince it would ſeem that fewer Formalities are neceſſary to leave the Inheritance in the natural Order to the Heir at Law, than what the Law requires to deprive him of it, and that it does not ſeem neceſſary that he who, after having made a Teſtament, changes his Mind, and is willing to die inteſtate, ſhould make a ſecond Teſtament in the ſame Form and Manner.

[*As to Revocation of Wills in* England, *it is particularly directed by Act of Parliament, that no Will in Writing concerning any Goods or Chattels, or Perſonal Eſtate, ſhall be repealed, nor any Clauſe, Deviſe, or Bequeſt therein be altered or changed by any Words, or Will by Word of Mouth only, except the ſame be in the Life of the Teſtator committed to Writing, and after the Writing thereof read unto the Teſtator, and allowed by him, and proved to be ſo done by three Witneſſes at the leaſt.* Stat. 29 Car. 2. cap. 3. §. 22.]

XIII.

13. *The Teſtament may be either entirely annulled, or only as to the Inſtitution, or as to ſome other Clauſe.*

Among the different Cauſes which annul the Wills of Teſtators, and which have been explained in the foregoing Articles, we muſt diſtinguiſh between thoſe which deſtroy entirely the whole Teſtament, ſo that there does not ſubſiſt ſo much as any one Diſpoſition in it, neither for the Inſtitution of the Heir or Executor, nor for the Legacies; and thoſe which annul only either the Inſtitution of the Heir or Executor, or ſome other Diſpoſition, without touching the reſt; which depends on the Rules that follow *q*.

q See the following Rules.

XIV.

14. *The ſecond Teſtament annuls or changes the firſt, according to the Diſpoſitions it contains.*

In the Caſe of a ſecond Teſtament, the firſt is either entirely annulled in all its Parts, or only in that which the ſecond may have changed in it, as has been ſaid in the ſecond Article. Thus the Effect of the Will of the Teſtator in his firſt Teſtament, depends on the

Effect which his Will explained in the ſecond Teſtament ought to have *r*. And by the ſecond Teſtament we are always to underſtand that which is the laſt, how many ſoever the former Teſtaments are *s*.

r This is a Conſequence of the firſt and ſecond Articles.

s Hoc eſt (eas tabulas) quæ noviſſime ita factæ ſunt: poſt quas nullæ factæ ſunt. *l.* 1. §. 1. *ff. de bon. poſſ. ſec. tab.*

XV.

15. *The Birth of a Child annuls the whole Teſtament that made no mention of it.*

In the Caſe of the Birth of a Child, which the Teſtator did not foreſee, and of which he had made no mention in the Teſtament, it is entirely annulled, and nothing of it ſubſiſts, even altho the Teſtator had inſtituted by the ſaid Teſtament his other Children, which he had at that time *t*. For it may be ſaid, with reſpect to the Diſpoſitions of that Teſtament, that if the Teſtator had foreſeen the Birth of this Child, he would have burdened the Succeſſion with fewer Legacies, or perhaps would have left none at all. And it might likewiſe happen, that if this Teſtament ought to ſubſiſt, this Child would be reduced to its Legitime or Child's Part, contrary to the Intention of the Teſtator: So that we ought to preſume of ſuch a Teſtament, that the Diſpoſitions thereof are contrary to thoſe which the Birth of this Child would have obliged the Teſtator to make, if he had foreſeen it.

t Si pater duos filios hæredes inſtituerit, & agnatione poſthumi ruptum teſtamentum fuerit, quamvis hæreditas pro duabus partibus ad eos pertineat, tamen fideicommiſſæ libertates præſtari non debent, ſicut nec legata quidem aut fideicommiſſa præſtare coguntur. *l.* 47. *ff. de fideicom. libert. l.* 24. §. 11. *eod.* See the ſixth Article.

We may gather this Conſequence from this Text, that even the moſt favourable Legacies would be revoked in this Caſe, ſince it annuls the Legacies of Liberty given to Slaves. But if there were in the ſaid Teſtament a Legacy left to Servants, in lieu of Wages due to them, it would not be ſo much a Legacy as an Acknowledgment of a Debt which ought to be acquitted; and it would be the ſame thing, if the Teſtator had charged his Heirs or Executors with ſome Reſtitution, which he was obliged to make. For the Cauſe which would annul this Teſtament, would not annul the Proof that it would make of a Truth of this Nature.

XVI.

16. *The Legacies of undutiful Teſtaments ſubſiſt.*

If a Teſtator, having Children, or, if he is without Children, having Parents, makes no mention of them in his Teſtament, or if he diſinherits them without juſt Cauſe, the Teſtament will be null only with reſpect to the Inſtitution of other Heirs or Executors in the Place of his Children or Parents, and all the other Diſpoſitions of the ſaid Teſtament will have their Effect *u*.

u Si vero contigerit in quibuſdam talibus teſtamentis quædam legata, vel fideicommiſſa, aut libertates, aut tutorum dationes relinqui, vel quælibet alia capitula conceſſa legibus nominari, ea omnia jubemus adimpleri, & dari illis quibus fuerint derelicta: & tanquam in hoc non reſciſſum obtineat teſtamentum. *Nov.* 115. *c.* 3.

This Text relates to the Teſtaments of Fathers and Mothers, and other Aſcendants; and the ſame thing is ordained at the End of the ivth *Chapter of the ſame Novel, with reſpect to the Teſtaments of Children who forget or diſinherit their Fathers, Mothers, or other Aſcendants.*

By the antient Law, the Legacies and other Bequeſts of undutiful Teſtaments were annulled, as well as the Inſtitution of the Heir or Executor. See the Remark on the fifth Article of the ivth *Section of undutiful Teſtaments.*

XVII.

27. *The next of Kin being inſtituted, cannot renounce the Execution of the Teſtament, that he may ſucceed to the Teſtator as dying inteſtate.*

In the Caſe where the Heir at Law, or next of Kin, is inſtituted Heir or Executor by a Teſtament, if to avoid Payment of the Legacies he ſhould pretend to renounce the Teſtamentary Succeſſion, and keep to his Right of ſucceeding to the Deceaſed, as dying inteſtate, he would nevertheleſs be bound to acquit the Legacies, and the other Charges regulated by the Teſtament *x*.

x Prætor voluntates defunctorum tuetur, & eorum calliditati occurrit, qui omiſſa cauſa teſtamenti, ab inteſtato hæreditatem partemve ejus poſſident, ad hoc, ut eos circumveniant, quibus quid ex judicio defuncti deberi potuit, ſi non ab inteſtato poſſideretur hæreditas: & in eos actionem pollicetur. *l.* 1. *ff. ſi quis omiſſ. cauſa teſtam.*

Quocumque enim modo hæreditatem lucri facturus quis ſit legata præſtabit. *d. l.* §. 9. *in f.* See the following Article, and the fourth Article of the firſt Section.

[*The Practice in* England *in this Caſe is, that when the Executor of a Will declines the Execution of it, the Legatees are at Liberty to propound it for the Support of their Legacies, and may have Adminiſtration with the Will annexed. For the Law does not put it into the Power of an Executor, to make the Teſtament ſubſiſt or not ſubſiſt, by his Acceptance or Non-Acceptance of the Execution thereof.*]

XVIII.

18. *If he that is inſtituted Heir or Executor in the Teſtament, renounces by Colluſion with the next of Kin, the Teſtamnet ſhall ſub-*

If he that is inſtituted Heir or Executor in a Teſtament renounces the Succeſſion on purpoſe that it may go to the Heir at Law, or next of Kin, the Heir at Law will be obliged to pay the Legacies, and the other Charges of the Teſtament, altho he had given nothing to the Perſon named Heir or Executor in the Teſtament, to induce him to leave the Inheritance to him, and the ſaid Executor had done it out of mere Favour

firſt with reſpect to all the other Diſpoſitions.

Favour and Courteſy to the Heir at Law *y*.

y Si quis per fraudem omiſerit hæreditatem, ut ad legitimum perveniat, legatorum petitione tenebitur. *l.* 1. §. *ult. ff. ſi quis omiſſ. cauſ. teſtam.*

Si quis pecuniam non accepit, ſimpliciter autem omiſit cauſam teſtamenti, dum vult præſtitum ei qui ſubſtitutus eſt, vel legitimo, numquid locus non ſit edicto? Plane indignandum eſt circumventam voluntatem defuncti. Et ideo, ſi liquido conſtiterit, in necem legatariorum hoc factum, quamvis non pecunia accepta, ſed nimia gratia collata: dicendum erit, locum eſſe utili actioni adverſus eum qui poſſidet hæreditatem. Et recte dicitur, ubicumque quis dum vult præſtitum ei, qui ſe repudiante venturus eſt, non repudiaturus niſi præſtitum vellet: & maxime ſi ob evertenda judicia id fecit, ibi dicendum eſt, adverſus poſſeſſorem competere actionem. *l.* 4. *eod.*

See the eighteenth Article of the firſt Section of Heirs and Executors in general.

We have not put down in this Article, that it is neceſſary that the Deſign of defeating the Legataries ſhould appear clearly, as is ſaid in the firſt Part of this laſt Text. For beſides that in the Sequel thereof it is ſaid, that this Rule ſhall take place chiefly, if there were any Deſign to deſtroy the Diſpoſitions of the Teſtament; which ſeems to intimate that even without this Deſign, the Heir at Law would be bound for the Legacies; another Conſideration ariſing from what ſhall be remarked on the following Article, has induced us not to add this Reſtriction to the Rule explained in this Article.

XIX.

19. *If he renounces without this Colluſion, what will be the Effect of this Renunciation.*

If in the ſame Caſe, where another Perſon is inſtituted Heir or Executor in the Teſtament than the Heir at Law, he ſhould renounce the Inheritance, not out of any Conſideration for the Intereſt of the Heir at Law, but becauſe he did not find his Account in accepting the Inheritance, this Inſtitution would be of no effect, as has been ſaid in the tenth Article. Thus, the Inheritance paſſing to the Heir of Blood, the Teſtament would remain without effect in its moſt eſſential Part, which is the Inſtitution of an Heir or Executor *z*.

z In irritum conſtituitur teſtamentum non adita hæreditate. *l.* 1. *in f. ff. de injuſt. rup. irr. fact. teſt.*

Si nemo hæreditatem adierit nihil valet ex iis quæ teſtamento ſcripta ſunt. *l.* 9. *ff. de teſtam. tut.*

Teſtamentum per omnia irritum. *l.* 20. *ff. de bon. poſſ. contr. tab.*

Si jure facto teſtamento, ceſſante hærede ſcripto, alter ab inteſtato adiit hæreditatem, neque libertates, neque legata ex teſtamento præſtari, manifeſtum eſt. *l.* 2. *in f. C. ſi omiſſ. ſit cauſ. teſt.*

¶ We have mentioned in this Article only the bare Nullity of the Inſtitution of the Teſtamentary Heir or Executor, and not the abſolute Nullity of the whole Teſtament, and of all the other Diſpoſitions that it might contain, altho it was the Rule of the *Roman* Law, explained in the Texts cited upon this Article, that all the Diſpoſitions ſhould remain null, if he that was inſtituted Executor, or Teſtamentary Heir, did not accept of the Succeſſion. This Rule was founded upon this, that the Inſtitution of the Heir or Executor was conſidered as the moſt eſſential Part of the Teſtament, and the Foundation of all the other Diſpoſitions. Which went ſo far in the antient *Roman* Law, that it was neceſſary to begin the Teſtament by the Inſtitution of the Heir or Executor, and that all the Legacies which preceded the ſaid Inſtitution were null, even thoſe which gave Liberty to Slaves *a*, altho there were no other Nullity in the Teſtament. It was upon the ſame Principle, that they made likewiſe the Validity of the Legacies to depend on the Executor's Acceptance of the Inheritance. So that it depended altogether on the Executor to make the Legacies valid by his accepting the Inheritance, or to annul them by renouncing it.

It appears clearly, from theſe Principles of the *Roman* Law, that this Rule, which annuls the Legacies for want of a Teſtamentary Heir or Executor, cannot have place in the Cuſtoms of *France*, ſeeing they do not acknowledge any Teſtamentary Heir, and that Teſtaments in the ſaid Cuſtoms are, according to the Spirit of the *Roman* Law, nothing elſe but Codicils. And as for the Provinces which are governed by the written Law, the Caſe is ſo rare, ſince the Invention of the Benefit of an Inventary, for Legacies to be loſt by the Teſtamentary Heir's renouncing the Inheritance, that it has never perhaps once happened. For what perſon is there who is inſtituted by a Teſtament, who having Hopes to reap ſome Advantage from the Succeſſion, and being at liberty to accept it with the Benefit of an Inventary, will readily renounce it? And if he refuſes it only becauſe it is really burdenſome, the Legataries loſe nothing thereby; ſeeing Legacies are paid only after the Debts.

It is true, that in the antient *Roman* Law, it might very well happen, that a Teſtamentary Heir might renounce an Inheritance which would have proved advantageous. For before the Invention of the Benefit of an Inventary, as there was no Medium between accepting purely and ſimply the Inheritance, or renouncing it, it might eaſily fall out that a Teſtamentary Heir might renounce a Succeſſion, which the apparent

a V. §. 34. *inſt. de legat.*

Charges

Charges might render ſuſpicious, altho the Goods of the Succeſſion might be more than the Charges: And it was in that Time that this Law was eſtabliſhed. But after the Invention of the Benefit of an Inventary, it cannot well be ſuppoſed that this Caſe ſhould happen, that a Succeſſion, in which there may remain Goods to the Heir or Executor, ſhould be abandoned. And in fine, altho it ſhould happen that a Teſtamentary Heir ſhould renounce a Succeſſion, of which the Goods are ſufficient to clear all the Charges, and to pay off either the whole Legacies, or a part of them; it does not ſeem to be juſt, nor agreeable to our Uſage, that the Legataries ſhould loſe their Legacies becauſe the Heir or Executor would not accept of the Inheritance. For as this Rule of the *Roman* Law, which annuls the Legacies when he that is inſtituted Heir or Executor abandons the Succeſſion, has had for its Foundation only theſe Niceties, which we have juſt now explained; ſo likewiſe it may be conſidered as a pure Nicety, and may be ſaid to be contrary to the firſt and moſt eſſential Principle of the *Roman* Law it ſelf in the Matter of Teſtaments, which is, that the Will of the Teſtator ought to ſerve as a Law, as has been remarked in its proper Place *b*; ſince this Will is not limited to the Inſtitution of an Heir or Executor, but reſpects likewiſe the Legacies, and ſometimes Legacies that are more favourable than the Inſtitution it ſelf, and which the Teſtator will have acquitted independently of the Will of his Heir or Executor, and even againſt his Will, if he ſhould oppoſe it.

It may be ſaid further, that it is contrary to Equity to make Bequeſts that are juſt and reaſonable, to depend on the whimſical Humour of an Heir or Executor; and to make Legataries loſe the Recompences of their Services and other good Deeds, on which may depend the Subſiſtence of their Families; and that for no other Reaſon, but that of a bare Nicety, which can be of no Advantage to any Perſon beſides the Heir at Law, who could not expect the Succeſſion but with the Condition of acquitting the Legacies, if he had been called to it by the Teſtament; and who not being called to ſucceed by the Teſtament, ought to content himſelf with taking the Place of him that is inſtituted by the Teſtament, with the Charges which the Teſtator had impoſed upon him. So that we might in this Caſe, more than in any other, put in practice the Sentiment of the moſt learned Commentators, who will have the Codicillary Clauſe to be ſupplied in every Teſtament, as has been ſaid in the fourth Section; which would have this Effect, that this Heir at Law would be obliged to acquit the Legacies, in default of him that is inſtituted Heir or Executor by the Teſtament; and that altho he were Heir by another Title than the Teſtament, yet he ought not to have the Benefit of the Succeſſion without acquitting the Charges of it, according to theſe Words of one of the Laws concerning this Matter, *Quocunque enim modo hæreditatem lucrifacturus quis ſit, legata præſtabit. l.* 1. §. 9. *in f. ff. ſi quis om. cauſ. teſt.* For altho theſe Words do not preciſely relate to the Caſe in queſtion, yet the Senſe and Meaning of them is applicable to it.

Altho all theſe Conſiderations ſeem ſufficient to make the Legacies ſubſiſt, when the Teſtamentary Heir renounces the Succeſſion, yet the Validity of the Legacies in this Caſe may likewiſe be founded on another Principle of Equity; and which is alſo of the *Roman* Law; That in the Caſes where the Queſtion is concerning the Validity of an Act, in which are contained two Things that have ſome Connexion with one another; if one of the two cannot ſubſiſt, yet the Act is nevertheleſs valid for that which may ſubſiſt without the other. Thus, for example, when by one and the ſame Act two Perſons have bound themſelves as Sureties for another, if one of the ſaid Perſons could not bind himſelf, as if it was either a Minor, or a Woman, who by the *Roman* Law could not oblige her ſelf for other Perſons, the Act which would be null with reſpect to the ſaid Woman, or Minor, would ſubſiſt for the other, who would remain obliged ſolely for the whole Debt *c*. It is only the Acts, of which no one Part can ſubſiſt but by the Validity of the Whole together, that are annulled in the Whole by the Nullity of any Part; as, if two Arbitrators being named by a Compromiſe, one of them either could not, or would not accept thereof, the Nomination would be altogether fruitleſs, with reſpect to them both; for one of them cannot judge without the other *d*; ſo that

b See the ſeventh Article of the firſt Section of this Title, and the fifth Article of the following Section.

c l. 48. *ff. de fidej. l.* 8. *C. ad Senat. Vell.*

d l. 7. §. 1. *ff. de recept.*

that the Nomination of one alone would ſubſiſt to no purpoſe. But even in the Caſes which relate to one only Thing, which can admit of no Diviſion, the Laws ſuppoſe a Diviſion therein, in order to make the Acts ſubſiſt ſo far as is poſſible. For it is the Spirit and Intention of the Laws, to give to all ſorts of Acts all the Effect that they can reaſonably have. Thus we ſee, even in the *Roman* Law, that *Juſtinian* having diſpenſed with the regiſtring of Donations that ſhould be under a Sum which he had regulated, he ordained that the Donations exceeding the ſaid Sum, which were not regiſter'd, and which for want of being regiſter'd ought to be null, ſhould ſubſiſt for the Sum that might be given without being regiſter'd. So that that Donation was partly null, and partly had its Effect[e]. Thus, by our Uſage, a Donation of all one's Goods, preſent and to come, may be divided by the Donee, who may reſtrain it to the Goods which the Donor had at the Time of the Donation, as has been remarked on the ſixth Article of the thirteenth Section of Heirs and Executors in general.

It is from theſe Principles that the Rule of the Canon Law has been taken, which ſays, that that which may be valid ought not to be annulled becauſe of its Connexion with that which is invalid: *Utile non debet per inutile vitiari*, C. 37. de reg. Jur. in. 6. Which is to be underſtood of the Caſes where this Connexion is not ſuch that one of the two things cannot ſubſiſt without the other. Thus we may ſay, that according to the ſame Principles it is equitable that a Teſtament which is without effect as to the Inſtitution of an Heir or Executor, ſhould nevertheleſs ſubſiſt as to the other Diſpoſitions, ſince they have no neceſſary Connexion with the ſaid Inſtitution, each of them having its Cauſe in the Intention of the Teſtator, which makes them independant one of another. For as his Will is in general with reſpect to them all together that they ſhould have their effect, ſo his Will is in particular with reſpect to every one of them, that it ſhould be executed, even altho the others could not have their effect.

Upon the ſame Subject we may remark a Deciſion of the Emperor *Antoninus*, in a Cauſe which was argued before him: The Queſtion was, to know whether a Teſtator having blotted out in his Teſtament the Names of his Executors, the Legacies with which his Executors were charged in the ſaid Teſtament ought to ſubſiſt. The Emperor's Advocate, who was of Counſel againſt the Legataries, pretended that the ſaid Legacies were eſcheated, that is of no effect for the Legataries, and that they did belong to the Exchequer, according to the Law which was then in being[f]: And he quoted the Rule, that for want of a Teſtamentary Heir, all the Diſpoſitions of the Teſtament were null, *Non poteſt ullum teſtamentum valere quod hæredem non habet*. But the Emperor, who knowing this Rule, had ſaid before of himſelf that theſe Legacies could not be valid, having ordered the Parties and their Advocates to withdraw, that he might reflect at more leiſure upon the matter, made them be called in again, and told them that it was juſt that the ſaid Legacies ſhould be confirmed[g]. But if it is equitable to make the Legacies ſubſiſt in a Caſe where the Teſtator ſeemed to annull his Teſtament by blotting out the Names of his Executors; there is much more reaſon to confirm the Legacies of a Teſtament, in which the Teſtator has made no manner of Change or Alteration, and where nothing has happened but the unjuſt Caprice of the Teſtamentary Heir, who notwithſtanding he may, without any Injury to himſelf, enter Heir with the Benefit of an Inventary, takes a Courſe which can be of no uſe but to deſtroy the Legacies, without reaping any Advantage thereby himſelf. It is true, that in the Caſe of this Law it was the Cauſe of the Exchequer againſt the Legataries, and that this Emperor preferred the Intereſt of the Legataries to that of the Exchequer; but he might have given up the Right of the Exchequer, without making the Legacies to ſubſiſt, and might have left to the Heir at Law the whole Inheritance. Thus the Principle of Equity, which was the Foundation of the Emperor's Deciſion, might likewiſe very juſtly decide in favour of the Legataries, in the Caſe where their Right is called in queſtion only by the Deed of the Executor, and not by any Change of Will in the Teſtator; for in this Caſe, the Condition of the Legataries is more favourable, than in that where the Teſtator by

[e] *l.* 34. C. *de donat. l.* 36. *in f. eod. Nov.* 162. *c.* 1. §. 2.

According to our Uſage in France, *every Donation that is not enrolled is intirely null.* See the xvth Article of the iſt Section of Donations.

[f] *V. l. un.* §. 1. *& ſeq. C. de caduc. toll.*

[g] *l.* 3. *ff. de his quæ in teſt. del. ind. vel inſcrib.*

blot-

blotting out the Names of his Executors, did himſelf give a mortal Wound to his Teſtament.

It is upon account of all theſe Conſiderations, that we have been induced to be of opinion, that this Rule of the *Roman* Law, which annulled the Legacies when the Teſtamentary Heir did not enter to the Inheritance, is not conformable to our Practice; which might likewiſe be founded on a Rule of the *Roman* Law, which ſays, that the Legacies belong to the Legataries from the moment of the Teſtator's Death, without waiting till the Teſtamentary Heir accepts the Inheritance, and that if he happens to die before he takes upon him the Execution of the Will, they tranſmit their Right to their Legacies to their Heirs *b*. It would ſeem to be a conſequence natural enough from this Principle, that ſince the Legatary has acquired his Right before the Teſtamentary Heir accepts of the Succeſſion, that he ſhould not loſe it by his Non-Acceptance of it; and eſpecially in our Uſage, which prefers always natural Equity to Niceties. To which may be applied the Words of the ſame Law, which contains this Deciſion of the Emperor *Antoninus* which we have juſt now explained; *In re dubia benigniorem Interpretationem ſequi non minus juſtius eſt, quam tutius:* That is to ſay, that in doubtful Caſes the ſafeſt and beſt way is to follow that which is moſt equitable.

We muſt in the laſt Place obſerve concerning the Validity of the Legacies in the Caſes where the Teſtamentary Heir renounces the Inheritance, that by the firſt Novel of *Juſtinian*, Chap. 1. if any one of the Heirs or Executors, being charged with Legacies, did delay to acquit them for a whole Year, he was deprived of his Right to the Inheritance which went to the Heir or Executor ſubſtituted in his Place, if there was any; and in default of him to his Coexecutor, and in default of Executors, or Teſtamentary Heirs, to the the Heirs at Law, but ſtill with the Charge of acquitting the Legacies. And if there was neither Subſtitute, nor Coexecutor, or that they would not accept the Inheritance, and that the Perſon whoſe Right it was to ſucceed in caſe there had been no Teſtament, had likewiſe refuſed, then the Goods went to the Legataries. It would ſeem to be very conformable to the ſame Spirit which moved the Lawgivers to take ſuch a multitude of Precautions for having the Legacies acquitted, that they ſhould not be annulled in the Caſe where the Teſtamentary Heir renounces the Inheritance, no more than in the Caſe of this Novel, where the Heirs who are called in default of the Executor that delays to acquit the Legacies do renounce likewiſe, and where the Law uſes all poſſible means to prevent the Legacies from periſhing.

[*b See the iſt Article of the ixth Section of Legacies.*

XX.

When the Teſtament is annulled by reaſon of a Change in the State of the Teſtator, which has put him under an Incapacity of having Heirs or Executors, as has been ſaid in the xith Article, this Teſtament will not only be null as to the Inſtitution of the Heir or Executor, the Teſtator not being capable of having any; but likewiſe as to all the other Diſpoſitions of the Teſtament, even the moſt favourable; for his Incapacity renders them all null *a*.

20. The Incapacity happen'd to the Teſtator annuls all the Diſpoſitions of the Teſtament.

a Irritum fit teſtamentum quoties ipſi teſtatori aliquid contigit, puta, ſi civitatem amittat. *l.* 6. §. 5. *ff. de inj. rupt. irr. fact. teſt.* See the xith Article.

XXI.

If the Teſtator tears the Original of his Teſtament, or if he raſes or croſſes the Subſcriptions, or by any other Means puts his Teſtament into ſuch a condition by Raſures or Daſhes, that it appears that his Intention was to annul it; it will remain null, altho there has been no other Teſtament made *b*.

21. The Teſtator may annul his Teſtament by tearing or raſing it.

b Si ſigna turbata ſint ab ipſo teſtatore, non videtur ſignatum. *l.* 22. §. 3. *ff. qui teſtam. fac. poſſ.*
Siquidem teſtator linum vel ſignacula inciderit, utpote ejus voluntate mutata, teſtamentum non valere. *l.* 30. *C. de teſtam.*

XXII.

If the Teſtament had been tore, or blotted only, by ſome Chance, or ſome Imprudence, or out of Malice, contrary to the Intention of the Teſtator, and that the Truth of the ſaid Fact appear'd to be well proved; it would nevertheleſs have its effect, if what remained entire of the Teſtament ſhould ſufficiently explain the Diſpoſitions of the Teſtator *c*. But if there was any Clauſe de-

22. The Blots and Daſhes made by chance, or againſt the Will of the Teſtator, do not annul the Teſtament.

c Si quidem teſtator linum vel ſignacula inciderit, vel abſtulerit, utpote ejus voluntate mutata teſtamentum non valere. Sin autem ex alia quacumque cauſa hoc contigerit, durante teſtamento, ſcriptos hæredes ad hæreditatem vocari. *l.* 30. *C. de teſtam.*

Quæ

defaced in ſuch a manner, that it were not poſſible to read ſo much of it as would be neceſſary to make it be underſtood, in the Impoſſibility of knowing juſtly what the Teſtator had writ, or cauſed to be writ therein, would hinder the Execution of it *d*.

Quæ in teſtamento legi poſſunt, ea inconſulto deleta & inducta, nihilominus valent. *l.* 1. *ff. de his qui in teſtam. del.*

Quod igitur incaute factum eſt, pro non facto eſt, ſi legi potuit. *d. l.* §. 1.

d Sed ſi legi non poſſunt quæ inconſulto deleta ſunt, dicendum eſt non deberi. *d. l.* 1. §. 2.

Sed conſulto quidem deleta exceptione petentes repelluntur: inconſulto vero non repelluntur, ſive legi poſſunt, ſive non poſſunt: quoniam ſi totum teſtamentum non extet, conſtat valere omnia quæ in eo ſcripta ſunt. *d. l.* 1. §. 3.

If the Notaries or Witneſſes knew the Contents of the Place that is defaced contrary to the Intention of the Teſtator, and that the Circumſtances ſhould render favourable the Proof that their Declaration might make, it ſeems reaſonable that in this Caſe their Teſtimony ſhould be received: which would be conformable to this laſt Text, where it is ſaid, that that which is defaced without any Deſign of the Teſtator, and which cannot be read, ought to be executed: For it cannot be executed unleſs it be known: and unleſs it can be read, it cannot be known but by the Declaration of the Notary and Witneſſes who may know it. And this Proof would have nothing in it contrary to the Ordinances, and our Uſage.

XXIII.

23. *The Additions made to explain the Teſtament do not annul it.*

If after the Teſtament is entirely written and ſigned, and the Witneſſes are withdrawn, the Teſtator had a mind to make ſome change in it, he could not do it but by a new Diſpoſition made according to form: But if without an Intention to alter any thing material in the Will, he had a mind only to add ſome Words to explain a dark and equivocal Expreſſion; as if having bequeathed a Set of Horſes, having more than one Set; or a Suit of Hangings, without naming which Suit, he having many; or having left a Legacy to a Perſon whom he had not deſcribed clearly enough; he ſhould explain, either in the Margin, or at the Bottom of the Teſtament, what Set of Horſes, or what Suit of Hangings, he meant to give, or ſhould mark more preciſely the Qualities that may diſtinguiſh this Legatary; Additions of this kind, or others of the like nature, would not annul the Teſtament: For they would make no Alteration in the Will of the Teſtator, and would not contain any new Bequeſt; but would explain only ſome Obſcurity in thoſe which he had already made, and which without this Explication would have raiſed after his Death Difficulties how to judge by Interpretations, and Reflections on the Circumſtances, what had been his Intention *e*.

e Si quid poſt factum teſtamentum mutari placuit, omnia ex integro facienda ſunt. Quod vero quis obſcurius vel nuncupat, vel ſcribit, an poſt ſolennia explanare poſſit, quæritur, ut puta Stichum legaverat, cum plures haberet, nec declaravit de quo ſentiret: Titio legavit, cum multos Titios amicos haberet: erraverat in nomine, vel prænomine, vel cognomine, cum in corpore non erraſſet: poteritne poſtea declarare de quo ſenſerit? & puto poſſe. Nihil enim nunc dat: ſed datum ſignificat. Sed etſi notam poſtea adjecerit legato, vel ſua voce, vel literis, vel ſummam, vel nomen legatarii, quod non ſcripſerat, vel nummorum qualitatem: an recte fecerit? & puto etiam qualitatem nummorum poſſe poſtea addi. Nam etſi adjecta non fuiſſet, utique placere conjectionem fieri ejus quod dereliquit, vel ex vicinis ſcripturis, vel ex conſuetudine patris familias, vel regionis. *l.* 21. §. 1. *ff. qui teſtam. fac. poſſ.*

XXIV.

24. *We ought to judge of Raſures and Additions according to the Circumſtances.*

In the Queſtions which concern the Regard we ought to have to Raſures, Daſhes, Additions, or other Changes which may happen in a Teſtament, and wherein we are to judge of the Effect they ought to have, we muſt diſtinguiſh between what was done at the time of making the Teſtament, and was approved of in preſence of the Notary and Witneſſes, and what was done afterwards, after that the Teſtament was perfected. In the firſt Caſe, whatever is approved of in the preſence of the Notary and Witneſſes makes a part of the Teſtament. And in the ſecond Caſe we ought to diſtinguiſh what has been done after making the Teſtament, by the Teſtator himſelf, whether it were to explain any thing in the Teſtament, as in the Caſes of the foregoing Article, or thro Inadvertency, or with a Deſign to annul the Teſtament by Raſures that might have this effect, or with other Views, from that which is done by other Perſons, either without any deſign, or out of malice, or to forge ſomething into the Will. And it is by theſe ſeveral Views, and the foregoing Rules that we are to judge, according to the Circumſtances, what ought to be the effect of theſe Changes *f*.

f De his quæ interleta ſive ſupraſcripta dicis, non ad juris ſolennitatem, ſed ad fidei pertinet queſtionem, ut appareat, utrum teſtatoris voluntate emendationem meruerint, vel ab altero inconſulto deleta ſint, an ab aliquo falſo hæc fuerint commiſſa. *l.* 12. *C. de teſtam.*

XXV.

25. *A Teſtament made by force is null.*

Seeing the Teſtament ought to contain only the Will of the Teſtator, which

ought to be free; if it were proved that a Teſtator had been obliged by ſome Violence, or other unlawful way, to make a Teſtament, or other Diſpoſitions in view of Death, not only would they be null, but the Author of this Attempt would be puniſhed for it as for a Crime, according to the Quality and Circumſtances of the Fact *g*.

g Civili diſceptationi crimen adjungitur, ſi teſtator non ſua ſponte teſtamentum fecit, ſed compulſus ab eo qui hæres eſt inſtitutus, vel a quolibet alio, quos noluerit, ſcripſit hæredes. *l.* 1. *C. ſi quis aliq. teſt. prohib. vel coeg.*

See the xth Article of the iiid Section of Heirs and Executors in general.

¶ We muſt not confound with the unlawful Ways ſpoken of in this Article, certain ways which a great many Perſons make uſe of to engage the Teſtator to make his Will in their favour, ſuch as Services, good Offices, Careſſes, Flatteries, Preſents, the Interpoſition of Perſons who cultivate for them the good Will of the Teſtator, and engage him to make ſome Bequeſt in their favour: For altho theſe kinds of ways may be inconſiſtent either with Decency or good Conſcience, or even contrary to both; yet the Laws of Men have not inflicted any Penalties on thoſe who practiſe them. And when theſe ſorts of Impreſſions have had the Succeſs to engage the Teſtator to make voluntarily the Diſpoſitions he was intreated to do, yet they become his Will; and the Motive of the Ways which have engaged him thereto does not render them null; ſince it ſuffices that he has made them voluntarily and freely. Thus this common Place of all thoſe who complaining of the Diſpoſitions of a Teſtament, ſay, that it was put upon the Teſtator againſt his Will, is only an uncertain and fruitleſs Argument, unleſs it be founded upon Circumſtances of ſome unlawful Way; and if the Teſtament has not been really and truly ſuggeſted in ſuch a manner that the Teſtator himſelf had not explained his own Intentions; but that, for example Perſons taking advantage of the Weakneſs of a ſick Man at his laſt Gaſp, had contrived a Teſtament which they preſented to him, and after having read it over to him, asked him whether he was not willing to approve all the Clauſes of it, and he had anſwer'd, Yes; this would be a Suggeſtion really and truly unlawful, and which being proved would annul Diſpoſitions made after this manner. *See the 27th Article of this Section; and the 8th Article of the 11th Section of Teſtaments.*

XXVI.

We ought to reckon among the number of Diſpoſitions that ought to be annulled, that which a Teſtator being deſirous to revoke, had been hinder'd from doing it by Violence, or ſome other unlawful way, on the part of thoſe who were to reap Advantage from the ſaid Diſpoſitions: For with reſpect to them, they by rendering themſelves unworthy of the ſaid Diſpoſitions, would render them null according to the Rule that has been explained in its Place *h*.

26. *The Teſtament is null with reſpect to him who forcibly hinders the revoking of it.*

h See the xth Article of the iiid Section of Teſtaments.

XXVII.

We muſt not count among the unlawful Ways which may annul a Teſtament, the Civilities, the good Offices, the Services which one Relation may render to another, a Friend to his Friend, a Wife to her Husband, or a Husband to his Wife, in order to deſerve by that means ſome Kindneſs, or to prevent the making of Diſpoſitions to their prejudice, which might be the Effect of ſome bad Impreſſion made upon the Teſtator by falſe Reports or other Cauſes, and which they might be deſirous to remove, and to induce the Teſtator to have more favourable Thoughts of them by theſe kinds of good Offices *i*.

27. *The Diſpoſitions procured by ſome good Office or Service are not null.*

i Virum, qui non per vim, nec dolum quo minus uxor contra eum mutata voluntate codicillos faceret, interceſſerat, ſed (ut fieri adſolet) offenſam ægræ mulieris maritali ſermone placaverat, in crimen non incidiſſe, reſpondi. Nec ei quod teſtamento fuerat datum, auferendum. *l. ult. ff. ſi quis aliq. teſt. prohib. vel. coeg.*

Judicium uxoris poſtremum in ſe provocare maritali ſermone non eſt criminoſum. *l. ult. C. eod.*

See the Remark on the xxvth Article.

SECT. VI.

Of the Rules of interpreting Obſcurities, Ambiguities, and other Defects of Expreſſion in Teſtaments.

HAVING explained the Nature and Forms of Teſtaments, and the ſeveral Cauſes which may annul them, it is proper in the next place to explain the Rules that are neceſſary to give to Teſtaments, that do ſubſiſt, their juſt effect, by the Interpretation of the Clauſes, which may give occaſion to any Difficulty or Doubt, either as to what may concern the Inſtitution of the

the Heir or Executor, or the other Diſpoſitions.

The Difficulties which may demand ſome Interpretation in Teſtaments are of two ſorts. One is of thoſe which ariſe from ſome Obſcurity, from ſome Ambiguity, or ſome other Defect of Expreſſion; and the other is of thoſe which may proceed from ſomething elſe than a Defect of Expreſſion, and which render it neceſſary to find out the Intention of the Teſtator by ſome other ways than by the Knowledge of the Senſe of the Words. The Difficulties of the firſt kind ſhall be the Subject-matter of this Section; and thoſe of the ſecond ſhall be explained in the following Section.

We may apply to theſe two ſorts of Difficulties ſome of the Rules which relate to the Interpretation of Covenants, and likewiſe ſome of thoſe which concern the Interpretation of Laws. And it will be eaſy to diſcover which of thoſe Rules may be applied here by the bare reading of the iid Section of Covenants, and of the iid Section of the Rules of Law.

All the Rules explained in this and the following Section, are to be underſtood not only of Teſtaments, but of all Diſpoſitions made in proſpect of Death, altho there is mention made only of Teſtaments.

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I.

1. *Three ſorts of Expreſſions.*

THERE are three ſorts of Expreſſions to be diſtinguiſhed in Teſtaments: The firſt is of thoſe that are perfectly clear; the ſecond, of thoſe that are ſo obſcure, that it is impoſſible to give them any Meaning; and the third, is of thoſe in which there is ſome Obſcurity, ſome Ambiguity, or ſome other Defect that may render the Senſe of them uncertain. And each of theſe kinds of Expreſſions hath its proper Rules, which ſhall be explained in this Section *a*.

a See the following Articles.

II.

2. *Firſt ſort of Expreſſions, thoſe that are clear.*

The Expreſſions which are perfectly clear, do not admit of any Interpretation to make their Senſe known, ſince their Clearneſs makes it evident enough. And if the Diſpoſition of the Teſtator appears to be clearly and diſtinctly explained thereby, we ought to keep to the Senſe that appears by the Expreſſion *b*.

b Cum in verbis nulla ambiguitas eſt, non debet admitti voluntatis quæſtio. *l.* 25. §. 1. *ff. de leg.* 3.

Cum enim manifeſtiſſimus eſt ſenſus teſtatoris, verborum interpretatio nuſquam tantum valeat, ut melior ſenſu exiſtat. *l.* 3. *in f. C. de lib. præter. vel exhæred.* See the fifteenth Article, and the laſt Article.

III.

3. *Second ſort of Expreſſions, thoſe that have no Meaning at all.*

The Expreſſions which cannot have any Meaning, are rejected as if they had not been written, and do not hinder the others from having their Effect *c*.

c Quæ in teſtamento ſcripta eſſent, neque intelligerentur quid ſignificarent, ea perinde ſunt ac ſi ſcripta non eſſent: reliqua autem per ſeipſa valent. *l.* 2. *ff. de his quæ pro non ſcript.*

IV.

4. Third sort of Expreſſions, thoſe which are obſcure.

The Expreſſions in which there is ſome Obſcurity, ſome Ambiguity, ſome double Meaning, or other Defect which may render their Senſe uncertain, ought to be interpreted by the Rules which follow *d*.

d See the Articles which follow.

V.

5. The firſt Rule of the Interpretation of Teſtaments, the Will of the Teſtator.

Since the Laws permit Teſtators to diſpoſe of their Goods by a Teſtament, it follows that the Will of the Teſtator holds therein the Place of a Law *e*. Thus, the firſt Rule of all Interpretations of Teſtaments, is, that the Difficulties in them ought to be explained by the ſaid Will of the Teſtator, as far as it can be known from the whole Tenor of the Teſtament, and the other Proofs that may be had of it, and that it is juſt and reaſonable, and has nothing contrary to Law or good Manners *f*. And it is to this firſt Rule, that all the others which concern the Interpretation of Teſtaments are reduced *g*; as will appear throughout the reſt of this Section, and in the following.

e See the firſt and ſeventh Articles of the firſt Section.

f Teſtamentum eſt voluntatis noſtræ juſta ſententia *l.* 1. *ff. qui teſt. fac. poſſ.* Quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, & ut generaliter dicam contra bonos mores fiunt, nec facere nos poſſe credendum eſt. *l.* 15. *ff. de condit. inſtit.*

g Semper veſtigia voluntatis ſequimur teſtatorum. *l.* 5. *C. de neceſſ. ſerv. hæred. inſtit.*

There is this Difference between Covenants and Teſtaments, as to the manner of interpreting them; That in Covenants we muſt conſider differently either the common Will of thoſe who treat together, or the bare Will of one of the two, without regard to the Will of the other, according to the Principles which have been explained in the ſecond Section of Covenants. But in Teſtaments, where the Teſtator alone explains his Will, that Will alone is always the only Rule. See the Texts cited on the ſeventh Article of the firſt Section.

VI.

6. The Uncertainty of the Expreſſion is explained by the Intention of the Teſtator.

If there is in a Teſtament any Ambiguity, or other Defect of Expreſſion, which may have a Meaning different from the Will of the Teſtator, which is otherwiſe well known, we ought to prefer the Intention of the Teſtator to that other Meaning. Thus, for example, if he who had a mind to inſtitute an Heir or Executor, contents himſelf with naming him by his Sirname, without adding either his Quality or other Circumſtances, which may diſtinguiſh him from other Perſons that have the ſame Name; it is by the Ties of Friendſhip, or Relation, that the Teſtator may have had with one of the two, or more, of the ſame Name, that we are to judge which of them he intended to name for his Heir or Executor. Thus, for another example, if the Teſtator had erred in the Name of his Executor, calling him *James* inſtead of *John*, and that there were another Perſon of the ſame Name and Sirname which the Teſtator had made uſe of, but to whom the Qualities which he had conſidered in the Choice of his Executor did not agree; the ſame Circumſtances of Friendſhip, Kindred, or others, which might ſerve to diſtinguiſh the Perſon whom the Teſtator had a mind to name for his Executor, would make him to be preferred to the Perſon who was named only by miſtake, contrary to the Intention of the ſaid Teſtator. And it would be the ſame thing in a Miſtake of the like Nature, concerning any of the Legataries *h*.

h Si quidem in nomine, cognomine, prænomine, agnomine legatarii teſtator erraverit, cum de perſona conſtat, nihilominus valet legatum. Idemque in hæredibus ſervatur, & recte. Nomina enim ſignificandorum hominum gratia reperta ſunt: qui ſi alio quolibet modo intelligantur, nihil intereſt. §. 29. *inſtit. de legat.* Error hujuſmodi nihil officit veritati. *l.* 4. *C. de teſtam.* Si in perſona legatarii deſignandi aliquid erratum fuerit, conſtat autem cui legare voluerit; perinde valet legatum, ac ſi nullus error intervenerit. *l.* 17. §. 1. *ff. de condit. & demonſtr.* See the twenty ſixth Article of the ſecond Section.

VII.

7. A falſe Deſcription does no Prejudice to a Bequeſt that is otherwiſe ſufficiently clear.

If the Teſtator, having ſufficiently explained himſelf, either as to the Perſon of his Executor, or of a Legatary, or as to the Thing bequeathed, had added, the better to ſpecify either the Perſons or the Things, ſome Quality, or other Mark, which ſhould appear to be falſe; as, if having named the Executor, or Legatary, he had added theſe Words, *Who is Son of ſuch an one, or of ſuch a Country*; or that having deviſed ſome Land or Tenement deſcribed by its Name, or by its Situation, or otherwiſe, he had added, *That he had bought the ſaid Land or Tenement of ſuch a Perſon*; all theſe Additions, altho they ſhould be found to be falſe, would make no Alteration in the Diſpoſitions, which otherwiſe are clear enough. For if the Perſons or Things are ſufficiently deſcribed by the firſt Expreſſion, what is added

added to deſcribe them more plainly being ſuperfluous, will only be a Miſtake which can do no prejudice *i*.

i Falſa demonſtratio non perimit legatum. *l.* 75. §. 1. *ff. de leg.* 1. Placuit falſam demonſtrationem legatario non obeſſe: nec in totum falſum videri, quod veritatis primordio adjuvaretur. *l.* 76. §. 3. *ff. de leg.* 2.

Si in patre vel patria, vel alia ſimili aſſumptione falſum ſcriptum eſt, dum de eo qui demonſtratus ſit conſtet, inſtitutio valet. *l.* 48. §. *ult. ff. de hæred. inſtit.* Huic proxima eſt illa juris regula, falſa demonſtratione legatum non perimi. Veluti ſi quis ita legaverit: *Stichum ſervum meum vernam do, lego.* Licet enim non verna, ſed emptus ſit, ſi tamen de ſervo conſtat, utile eſt legatum. Et convenienter, ſi ita demonſtraverit, *Stichum ſervum quem à Seio emi*, ſitque ab alio emptus, utile eſt legatum, ſi de ſervo conſtat. §. 30. *inſt. de legat.* Demonſtratio falſa eſt, veluti ſi ita ſcriptum ſit, *Stichum quem de Titio emi, fundum Tuſculanum qui mihi à Seio donatus eſt.* Nam ſi conſtat de quo homine, de quo fundo ſenſerit teſtator, ad rem non pertinet, ſi is quem emiſſe ſignificaverit donatus eſſet: aut quem donatum ſibi ſignificaverat, emerit. *l.* 17. *ff. de condit. & demonſtr. l.* 10. *ff. de aur. arg.* See the fifth Article, and the eleventh Article of the eighth Section.

VIII.

8. The Obſcurities and Ambiguities are explained by the Circumſtances.

If there are in a Teſtament any Expreſſions which are not determined to a certain Meaning by the natural Signification of the Words, and that there is in them ſome Obſcurity, ſome Ambiguity, or other Defect, which makes it uncertain what it was the Teſtator had a mind to expreſs; theſe ſorts of Expreſſions will be interpreted by the Proofs that may be gathered of his Will from the different Circumſtances that may ſerve to that end, and from diſcerning the Effect of theſe Circumſtances by the Uſe of the Rules that follow *l*.

l Cum in teſtamento ambigue, aut etiam perperam ſcriptum eſt, benigne interpretari, & ſecundum id quod credibile eſt cogitatum, credendum eſt. *l.* 24. *ff. de reb. dub.*

In ambiguo ſermone non utrumque dicimus, ſed id dumtaxat quod volumus. *l.* 3. *ff. de reb. dub.* See the following Articles.

IX.

9. Interpretation of a Legacy that has relation to two Things, and muſt be fixed to one.

If the Teſtator had expreſſed himſelf in a Legacy in a ſuch a manner, that his Expreſſion ſeems to have relation to two Things, one of which alone he had in view, and he has not ſufficiently determined which of the two he had a mind to bequeath, we ſhall judge of his Intention by the Circumſtances which may give any light thereto. Thus, for example, if a Teſtator, who had two Pictures, one of a St. *John* by *Raphael*, the other of a Battle by *Rubens*, having only theſe two Pieces of the ſaid two Painters, had bequeathed his Battle of *Raphael*, the Expreſſion of the Name of the Painter would mark the St. *John*, and that of the Hiſtory of the Picture would point out the Battle. Thus, this Expreſſion would have ſome relation to both the Pictures; and it would ſeem that the Legatary might demand a Picture of *Raphael*'s. But becauſe the Hiſtory of the Picture of the Battle would denote it more ſenſibly, than the Name of *Raphael* would do that of the St. *John*, and that theſe Pictures would be more diſtinguiſhed by their Subjects that are ſo different, than by the different Names and Merits of the Painters, the Legatary would have the Battle, altho it were of another Hand than of *Raphael m*.

m Qui habebat Flaccum fullonem, & Philonicum piſtorem, uxori Flaccum piſtorem legaverat: qui eorum, & num uterque deberetur? Placuit primo eum legatum eſſe quem teſtator legare ſenſiſſet. Quod ſi non appareret, primum inſpiciendum eſſe, an nomina ſervorum dominus nota habuiſſet: quod ſi habuiſſet, eum deberi, qui nominatus eſſet: tametſi in artificio erratum eſſet. Sin autem ignorata nomina ſervorum eſſent, piſtorem legatum videri, perinde ac ſi nomen ei adjectum non eſſet. *l. penult. ff. de reb. dub.*

¶ If we ſuppoſe, for another example, that a Teſtator, who had a black *Spaniſh* Horſe, and a white *Barbary* Horſe, had bequeathed his white *Spaniſh* Horſe; would the Legatary have the *Spaniſh* Horſe, or the *Barb*? The Kind would denote the *Spaniſh* Horſe, and the Colour the *Barb*; which might be a Foundation for two oppoſite Interpretations. For if the Teſtator was ignorant of the Difference between a *Barb* and a *Spaniſh* Horſe, it might be preſumed that it were the *Barb* which he had bequeathed, having diſtinguiſh'd him by the Colour, which he could not but know. But if we ſuppoſe that the Teſtator knew perfectly well the Difference between a *Spaniſh* Horſe and a *Barb*, will not his making mention of the *Spaniſh* Horſe induce us to think that he did not err in the Kind, and that he had really a mind to give a *Spaniſh* Horſe. And that thus the Error being only in the Colour, and not in the Kind, it would be a Miſtake either of the Perſon who writ the Teſtament, or of the Teſtator himſelf, who by having added the Colour, had render'd his Expreſſion uncertain: Or will it be ſaid, that the Colour making a greater Diſtinction than the Kind,

Kind, the Teſtator hath bequeathed the *Barb?* Or laſtly, will one chuſe rather to decide the Doubt in favour of the Executor, and give him his Choice, by the Rule explained in the ſixth and following Articles of the ſeventh Section; or in favour of the Legatary, and give him the Choice, purſuant to the Rule explained in the tenth and following Articles of the ſame Section? Which would depend on the Circumſtances which might make the Preſumption to be in favour of the Legatary: For if the Circumſtances did not decide it for him, and if the Queſtion were in an equal Ballance, and really doubtful, it would be the Heir or Executor that ought to have the Choice.

X.

10. *A Miſtake in the Name of the Thing bequeated, does no harm to the Legacy.*

If he who has a mind to deviſe ſome Land or Tenement errs in the Name, whether it be thro Forgetfulneſs, or becauſe he had a Deſign to change the Name thereof, or thro ſome Miſtake, and gives to the ſaid Land or Tenement the Name of ſome other, but ſo as that this Miſtake appears otherwiſe by the Circumſtances, and that his Will be ſufficiently known, the Legacy ſhall have its effect for the Land or Tenement which he had a mind to give, altho he has miſtaken its true Name *n*.

n Si quis in fundi vocabulo erraverit & Corneliano pro Semproniano nominavit debebitur Sempronianus. *l.* 4. *ff. de legat.* 1.

XI.

11. *The Words which are neceſſary to make the Senſe perfect may be ſupplied.*

If it happens that thro ſome Forgetfulneſs or Miſtake, whether it be of the Teſtator himſelf, if he writes his own Teſtament, or of the Perſon whom he employs to write it, there are wanting in ſome Expreſſions neceſſary Words, ſo that it cannot have any Meaning without adding them, and that by ſuch Addition the Senſe is perfect; this Omiſſion will be ſupplied by ſuppoſing the Words that are wanting to be there inſerted. Thus, for inſtance, if a Teſtator had ſaid, *I inſtitute ſuch a one*, without adding the Word *Heir*, or *Executor*, it would be ſupplied. Thus, in a Legacy, where it ſhould be ſaid only, *To ſuch a one the Sum of ſo much*, it would be reaſonable to ſuppoſe the Words, *I give and bequeath*. Thus, in all ſorts of imperfect Expreſſions, where one may judge by the Expreſſion it ſelf, or by the Sequel of the Teſtament, what are the Words omitted, which would naturally make up the Senſe which the Teſtator had in his Mind, it would be juſt to ſupply them *o*.

o Si omiſſa fideicommiſſi verba ſunt, & cætera quæ leguntur cum his quæ ſcribi debuerant congruant, recte datum, & minus ſcriptum exemplo inſtitutionis legatorumque intelligitur: quam ſententiam optimus quoque Imperator noſter Severus ſecutus eſt. *l.* 67. §. 9. *ff. de legat.* 2.

Verbum *volo* licet deſit, tamen quia additum perfectum ſenſum facit, pro adjecto habendum eſt. *l.* 10. *C. de fideicom.*

Item Divus Pius reſcripſit, *illa uxor mea eſto*, inſtitutionem valere, licet deeſſet *hæres*. *l.* 1. §. *penult. ff. de hæred. inſtit.*

Errore ſcribentis teſtamentum Juris ſolennitas mutilari nequaquam poteſt: quando minus ſcriptum, plus nuncupatum videtur. Et ideo recte teſtamento condito, quamquam deſit *hæres eſto*, conſequens eſt, exiſtente hærede legata ſeu fideicommiſſa, juxta voluntatem teſtatoris, oportere dari. *l.* 7. *C. de teſt.* See the following Articles.

XII.

12. *Example of a Conjecture for diſcovering the Uncertain Intention of the Teſtator.*

If the Expreſſion is defective, not becauſe of the Omiſſion of a Word that is neceſſary to be ſupplied for making the Senſe perfect, as in the Caſe of the foregoing Article, but becauſe of ſome Uncertainty, or Obſcurity, that could not be cleared up by any other Expreſſion in the Teſtament; and that the Explanation thereof ſhould depend on the Knowledge of the Intention of the Teſtator, which he had not ſufficiently made known; it would be neceſſary in this Caſe to have recourſe to the other Proofs or Preſumptions which might diſcover the ſaid Intention. Thus, for example, if a Teſtator had left to ome Perſon a yearly Penſion, without explaining the Sum; as it would be certain on one ſide that this Legacy ought to ſubſiſt, and uncertain on the other to what Sum the Teſtator had a mind to fix it, it would be neceſſary to regulate this Penſion in the manner that it might be reaſonable to ſuppoſe the Teſtator would regulate it himſelf, if he were alive. Which would depend on the Circumſtances of the Quality of the Teſtator, and Largeneſs of his Eſtate; on the Quality of the Legatary, and Greatneſs of his Wants; on the Quality of the Heirs or Executors, whether they were Deſcendants or Aſcendants to the Teſtator, or collateral Relations, or nothing of kin to him; and if they were Children, in what Number they were. But if this Teſtator was wont to give every Year to the ſaid Legatary ſomething for his Maintenance, or Alimony, the Legacy might be regulated

on

on the ſame foot with what the Teſtator was wont to give him in his Lifetime *p*.

p Si cui annuum fuerit relictum ſine adjectione ſummæ, nihil videri huic adſcriptum, Mela ait. Sed eſt verior ſententia quod teſtator præſtare ſolitus fuerat, id videri relictum: ſi minus, ex dignitate perſonæ ſtatui oportebit. *l.* 14. *ff. de an. leg.* See the xiith Article of the vth Section of Legacies.

XIII.

13. *Another Example of the Interpretation of a defective Expreſſion.*

We may add for another Example of a defective Expreſſion which it would be neceſſary to interpret by the Intention of the Teſtator, a Legacy left in theſe Terms; *I give and bequeath unto ſuch a one the Sum of ſo much, until ſhe is married*, without mentioning that this Sum ſhould be paid her every Year to the time of her Marriage: which would give riſe to the Queſtion, whether it would not be only a Legacy of this Sum to be paid once for all, or whether it would be an annual Legacy to the time of the Marriage. And it is this laſt Senſe that theſe Words ought to have, *until ſhe is married*; for they ought to have their Meaning and their Effect, and they can have no other: ſo that theſe laſt Words prove that the Teſtator who has made uſe of this Expreſſion had a mind that this Sum ſhould be paid every Year until the Marriage of this Legatary *q*, unleſs there were particular Circumſtances in the Caſe, and ſuch as might require that another Interpretation ſhould be given to the Words.

q Legatum ita eſt: *Attiæ, donec nubat, quinquaginta damnas eſto hæres meus dare:* neque adſcriptum eſt *in annos ſingulos.* Labeo, Trebatius, *præſens* legatum deberi putat: ſed rectius dicitur, id legatum in annos ſingulos deberi. *l.* 17. *ff. de ann. leg.*

XIV.

14. *The Legacy of a Houſe takes in the Garden, which is a part of it.*

If a Teſtator who had a Houſe buys a Garden that is adjoining to it, and afterwards deviſes the ſaid Houſe, without making mention of the Garden, it will be judged by the Circumſtances whether the Garden ought to be comprehended under the Legacy, or whether it ought not: For if the Teſtator had bought this Garden to join it to another Houſe than that which he had deviſed by his Will, or to build a ſeparate Houſe upon it, or for any other uſe than that of accommodating the Houſe deviſed, it might not be comprehended in the Legacy. But if the Teſtator had bought this Garden only for the Conveniency of the ſaid Houſe, and to make it more healthy and more agreeable, and that having made a Paſſage from the Houſe to the Garden, he had looked upon it as one of its Dependancies; the Legatary would have the Garden, together with the Houſe *r*. For the Teſtator would have made of theſe two diſtinct things only one Meſſuage contained under the Name of the Houſe deviſed. And it is likewiſe the uſual Cuſtom to underſtand by a Houſe not barely that which is deſigned for Lodging, but likewiſe the Courts, the Stables, the Garden and the other Dependancies and Conveniencies that happen to be joined to it *s*.

r Qui domum poſſidebat, hortum vicinum ædibus comparavit; ac poſtea domum legavit. Si hortum domus cauſa comparavit; aut amæniorem domum ac ſalubriorem poſſideret aditumque in eum per domum habuit, & ædium hortus additamentum fuit, domus legato continebitur. *l.* 9. §. 5. *ff. de leg.* 3.

See the vth Article, and the viiith Article of the ivth Section of Legacies.

s Ex communi uſu nomina exaudiri debere. *l.* 7. §. 2. *ff. de ſupellect. leg.*

See the following Article.

XV.

15. *That which is evident from the Terms is not interpreted.*

If a Teſtator, being ignorant of the true Uſe of the Words, had left a Legacy in Terms which he believed did comprehend certain things that he had a mind to bequeath, but which the natural Meaning of the ſaid Terms would not comprehend, and that there was nothing in the Sequel of his Teſtament that diſcovered this Intention, but that the Legatary pretended only to prove that the Teſtator underſtood the ſaid Words in the Senſe that he had a mind to give to his Legacy, ſuch a Proof would not be received for giving to the Expreſſion of a Teſtament another Meaning than that which the Words bear being taken in the Senſe they would have in the common Acceptation of 'em. Thus, for inſtance, if a Teſtator deſigning to give all his Moveables to a Legatary, had made uſe of the Word Utenſils, thinking that the ſaid Word comprehended them all; this Legacy would be reſtrain'd to the Moveables that are commonly comprehended under this Name. For altho it is true that the Intention ought to be preferred to the Expreſſion; yet that is only when the Sequel of the Teſtament diſcovers clearly the ſaid Intention: but not in Caſes where there is no doubt to be made of the Meaning of the Expreſſion: For in that caſe the only Preſumption that can be admitted, is, that the Teſtator has ſaid what

what he had a mind to ſay, and that he had no mind to ſay what he has not ſaid *t*.

t Non aliter a ſignificatione verborum recedi oportet, quam cum manifeſtum eſt aliud ſenſiſſe teſtatorem. *l.* 69. *ff. de leg.* 3.

Quod ſi quis cum vellet veſtem legare, ſupellectilem adſcripſit, dum putat ſupellectilis appellatione veſtem contineri. Pomponius ſcripſit, veſtem non deberi. Quemadmodum ſi quis putet auri appellatione electrum, vel auricalcum contineri; vel quod eſt ſtultius, veſtis appellatione etiam argentum contineri. Rerum enim vocabula immutabilia ſunt, nominum mutabilia. *l.* 4. *ff. de leg.* 1.

Servius fatetur ſententiam ejus qui legaverit aſpici oportere, in quam rationem ea ſolitus ſit referre. Verum, ſi ea de quibus non ambigeretur, quin in alieno genere eſſent (ut puta eſcarium, argentum, aut penulas & togas ſuppellectile quis adſcribere ſolitus ſit) non idcirco exiſtimari oportere ſupellectile legata; ea quoque contineri. Non enim ex opinionibus ſingulorum, ſed ex communi uſu nomina exaudiri debere. *l.* 7. §. 2. *ff. de ſupell. leg.*

Non videri quemquam dixiſſe cujus non ſuo nomine uſus ſit. Nam etſi prior atque potentior eſt quam vox, mens dicentis; tamen nemo ſine voce dixiſſe exiſtimatur. *d.* §. *in f.*

See the iid Article.

XVI.

16. *The Word Children is underſtood only of thoſe that are lawfully begotten.*

It follows from the Rule explained in the preceding Article, that the Expreſſions ought to be taken in the Senſe which common Uſage gives to the Words *u*. Which is not to be always underſtood of the general and indefinite Senſe that all Words may have; but of the Senſe which has relation to the Subject-matter of the Expreſſion of the Teſtator; and to the Intention which he may have had. Thus, for example, the Word *Son* indefinitely and in general comprehends a Baſtard and a Son lawfully begotten; but if a Teſtator who had Children lawfully begotten, having likewiſe a Baſtard, had made ſome Diſpoſitions in which he had named his Children, or his Sons without Diſtinction, either inſtituting them his Executors, or leaving them ſome Legacy; or that a Teſtator who had no Children of his own, had named for his Executors the Children of another Perſon, or had given them any Legacy, theſe Names of Sons, or Children, which may be applied to Baſtards, would not comprehend them *x*. For beſides that we ought not to preſume that this was the Intention of the ſaid Teſtators, the Names of Sons and Children are not applied to Baſtards in the indefinite Expreſſions, but when they are certainly comprehended under the Subject-matter of the Expreſſion. And this Caſe being excepted, the indefinite Signification of the Words *Sons* and *Children* do not agree to them, except when the Words are qualified with the Addition of Baſtards to diſtinguiſh them.

u Ex communi uſu nomina exaudiri deberi. *l.* 7. §. 2. *ff. de ſupell. leg.*

x Filium eum definimus qui ex viro & uxore ejus naſcitur. *l.* 6. *ff. de ſtatu hom.* Juſti liberi. *l.* 5. *in f. ff. de in jus voc.*

XVII.

17. *The Regard that ought to be had to the Deſtination of the Teſtator.*

If in the Expreſſion of things bequeathed either to the Heirs or Executors, or to the Legataries, there were any Uncertainty as to what ought to be comprehended under it, and what ought to be excepted from it, it would be neceſſary to regulate the Extent, and to fix the Bounds thereof, according as we might be able to judge what the Teſtator himſelf comprehended under it, if his Intention appeared either by ſome Deſtination that he had made of the things bequeathed, or by ſome other way. Thus, for example, if a Merchant who carried on different Commerces in ſeveral Provinces, and had divers Warehouſes for ſelling his Goods, as at *Rouan* and *Bourdeaux*, and in other Towns, had left in his Teſtament to one of his Heirs or Executors, or to a Legatary, all the Stock of his Trade at *Rouan*, and to another all the Stock of his Trade at *Bourdeaux*, and there ſhould happen to be at *Bourdeaux* at the time of his Death, Merchandize which he had bought for *Rouan*, where he deſigned to ſell them; the ſaid Goods would belong to him who was to have the Stock of the Trade at *Rouan*: For altho the Goods being at *Bourdeaux* at the time of the Teſtator's Death, might ſeem to be part of the Stock at *Bourdeaux*; yet the Teſtator, by having deſtinated them for the Stock of his Trade at *Rouan* has made them part of that Stock, and they would belong to him who ought to have that Stock. Thus, in the ſame manner, if there were other Goods bought at *Rouan* to be tranſported to *Bourdeaux*, they would belong to him who was to have that Stock at *Bourdeaux*. And if the Goods not being as yet bought, the Money deſigned for buying them were ſent, and were ſtill extant, either in Specie or Bills of Exchange, this Money, wherever it were, being part of the Stock of the Trade of that Place where the Goods were deſigned to be ſold, would belong to the Executor or Legatary,

tary, who ought to have the ſaid Goods *y*.

y Ex facto proponebatur, quidam duos hæredes ſcripſiſſe: unum rerum provincialium, alterum rerum italicarum: & cum merces in Italia devehere ſoleret, pecuniam miſiſſe in provinciam ad merces comparandas, quæ comparatæ ſunt, vel vivo eo, vel poſt mortem, nondum tamen in Italiam devectæ. Quærebatur, merces utrum ad eum pertineant qui rerum italicarum hæres ſcriptus erat, an vero ad eum qui provincialium——Rerum autem italicarum vel provincialium ſignificatione, quæ res accipiendæ ſint videndum eſt: & facit quidem totum voluntas defuncti. Nam quid ſenſerit ſpectandum eſt. Veruntamen hoc intelligendum erit, *rerum italicarum* ſignificatione, eas contineri, quas perpetuo quis ibi habuerit, atque ita diſpoſuit ut perpetuo haberet. Cæteroquin, ſi tempore in quo tranſtulit in alium locum, non ut ibi haberet, ſed ut denuo ad priſtinum locum revocaret, neque augebit quo tranſtulit, neque minuet unde tranſtulit——Quæ res in propoſito ſuggerit, ut italicarum rerum eſſe credantur hæ res, quas in Italia eſſe teſtator voluit. Proinde & ſi pecuniam miſit in provinciam ad merces comparandas, & necdum comparatæ ſint: Dico pecuniam quæ idcirco miſſa eſt ut per eam merces in Italiam adveherentur (in) Italico patrimonio injungendam. Nam & ſi dediſſet in provincia de pecuniis quas in Italia exercebat, ituras & redituras, dicendum eſt, hanc quoque Italici patrimonii eſſe rationem. Igitur efficere dici, ut merces quoque iſtæ quæ comparatæ ſunt ut Romam veherentur, ſive profectæ ſunt eo vivo, ſive nondum, & ſive ſcit, ſive ignoravit, ad eum hæredem pertinere cui Italicæ res ſunt adſcriptæ. *l.* 35. *d. l.* §. 3. *in princip. & in f. & §. penult. & ult. ff. de hæred. inſt.*

Si tempore in quo tranſtulit in alium locum, non ut ibi haberet: ſed ut denuo ad priſtinum locum revocaret, neque augebit quo tranſtulit, neque minuet unde tranſtulit. *d. l.* 35. §. 3. *ff. de hæred. inſtit.* See the following Article.

XVIII.

18. *Other Examples of the ſame Rule.*

We may give for another Example of the Rule explained in the foregoing Article, the Caſe where a Teſtator having deviſed a Country-Houſe, with the Moveables, Horſes and Cattel which he uſed to keep there, it ſhould happen that at the time of the Teſtator's Death there ſhould be a Set of Horſes which he commonly uſed in Town, at the ſaid Country-Houſe, whether it was becauſe he died ſuddenly, or that they had been ſent thither to be put out to Graſs for ſome time, or for ſome other Reaſon; for by this Rule theſe Horſes would not be comprehended in the ſaid Legacy, which ought to be underſtood only of the Cattle and other things deſtined to be always in the ſaid Place. And for the ſame Reaſon this Legacy would include the Plough-Horſes deſigned for the Service of the ſaid Houſe, which ſhould happen to be elſewhere at the time of the Teſtator's Death: For the different Deſtinations of the Teſtator would explain his Intention, and ſhew what ſhould be reckoned to belong to the ſaid Houſe, and what not *z*. And the Chance which in this Caſe, as in that of the foregoing Article, makes that a thing deſtined for one Place happens to be in another, does not change its Deſtination. Thus, for another Example of the ſame Rule explained in the preceding Article, if a Teſtator having bought by one and the ſame Contract, and for one and the ſame Price, two Eſtates of different Names, but which joined to one another, and having confounded the two together in his poſſeſſion, by letting them both to farm by the ſame Leaſe, under one of the two Names only, or by inſerting them in the ſame manner in his Book or Memorandum of his Affairs, makes afterwards a Deviſe in which he names only one Eſtate by the ſame Name under which he had confounded the two, declaring that he deviſes it ſuch as he had purchaſed it, and without making any reſerve or mention of the other Eſtate; this Deviſe under theſe Circumſtances will comprehend both the Eſtates, which it would not do, if there were only the bare Circumſtance of the purchaſing both the one and the other by one and the ſame Contract, and for one and the ſame Price *a*.

z Si fundus legatus ſit *cum his quæ ibi erunt*: quæ ad tempus ibi ſunt non videntur legata. *l.* 44. *ff. de legat.* 3.

Qui ſaltum æſtivum legavit, & hoc amplius etiam *eas res legaverit quæ ibi eſſe ſolent*, non videtur de illis pecoribus ſenſiſſe quæ hyeme in hibernis, aut æſtate in æſtivis eſſe ſolent: ſed de illis ſenſit quæ perpetuo ibi ſunt. *l.* 67. *eod.*

Nec quod caſu abeſſet, minus eſſet legatum: nec quod caſu ibi ſit, magis eſſe legatum. *l.* 86, *in f. ff. de legat.* 3.

a Titio Seiana prædia ſicuti comparata ſunt do, lego: cum eſſent Gabiniana quoque ſimul uno pretio comparata, non ſufficere ſolum argumentum emptionis reſpondi, ſed inſpiciendum, an literis & rationibus appellatione Seianorum Gabiniana quoque continentur, & utriuſque poſſeſſionis confuſi reditus titulo Seianorum accepto lati eſſent. *l.* 91. §. 3. *ff. de legat.* 3.

We have put down in the Article on the Caſe of this laſt Text, that the two Eſtates were adjoining to one another; for if they were ſituated in different Places, one ſingle Name could not agree both to the one and the other, and their Separation would make two different Eſtates which could not be comprehended under one proper Name.

XIX.

19. *Divers Views for diſcovering the Intention of the Teſtator.*

It follows from the Rules explained in the foregoing Articles, that in all the Caſes where the Queſtion is how to interpret the Expreſſions of a Teſtator, it is by the Proofs or Preſumptions, which may diſcover his Intention, that we are to judge of them; and this depends on the different Circumſtances that may have any relation to the Diffi-

what he had a mind to ſay, and that he had no mind to ſay what he has not ſaid *t*.

t Non aliter a ſignificatione verborum recedi oportet, quam cum manifeſtum eſt aliud ſenſiſſe teſtatorem. *l.* 69. *ff. de leg.* 3.

Quod ſi quis cum vellet veſtem legare, ſupellectilem adſcripſit, dum putat ſupellectilis appellatione veſtem contineri. Pomponius ſcripſit, veſtem non deberi. Quemadmodum ſi quis putet auri appellatione electrum, vel auricalcum contineri; vel quod eſt ſtultius, veſtis appellatione etiam argentum contineri. Rerum enim vocabula immutabilia ſunt, nominum mutabilia. *l.* 4. *ff. de leg.* 1.

Servius fatetur ſententiam ejus qui legaverit aſpici oportere, in quam rationem ea ſolitus ſit referre. Verum, ſi ea de quibus non ambigeretur, quin in alieno genere eſſent (ut puta eſcarium, argentum, aut penulas & togas ſuppellectile quis adſcribere ſolitus ſit) non idcirco exiſtimari oportere ſupellectile legata; ea quoque contineri. Non enim ex opinionibus ſingulorum, ſed ex communi uſu nomina exaudiri debere. *l.* 7. §. 2. *ff. de ſupell. leg.*

Non videri quemquam dixiſſe cujus non ſuo nomine uſus ſit. Nam etſi prior atque potentior eſt quam vox, mens dicentis; tamen nemo ſine voce dixiſſe exiſtimatur. *d.* §. *in f.*

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16. The Word Children is underſtood only of thoſe that are lawfully begotten.

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u Ex communi uſu nomina exaudiri deberi. *l.* 7. §. 2. *ff. de ſupell. leg.*

x Filium eum definimus qui ex viro & uxore ejus naſcitur. *l.* 6. *ff. de ſtatu hom.* Juſti liberi. *l.* 5. *in f. ff. de in jus voc.*

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tary, who ought to have the ſaid Goods *y*.

y Ex facto proponebatur, quidam duos hæredes ſcripſiſſe: unum rerum provincialium, alterum rerum italicarum: & cum merces in Italia devehere ſoleret, pecuniam miſiſſe in provinciam ad merces comparandas, quæ comparatæ ſunt, vel vivo eo, vel poſt mortem, nondum tamen in Italiam devectæ. Quærebatur, merces utrum ad eum pertineant qui rerum italicarum hæres ſcriptus erat, an vero ad eum qui provincialium——Rerum autem italicarum vel provincialium ſignificatione, quæ res accipiendæ ſint videndum eſt: & facit quidem totum voluntas defuncti. Nam quid ſenſerit ſpectandum eſt. Veruntamen hoc intelligendum erit, *rerum italicarum* ſignificatione, eas contineri, quas perpetuo quis ibi habuerit, atque ita diſpoſuit ut perpetuo haberet. Cæteroquin, ſi tempore in quo tranſtulit in alium locum, non ut ibi haberet, ſed ut denuo ad priſtinum locum revocaret, neque augebit quo tranſtulit, neque minuet unde tranſtulit——Quæ res in propoſito ſuggerit, ut italicarum rerum eſſe credantur hæ res, quas in Italia eſſe teſtator voluit. Proinde & ſi pecuniam miſit in provinciam ad merces comparandas, & necdum comparatæ ſint: Dico pecuniam quæ idcirco miſſa eſt ut per eam merces in Italiam adveherentur (in) Italico patrimonio injungendam. Nam & ſi dediſſet in provincia de pecuniis quas in Italia exercebat, ituras & redituras, dicendum eſt, hanc quoque Italici patrimonii eſſe rationem. Igitur efficere dici, ut merces quoque iſtæ quæ comparatæ ſunt ut Romam veherentur, ſive profectæ ſunt eo vivo, ſive nondum, & ſive ſcit, ſive ignoravit, ad eum hæredem pertinere cui Italicæ res ſunt adſcriptæ. *l.* 35. *d. l.* §. 3. *in princip. & in f. & §. penult. & ult. ff. de hared. inſt.*

Si tempore in quo tranſtulit in alium locum, non ut ibi haberet: ſed ut denuo ad priſtinum locum revocaret, neque augebit quo tranſtulit, neque minuet unde tranſtulit. *d. l.* 35. §. 3. *ff. de hared. inſtit.* See the following Article.

XVIII.

18. *Other Examples of the ſame Rule.*

We may give for another Example of the Rule explained in the foregoing Article, the Caſe where a Teſtator having deviſed a Country-Houſe, with the Moveables, Horſes and Cattel which he uſed to keep there, it ſhould happen that at the time of the Teſtator's Death there ſhould be a Set of Horſes which he commonly uſed in Town, at the ſaid Country-Houſe, whether it was becauſe he died ſuddenly, or that they had been ſent thither to be put out to Graſs for ſome time, or for ſome other Reaſon; for by this Rule theſe Horſes would not be comprehended in the ſaid Legacy, which ought to be underſtood only of the Cattle and other things deſtined to be always in the ſaid Place. And for the ſame Reaſon this Legacy would include the Plough-Horſes deſigned for the Service of the ſaid Houſe, which ſhould happen to be elſewhere at the time of the Teſtator's Death: For the different Deſtinations of the Teſtator would explain his Intention, and ſhew what ſhould be reckoned to belong to the ſaid Houſe, and what not *z*. And the Chance which in this Caſe, as in that of the foregoing Article, makes that a thing deſtined for one Place happens to be in another, does not change its Deſtination. Thus, for another Example of the ſame Rule explained in the preceding Article, if a Teſtator having bought by one and the ſame Contract, and for one and the ſame Price, two Eſtates of different Names, but which joined to one another, and having confounded the two together in his poſſeſſion, by letting them both to farm by the ſame Leaſe, under one of the two Names only, or by inſerting them in the ſame manner in his Book or Memorandum of his Affairs, makes afterwards a Deviſe in which he names only one Eſtate by the ſame Name under which he had confounded the two, declaring that he deviſes it ſuch as he had purchaſed it, and without making any reſerve or mention of the other Eſtate; this Deviſe under theſe Circumſtances will comprehend both the Eſtates, which it would not do, if there were only the bare Circumſtance of the purchaſing both the one and the other by one and the ſame Contract, and for one and the ſame Price *a*.

z Si fundus legatus ſit *cum his quæ ibi erunt*: quæ ad tempus ibi ſunt non videntur legata. *l.* 44. *ff. de legat.* 3.

Qui ſaltum æſtivum legavit, & hoc amplius etiam *eas res legaverit quæ ibi eſſe ſolent*, non videtur de illis pecoribus ſenſiſſe quæ hyeme in hibernis, aut æſtate in æſtivis eſſe ſolent: ſed de illis ſenſit quæ perpetuo ibi ſunt. *l.* 67. *eod.*

Nec quod caſu abeſſet, minus eſſet legatum: nec quod caſu ibi ſit, magis eſſe legatum. *l.* 86, *in f. ff. de legat.* 3.

a Titio Seiana prædia ſicuti comparata ſunt do, lego: cum eſſent Gabiniana quoque ſimul uno pretio comparata, non ſufficere ſolum argumentum emptionis reſpondi, ſed inſpiciendum, an literis & rationibus appellatione Seianorum Gabiniana quoque continentur, & utriuſque poſſeſſionis confuſi reditus titulo Seianorum accepto lati eſſent. *l.* 91. §. 3. *ff. de legat.* 3.

We have put down in the Article on the Caſe of this laſt Text, that the two Eſtates were adjoining to one another; for if they were ſituated in different Places, one ſingle Name could not agree both to the one and the other, and their Separation would make two different Eſtates which could not be comprehended under one proper Name.

XIX.

19. *Divers Views for diſcovering the Intention of the Teſtator.*

It follows from the Rules explained in the foregoing Articles, that in all the Caſes where the Queſtion is how to interpret the Expreſſions of a Teſtator, it is by the Proofs or Preſumptions, which may diſcover his Intention, that we are to judge of them; and this depends on the different Circumſtances that may have any relation to the Diffi-

culty that is to be adjusted. Thus we consider the Qualities of the Persons, and those of the Things, if those Qualities can be of any use to discover the said Intention. Thus we distinguish the several Usages of the Places, either for the Sense of the Words, or for the other Difficulties which the said Usages may help to explain, and especially the particular Usages of the Testators in the OEconomy and Management of their Affairs; and we take what we can have from their Memorandums and Journals of their Affairs, and other such like Circumstances *b*. But the Regard that is usually had to all these Views is of no use, unless it be directed by two other general Views, which ought to be the first in all Interpretations. One is, not to expose an Expression that is clear in itself to Interpretations contrary to the natural Sense *c*; and the other is, not to prefer to reasonable Presumptions of the Intention of the Testator, a Sense altogether opposite, under Pretext of adhering slavishly to the literal Sense of an Expression, which the Sequel of the Testament, and the Circumstances, would oblige us to understand otherwise, in order to reconcile it with the said Intention *d*. Thus in general it depends on the Prudence of the Judge, to examine whether an Expression ought to be taken precisely in the literal Sense, or if it is necessary, or equitable, to interpret it: And he ought to be careful in applying the proper Rules by which it is to be interpreted *e*.

b Si numerus nummorum legatus sit, neque apparet quales sunt legati: ante omnia ipsius patrisfamilias consuetudo, deinde regionis in qua versatus est, exquirenda est: sed & mens patrisfamilias & legatarii dignitas, vel caritas & necessitudo, item earum quæ præcedunt, vel sequuntur summarum scripta sunt spectanda. *l.* 50. §. *ult. ff. de legat.* 1.

Optimum esse Pedius ait, non propriam verborum significationem scrutari: sed imprimis quid testator demonstrare voluerit: deinde in qua præsumptione sunt, qui in quaque regione commorantur. *l.* 18. §. 3. *in f. ff. de instruct. vel. instr. legat.*

c Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio. *l.* 25. §. 1. *ff. de legat.* 3.

See the iiid and xvth Articles.

d Non enim in causa testamentorum ad definitionem utique descendendum est: cum plerumque abusive loquantur, nec propriis nominibus ac vocabulis semper utantur. *l.* 69. §. 1. *ff. de legat.* 3.

e Voluntatis defuncti quæstio in æstimatione judicis est. *l.* 7. *C. de fideicomm.*

If besides the Ways explained in this Article for discovering the Intention of the Testator, there should be found other Testaments, altho revoked, we might explain by the former Testaments that which is obscure and uncertain in the Testament which subsists; if the Difficulty happens to be more clearly explain'd in any of the other Testaments, provided that this is done without making valid any part of the said Testament which has been revoked.

As to the use of the Rule explained in this Article, we must understand it in the Sense which results from all the Rules that have been explained in the foregoing Articles of this Section, for it has relation to them. See the last Article of the following Section.

SECT. VII.

Of the Rules for interpreting the other sorts of Difficulties besides those of the Expressions.

BEsides the Difficulties that may arise from the Defects of the Expressions in Testaments; there are others which have other Causes, and which cannot be prevented by Dispositions expressed in the clearest Terms. Some of them proceed from the Change that is made by unforeseen Accidents, and which oblige us to conjecture, by Presumptions which may be grounded on the known Intentions of the Testator, what he himself would have order'd, if he had foreseen these Accidents. Others are occasioned by some Error the Testator was under in a matter of Fact that was unknown to him, and where it appears clearly enough by his Dispositions what he would have order'd if the Truth which he was ignorant of had been known to him. And others have other Causes altogether different.

Altho it is very difficult, and even impossible for those who begin the Study of the Law to comprehend these several kinds of Difficulties without some Examples, yet it is not proper to give any here, because each sort of Difficulty is to be explain'd in its proper Place in this Section; and we shall there set down the Examples that are necessary for understanding them aright. But we have been oblig'd to mark in general these kinds of Difficulties, and to give here this Idea of 'em, in order to shew the Difference which distinguishes 'em from the Difficulties which have been the Subject-matter of the foregoing Section.

It is necessary to remember here the last Remark which has been made in the Preamble of the foregoing Section, concerning the Rules of some other Titles, which may have some relation to the Interpretation of Testaments.

We shall not make here, nor in the Sequel of this Section, any Division or Distinction of the several sorts of Cases, in which the Interpretations that shall be spoken of here are necessary, in order to reduce the said Cases to certain kinds. For besides that the greatest

part

part of them are ſuch, that it is not poſſible to comprehend them under peculiar Ideas that have preciſe Characters to diſtinguiſh them from all the others, and that there are even ſome of them of which every one by it ſelf would demand a proper kind; this Exactneſs would not only be uſeleſs, but would produce, under the Appearance of ſome Order, a real Confuſion; and it is enough that all theſe Caſes are contained under the general Idea that the Title of this Section gives of them; and that under this Title the Reader ſhall have the Rules that are neceſſary for this Matter, and the Examples which ſhew the Application of them, and the Uſe that may be made of them in all the Caſes that may ariſe from all ſorts of Events.

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I.

THE firſt Rule for the Interpretation of the Difficulties which are the Subject-matter of this Section, as well as of thoſe which have been explained in the preceding Section, is the Will of the Teſtator. And whether this Will appears by the Diſpoſitions themſelves, or by clear and certain Conſequences that may be drawn from them, or even by Conjectures only; it is always by the Knowledge that can be had thereof, that we are to decide the Matter, by adjuſting the Difficulty in the manner that we judge the Teſtator himſelf would have done it, according to the Views and Sentiments which his Diſpoſitions ſhew him to have had *a*.

1. The firſt Rule of this Interpretation, is the Will of the Teſtator.

a Semper veſtigia voluntatis ſequimur teſtatorum. *l.* 5. *C. de neceſſ. ſerv. hæred. inſtit.*
See the fifth Article of the preceding Section.

II.

If the Difficulty which makes it neceſſary to interpret the Teſtament, depends barely on the Conſideration that the Teſtator may have had for one of the Perſons intereſted in the ſaid Interpretation, more than for the other; the Queſtion will be decided in favour of that Perſon for whom the Teſtator is judged to have had the greateſt Eſteem: Which will depend either on the particular Proofs that may be had of it from his Diſpoſitions, or on the Rules which follow *b*.

2. Interpretation by the Eſteem which the Teſtator had for the Perſons.

b See the Articles which follow.

III.

Between two Heirs or Executors, whom a Teſtator had called to his Succeſſion; the one, who was not of his Family, by a former Teſtament, made in due Form; and the other, who had Right to ſucceed to him if he died inteſtate, and whom he had inſtituted by a ſecond Teſtament, in which there was wanting ſome Formality; the Conſideration of the Heir of Blood, or next of Kin, would render his Cauſe ſo favourable above the other, that, as it has been explained in another Place, the Law would give him in this Caſe

3. Interpretation in favour of the Heir of Blood againſt a Stranger.

the Succeſſion *c*, contrary to the Rule which prefers a former Teſtament made in due Form, to a ſecond, in which ſome Formality is wanting: Which we repeat here only to ſhew the Spirit of the Law, which in doubtful Caſes favours the Heir of Blood. From whence it follows, that in the Caſes where it is neceſſary to interpret ſome Diſpoſition of a Teſtator, which concerns ſome Perſon of his Family, and another no ways related to it, if all other Circumſtances were equal, the Tie of Kindred would decide the Matter, by the Preſumption that the Teſtator had had a greater Conſideration for his Relation, than for a Stranger.

c See the fifth Article of the fifth Section, where it is explained what are the Formalities which are required in this ſecond Teſtament.

IV.

4. Inſtitution of a firſt Executor, preferred to a ſecond Inſtitution made in due Form.

If he who had already made a Teſtament, hearing afterwards, by a falſe Report, that the Executor whom he had inſtituted was dead in a foreign Country, made a ſecond Teſtament, in which he had declared, that not being able to have for his Executor the Perſon whom he had named by his firſt Teſtament, he named ſuch a one; and if after the Death of the ſaid Teſtator, the Executor inſtituted by the firſt Teſtament ſhould happen to appear, he would be preferr'd to him that had been inſtituted by the ſecond, only becauſe of this Error. For the Expreſſion of the Motive which had induced the Teſtator to name another Executor, would be a ſufficient Reaſon to convince us that he would not have done it, if he had known the Truth. Thus, his Expreſſion ſhewing his Error, would have the ſame Effect as if he had inſtituted this ſecond Executor upon this Condition, that he ſhould be Executor only in caſe the firſt were really dead, and that if the firſt Executor were alive, he ſhould ſucceed, and exclude the other *d*.

d Pactumeius Androſthenes Pactumeiam Magnam filiam Pactumeii Magni ex aſſe hæredem inſtituerat, eique patrem ejus ſubſtituerat. Pactumeio Magno occiſo, & rumore perlato quaſi filia quoque ejus mortua, mutavit teſtamentum, Noviamque Rufum hæredem inſtituit, hac præfatione: *Quia hæredes quos volui habere mihi continere non potui, Novius Rufus hæres eſto.* Pactumeia Magna ſupplicavit imperatores noſtros, & cognitione ſuſcepta licet modus inſtitutione contineretur, quia falſus non ſolet obeſſe, tamen ex voluntate teſtantis, putavit Imperator ei ſubveniendum. Igitur pronuntiavit hæreditatem ad Magnam pertinere. *l. ult. ff. de hæred. inſt.*

See, as to what is ſaid in this Text, that Falſus modus non ſolet obeſſe, *that which is ſaid in the twenty firſt Article.*

If in this ſecond Teſtament the Teſtator had not explained the Motive that had induced him to name another Executor, the bare Error in which he was as to the Death of this firſt Executor, would not have been a ſufficient Reaſon for annulling the Inſtitution of the ſecond. For altho he had had no Thought of the Death of the firſt, he might have had other Motives for this Change, whether it had been that he had ceaſed to have the ſame Conſideration for him that he had before, or that the ſecond Executor had by his Civilities engaged the Teſtator to make this ſecond Diſpoſition, or for other Cauſes. See the following Article.

V.

5. In the Caſe of the preceding Article, the Legacies of the ſecond Teſtament would ſubſiſt.

If in the Caſe of the foregoing Article the ſecond Teſtament contained Legacies, the firſt Executor would be bound to acquit them, in the ſame manner as if he had been named Executor in this ſecond Teſtament *e*.

e Sed legata ex poſteriore teſtamento eam præſtare debere perinde atque ſi in poſterioribus tabulis ipſa fuiſſet hæres inſtituta. *d. l. ult. in f. ff. de hared. inſt.*

¶ If the Caſe of the preceding Article had happened, and there were likewiſe Legacies in the firſt Teſtament different from thoſe of the ſecond, this firſt Executor, who, as it is ſaid in the preſent Article, would be obliged to acquit the Legacies of this ſecond Teſtament, would not be bound to pay thoſe of the firſt: For altho his Inſtitution, which was the moſt eſſential part of the firſt Teſtament, ought to ſubſiſt, and it was burdened with the Legacies of the ſaid firſt Teſtament; yet they would be annulled by the Rule which determines that the ſecond Teſtament annuls the firſt. And this Executor might likewiſe ſay, that it is not by the Validity of this firſt Teſtament that his Inſtitution, which it contains, ought to ſubſiſt, but by the Effect of the Intention of the Teſtator explained in the ſecond; which marked expreſly, that he named another Executor beſides him for no other Reaſon, but becauſe, believing him to be dead, he ſuppoſed that he could not ſucceed to him; which implied the tacit Condition, explained in the preceding Article, and the Will of the Teſtator, that if the firſt Executor were alive, he ſhould ſucceed to him: But that this tacit Condition, and this Will of the Teſtator, which had the Effect to annul the Inſtitution of the Executor in the ſecond Teſtament, and to confirm that of the firſt, did no ways concern the Legacies of this firſt Teſtament which the ſecond did not confirm; and that therefore the Revocation of thoſe Legacies in

in the firſt Teſtament, which had been made by the ſecond, ought to ſubſiſt, altho the Revocation of the Inſtitution of the Executor of the firſt Teſtament did not ſubſiſt.

We ſee by this Event a pretty odd Effect which deſerves our Conſideration: It is, that the Condition of this ſecond Executor, for whom the Teſtator had a much greater Conſideration, than for the Legataries of the ſame Teſtament by which he was inſtituted, is much more diſadvantageous than that of the ſaid Legataries; ſince they are to have all that the Teſtator had a mind to give them, and that he who was to have had the whole Bulk of the Eſtate will have nothing at all: ſo that the Intention of this Teſtator happens to be fruſtrated, in that the Condition of the Legataries will be better than that of this Executor.

We may make here a laſt Reflexion on this Difference between the Condition of this Executor and that of theſe Legataries, that it is impoſſible for human Laws to be ſo exact, as to regulate all the Caſes that may poſſibly happen, in ſuch a manner, as that by obſerving always theſe Laws, whether according to the Letter, or according to the Spirit of them, there ſhall ariſe no Inconvenience from them; and that ſuch Proviſion ſhall be always made for all ſorts of Events, that nothing in any one of them ſhall be contrary to that which Equity may demand; but we ſee frequently thoſe ſorts of Inconveniencies which cannot be redreſſed: And there would be no other Remedy for this Inconvenience beſides the Civility of the firſt Executor, who, conſidering the Condition of him in whoſe Place he ſucceeds, and the Good-will that his Benefactor had towards the ſaid Perſon, ſhould be diſpoſed upon this Conſideration to give him a Share of the Goods which he takes away from him. This is what Equity and Humanity would ſeem to oblige this firſt Executor to do, eſpecially if he ſtood leſs in need of the Goods of the Succeſſion than the ſecond Executor. We know by Hiſtory, that there have been ſeveral good moral Heathens, who would not have failed to do ſo in the preſent Caſe; and the Spirit of the divine Law, the firſt Principles of which were unknown to them, does inſpire much more ſtrongly theſe Sentiments into ſuch Perſons as make it the Rule of their Actions. And it is only by the Spirit of theſe Principles that a full and perfect Proviſion is made for every thing, and in ſuch a manner, that whatever Event happens, there cannot follow from it any Conſequences that may deſerve the Name of Inconveniencies.

VI.

6. The Executor is in general more favoured than the Legatary.

If the Difficulty, which may depend on the Conſideration of the Perſons, happens to be between the Executor and a Legatary, ſo that all other Conſiderations happen to be equal, and that nothing deciding either for one or the other, the Doubt is reduced to this ſingle Point, to know which of the two ought to be the moſt favoured, it will be the Executor. For beſides that the Teſtator has without doubt had a greater Conſideration for him than for the Legatary, he is in the place of a Debtor, and the Legatary in place of the Creditor; and in doubtful Caſes the Condition of the Debtor is always favoured *f*. But if any Circumſtances render the Condition of the Legatary more favourable, they will make the Preference of the Executor to ceaſe; which cannot be well underſtood but by Examples, ſuch as theſe that follow.

f See the thirteenth and fifteenth Articles of the ſecond Section of Covenants. See the Articles which follow.

VII.

7. Firſt Example of the Preference of the Executor.

If a Teſtator, who had two Lands or Tenements of the ſame Name, but of different Value, had deviſed one of them, without diſtinguiſhing it from the other, naming it only by the Name that was common to both, and without marking in any thing which of the two he had a mind to deviſe; the Executor in this Caſe would have the Choice of them, and might retain the moſt precious to himſelf, and give that which is of leaſt Value to the Legatary. For the Queſtion would be altogether independent of all other Conſideration beſides that of knowing who ſhould have the Choice, whether the Executor, or the Legatary. Thus in this preciſe Doubt, which would depend barely upon knowing which of the two the Teſtator had the greateſt Conſideration for, the Rule explained in the preceding Article would decide it in favour of this Executor *g*.

g Scio ex facto tractatum, cum quidam duos fundos ejuſdem nominis habens, legaſſet *fundum Cornelianum*: & eſſet alter pretii majoris, alter minoris, & hæres diceret minorem legatum, legatarius majorem. Vulgo fatebitur utique minorem eum legaſſe,

legaſſe, ſi majorem non potuerit docere legatarius. *l.* 39. §. 6. *ff. de legat.* 1.

Si de certo fundo ſenſit teſtator, nec appareat de quo cogitavit, electio hæredis erit quem velit dare. *l.* 17. §. 1. *eod.*

Si quis plures Stichos habens, Stichum legaverit: ſi non appareat de quo Sticho ſenſit, quem elegerit debet præſtare. *l.* 32. §. 1. *eod.*

See the ſeventh Section of the Title of Legacies.

VIII.

8. *Second Example.* If a Teſtator, having two or more Silver Baſons of different Values, had bequeathed one of them, without ſpecifying which, the Executor might give only that of the leaſt Value; and by that he will have ſatisfied the Legacy. And it would be the ſame thing, if a Teſtator, having two Horſes of the ſame Name, as two Courſers, or called by other proper Names, had bequeathed a Horſe, calling him by his Name *h*.

h Sed etſi lancem legaverit, nec appareat quam, æque electio eſt hæredis quam velit dare. *l.* 37. §. 1. *ff. de legat.* 1.

Si quis plures Stichos habens Stichum legaverit: ſi non apparet de quo Sticho ſenſit, quem elegerit debet præſtare. *l.* 32. §. 1. *eod. V. l.* 4. *ff. de trit. vin. vel. ol. leg.* See the ſeventh Section of the Title of Legacies.

IX.

9. *Third Example.* If it happened that of one and the ſame Teſtament there were two Originals, which the Teſtator had made at the ſame time, one to be depoſited either in the hands of a Notary Publick, or of ſome other Perſon, and the other to be kept by himſelf; or that there were two ingroſſed Copies of one and the ſame Teſtament, the Minute or Inſtructions of which had been loſt by Fire, or ſome other Accident, and that in one of the Copies, or in one of the Originals, the ſame Legacy to one and the ſame Perſon was of a leſſer Sum, and of a greater Sum in the other Original or Copy, and that there appeared no Raſure in the Writing, nor any Suſpicion of Alteration or Forgery; the Legatary could demand only one of the two Sums, and that even the leaſt. For this Accident making it impoſſible to know the Intention of the Teſtator, thereby to decide which of the two Sums the Legatary might demand, and there being nothing to determine that the Legatary ought to have the Choice, the Executor would have it, and would be bound only to give the leſſer Sum *i*.

i Sempronius Proculus nepoti ſuo ſalutem. Binæ tabulæ teſtamenti eodem tempore exemplarii cauſa ſcriptæ, ut vulgo fieri ſolet, ejuſdem patris familias proferebantur: in alteris centum, in alteris quinquaginta aurei legati ſunt Titio. Quæris utrum (centum) & quinquaginta aureos, an centum dumtaxat habiturus ſit? Proculus reſpondit, in hoc caſu magis hæredi parcendum eſt: ideoque utrumque legatum nullo modo debetur, ſed tantummodo quinquaginta aurei. *l.* 47. *ff. eod. de leg.* 2. See the ſeventeenth Article of the firſt Section.

X.

10. *First Example where the Legatary is favoured.* We muſt not extend the Rule explained in the vith, viith, viiith, and ixth Articles beyond the Caſes of the ſaid Articles, or other Caſes of the like nature: For if other Conſiderations may require an Interpretation favourable for the Legatary, or ſome other Temperament between his Intereſt and that of the Executor, the Diſpoſition of the Teſtator might be interpreted by theſe other Conſiderations according to the Circumſtances. Thus, for Example, if a Teſtator had bequeathed a Horſe indefinitely and in general, or a Watch, or a Suit of Hangings, ſince in all theſe things there are Qualities altogether different, good and bad, the Legacies of this kind being Favours proportioned to the Qualities of the Teſtator and of the Legatary, and to the other Circumſtances which may diſcover the Intention of the Teſtator, it would be contrary to the good Will that the Teſtator bore towards the Legatary, to leave it to the choice of the Executor to give the worſt of the ſaid things to the Legatary; and it would be likewiſe contrary to the good Intention which the Teſtator had for the Executor, to give the Legatary Power to chuſe the moſt precious Individual of that kind of things that was bequeathed: Which makes it neceſſary to regulate a Legacy of this kind by a Temperament that fixes between theſe Extremities, equally unjuſt and oppoſite to the Intention of the Teſtator, a Medium which may not be contrary either to the Intereſt of the Executor, nor to the Conſideration which the Teſtator had for the Legatary. Thus, ſuch a Legacy would be moderated to a reaſonable Choice between the Extremities of the beſt and the worſt, to give to the Legatary either a Watch, or a Horſe, or a Suit of Hangings, or any other thing among ſeveral of the ſame kind, ſuch as might be conformable to his Circumſtances, to thoſe of the Teſtator, to the Goods of the Succeſſion, and to the other Circumſtances that might come into conſideration for the regulating of the ſaid Temperament; whether it be that there were many of theſe ſorts of things in the Inheritance, to chuſe out of, or that there being no ſuch things among the Goods

Goods of the Succeſſion, the Executor were obliged to procure them elſewhere *l.*

l Legato generaliter relicto veluti hominis, Caius Caſſius ſcribit, id eſſe obſervandum, ne optimus vel peſſimus accipiatur. Quæ ſententia reſcripto imperatoris noſtri, & Divi Severi juvatur, qui reſcripſerunt homine legato, actorem non poſſe eligi. *l.* 37. *ff. de legat. l.* 1. See the following Article.

The Rule explained in this Article demands Reflections that are not ſet down here, they being reſerved for a more proper Place. See the Preamble of the viith Section of Legacies, and the firſt Articles of this viith Section.

XI.

11. *Second Example.* The Temperament which has been juſt now explained in the preceding Article, for regulating theſe ſorts of indefinite Legacies, by ſome Medium between the oppoſite Intereſts of the Executor and Legatary is ſo natural and ſo reaſonable, that it ought to be uſed likewiſe in the Caſe of a Legacy, where the Executor is left at liberty to give out of ſeveral Horſes any one he pleaſes, or to give any one thing he thinks fit out of many of the ſame kind, which may be not only of different Prices, but alſo of different Qualities, good or bad: For this Liberty would not extend ſo far as to give the Executor power to give the worſt of them all; but would leave him only the Right to keep the beſt, and to give out of the middle ſort one which the Legatary could not reaſonably refuſe *m*.

m Si hæres generaliter ſervum quem ipſe voluerit dare juſſus, ſciens furem dederit, iſque furtum legatario fecerit: de dolo malo agi poſſe, ait. Sed quoniam illud verum eſt *hæredem in hoc teneri ut non peſſimum det*, ad hoc tenetur ut alium hominem præſtet, & hunc pro noxæ deditione relinquat. *l.* 100. *ff. de legat.* 1.

XII.

12. *Third Example.* If a Teſtator had bequeath'd a yearly Penſion, or Alimony, to a Legatary, to engage him to remain in company with another Perſon that was dear to the ſaid Teſtator, whether it be that the Legacy was conceived in Terms that impoſed that Condition, or that it was ſaid that the Alimony or Penſion ſhould be paid as long as the Legatary tarried with the ſaid Perſon, and that the ſaid Perſon ſhould happen to die before the Legatary who had lived with him until the time of his Death; the Penſion or Alimony would be continued, unleſs the Expreſſion of the Teſtator ſhewed clearly that it was his Intention that the Penſion or Alimony ſhould ceaſe after the ſaid Death. For beſides the Favourableneſs of a Legacy of this kind, which is regularly underſtood to be during the whole Life, it might be ſaid that this Legatary had performed that which the Teſtator had in his view as the Motive of the Legacy. And it would be juſtly preſumed even of the Legacy of Alimony, to be paid ſo long as the Legatary ſhould live with the ſaid Perſon, that the Intention of the Teſtator was only to oblige the Legatary to continue with him as long as the ſaid Perſon ſhould live *n*.

n Annua his verbis legavit, ſi morentur cum matre mea, quam hæredem ex parte inſtitui. Quæſitum eſt an mortua matre conditio appoſita defeciſſe videatur: ac per hoc neque cibaria, neque veſtiaria his debeantur? Reſpondit, ſecundum ea quæ proponerentur, deberi. *l.* 20. *ff. de ann. leg. & fideicomm.*

Imperator Antoninus Pius, libertis ſextiæ Baſiliæ: quamvis verba teſtamenti ita ſe habeant, *ut quoad cum Claudio Juſto morati eſſetis, alimenta vobis & veſtiarium legatum ſit*: Tamen hanc fuiſſe defuncti cogitationem interpretor, ut & poſt mortem Juſti Claudii, eadem vobis præſtari voluerit, reſpondit. Ejuſmodi ſcripturam ita accipi ut neceſſitas alimentis præſtandis perpetuo maneat. *l.* 13 §. 1. *ff. de alim. vel cib. legat. l.* 1. *C. de legat.* See the xiith Article of the vth Section of Legacies.

XIII.

13. *Fourth Example.* If he who had deviſed a Land makes ſome Addition to it, whether it be that he builds a Houſe upon it, or that he adds to it ſome other Piece of Ground for the uſe of a Service, or ſome other Conveniency, theſe and other ſuch-like Changes which may increaſe either the Value or Extent of the thing deviſed, will not have Effect to revoke the Legacy; but will ſhew on the contrary that the Teſtator had a mind to augment it. Thus the Expreſſion of the Teſtament which did not comprehend this Augmentation that is made afterwards, will be interpreted againſt the Executor. Thus on the contrary, if the Teſtator had diminiſhed the thing deviſed, as if he had alienated a Part of the Land deviſed, or pulled down a Building in whole or in part, the Legacy thereof would be diminiſhed in ſo much *o*.

o Si ex toto fundo legato teſtator partem alienaſſet, reliquam duntaxat partem deberi placet: quia etiam ſi adjeciſſet aliquid ei fundo, augmentum legatario cederet. *l.* 8. *ff. de legat.* 1. *l.* 24. §. 3. & 4. *eod. l.* 10. *ff. de legat* 2. See the xivth Article of the vth Section. See the vth, vith, viith, and viiith Articles of the ivth Section of Legacies.

XIV.

14. *Fifth Example.* If a Teſtator had left a Legacy to a Woman in caſe the firſt Child ſhe ſhould have were a Son, and it happened that ſhe

ſhe had at one Birth a Son and a Daughter, and that by ſome chance it could not be known if the Son had been born before or after the Daughter, it would be preſumed in favour of the Legatary, that the Condition had come to paſs *p*.

p Si ita libertatem acceperit, ancilla, *Si primum marem peperit libera eſto*: Et hæc uno utero marem & fœminam peperiſſet: ſi quidem certum eſt quid prius edidiſſet, non debet de ipſius ſtatu ambigi, utrum libera eſſet necne: ſed nec filiæ, nam ſi poſtea edita eſt, erit ingenua: ſin autem hoc incertum eſt, nec poteſt, nec per ſubtilitatem judicialem manifeſtari, in ambiguis rebus humaniorem ſententiam ſequi oportet, ut tam ipſa libertatem conſequatur, quam filia ejus ingenuitatem, quaſi per præſumptionem priore maſculo edito. *l.* 10. §. 1. *ff. de reb. dub.*

¶ Altho this Text be in the Caſe of a Legacy of Liberty left to a Slave, which made this Diſpoſition favourable; yet it ſeems that the Deciſion ought to be the ſame in any other Legacy that ſhould depend on ſuch a Condition. For it would ſeem, moreover, that in the Caſe of this Text, altho it ſhould be certain that the Son was born the laſt, yet it might be preſumed that the Teſtator not foreſeeing that the Woman ſhould have two Children at one Birth, had meant that if ſhe had a Male Child at her firſt Delivery, the Legacy ſhould be due. And the literal Interpretation which would decide, that the Son being born the laſt, the Condition of the Legacy had not happen'd, would appear a Nicety oppoſite to the Senſe which might be naturally gather'd from the Intention of this Teſtator, who had conſider'd as the firſt Child, not him that ſhould be the firſt of two Children at one and the ſame Birth, but a Male Child that ſhould be born at the Woman's firſt Delivery. This ſeems to be the manner in which Reaſon and Equity would interpret the Intention of the Teſtator in this Doubt, if there ſhould be any. *In re dubia benigniorem Interpretationem ſequi non minus juſtius eſt, quam tutius. l.* 3. *ff. de his quæ in teſt. del.*

XV.

15. *Sixth Example.* When a Teſtator bequeaths to a Servant, or other Perſon, the Sum that ſhall be neceſſary to inſtruct him in a Trade, it does not depend on the Executor to limit the Legacy to the Trade that this Legatary might learn at the cheapeſt rate: But it ought to be underſtood of the Trade that will ſuit beſt with the Quality, the Age, the Inclination, and the Diſpoſition of this Legatary; unleſs it be that theſe Circumſtances ſhould demand a Trade wherein the Apprenticeſhip would be ſo very expenſive, that it might be judged by the Quality of the Teſtator, and Quantity of his Eſtate, that his Intention reſtrain'd the Legacy to an Apprenticeſhip that ſhould coſt leſs *q*.

q Titius liber eſto; & ut eum hæres artificium doceat unde ſe tueri poſſit, peto. Pegaſus inutile fideicommiſſum eſſe ait, quia genus artificii adjectum non eſſet. Sed prætor aut arbiter ex voluntate defuncti, & ætate & conditione, & natura ingenioque ejus, cui relictum erit, ſtatuet quod potiſſimum artificium hæres docere eum ſumptibus ſuis debeat. *l.* 12. *ff. de legat* 3.

XVI.

16. *Example of a Caſe where the Event changes the Diſpoſition of the Teſtator.* We have ſeen in the ixth Article, that it may happen by ſome Chance that it is not poſſible to know the Intention of the Teſtator; and it happens likewiſe by other ſorts of Events, that altho this Intention is perfectly known, and that we diſcover clearly all that the Teſtator had in view, the Event which inſtead of the Caſe which he did foreſee, produces another which his Diſpoſition did not comprehend, requires that it be regulated in a manner different from what the Teſtator had order'd for the Caſe that he did foreſee. But here we ought to take his Intention for our Rule, and to order in the Caſe that has happened what we judge the Teſtator himſelf would have order'd, conſidering his Intention in the Caſe explained in his Teſtament. Thus, for Example, if a Teſtator had order'd, that if at the time of his Death he had one Son, he ſhould be his ſole Heir or Executor, but that if he had two Sons, they ſhould ſhare equally his Succeſſion; that if there were two Daughters, they ſhould likewiſe divide his Inheritance between them in two equal Portions; and that if he had a Son and a Daughter, the Son ſhould have two Thirds of his Eſtate, and the Daughter one Third; and that it happens that this Teſtator leaves behind him two Sons and one Daughter, this unforeſeen Caſe ought to be regulated by the Proportion that the Teſtator had ſettled between the Condition of the Sons and that of the Daughters, in the Caſe where there ſhould be one Son and one Daughter. And ſince his Intention was, that a Son ſhould have twice as much as a Daughter, and that the Condition of the Sons ſhould be equal, we ought to preſume that in the caſe of this Event he would have given according to the ſame Proportion two Fifths to each of his two Sons, and one

Fifth to his Daughter. And it is in this manner that the Succeſſion ought to be divided in this Caſe *r*.

r Clemens Patronus teſtamento caverat, ut *ſi ſibi filius natus ſuiſſet, hæres eſſet : ſi duo filii, ex æquis partibus hæredes eſſent : ſi duæ filiæ, ſimiliter : ſi filius & filia, filio duas partes, filiæ tertiam dederat.* Duobus filiis & filia natis, quærebatur quemadmodum in propoſita ſpecie faciemus, cum filii debeant pares, vel etiam ſinguli duplo plus quam ſoror accipere. Quinque igitur partes fieri oportet, ut ex his binas maſculi, unam fœmina accipiat. *l.* 81. *ff. de hæred. inſt.*

This manner of Interpretation will agree to all the different Combinations of other numbers of Sons and Daughters, which a Teſtator might leave behind him at his Death ; and the Equity thereof is founded on the Proportion which the Teſtator himſelf had regulated. And altho it is not certain to ſuppoſe that a Teſtator will always obſerve the ſame Proportion in all the poſſible Combinations of the number of Sons and Daughters ; and altho he might augment or diminiſh the Portions of the Sons and Daughters upon another foot, according to the Differences of their number, and alter the ſaid Portions, yet we cannot enter into the Conjectures of theſe Changes, becauſe they would have no certain Foundation : So that this Rule will be always juſt in the like Caſes. See the following Article.

XVII.

17. *Another Example of the ſame kind.*

If a Teſtator, not having as yet any Children, had left his Wife big with Child, and had inſtituted her Executrix together with the Child that ſhould be born, giving one Third of his Eſtate to the Mother if it ſhould be a Son, and the Half if it ſhould be a Daughter ; and that the Wife was deliver'd both of a Son and a Daughter, the Son would have one Half, and the Daughter and the Mother would ſhare the other Half between them. And by this means the Intention of this Teſtator would be accompliſhed ; for his Will was that the Son ſhould have the double of what the Mother had, and that the Mother ſhould have as much as the Daughter *s*.

s See the ſame Caſe explained for another uſe in the vth *Article of the* iid *Section of the Rules of Law.*

XVIII.

18. *Another Example of the Interpretation of a Diſpoſition in a Caſe unforeſeen.*

If a Teſtator who had two Sons and a Grand-Daughter by another Son, having ſubſtituted his Sons one to the other, in caſe the firſt who died ſhould have no Iſſue ; and having ſubſtituted his Grand-Daughter to them both, in caſe both the one and the other ſhould die without Children ; it happened that one of the Brothers died, leaving Children behind him, and that the other Brother having outlived his Nephews, died without Children, the Subſtitution of the Grand-Daughter would have its Effect with reſpect to him that died laſt. For altho ſhe was not called to the Subſtitution except in caſe the two Brothers ſhould die without Children, and that this Caſe had not happened ; yet ſeeing in theſe ſorts of Diſpoſitions it is the Intention of the Teſtator which ought to ſerve as the Rule, we ought to preſume that the Teſtator, who had called his Grand-Daughter to the Succeſſion of his two Sons, after him who ſhould die laſt, if they both died without Children, would have much rather directed in the Caſe that has happened, if he had foreſeen it, that ſhe ſhould ſucceed to this Brother who died laſt. And it would be equally unreaſonable and unjuſt, that ſhe who by the Diſpoſition of the Grandfather was to have both the Portions, if her Uncle who died laſt without Children had ſucceeded to the Uncle who died firſt, in caſe he had left no Children, ſhould be deprived of the Portion of her Uncle who died in the laſt Place, to whom ſhe was ſubſtituted, as well as to the other *t*.

t Cum ita fuerat ſcriptum, *Fidei filiorum meorum committo, ut ſi quis eorum ſine liberis prior diem ſuum obierit, partem ſuam ſuperſtiti fratri reſtituat : quod ſi uterque ſine liberis diem ſuum obierit, omnem hæreditatem, ad neptem meam Claudiam pertinere volo.* Defuncto altero ſuperſtite filio, noviſſimo autem ſine liberis, neptis prima quidem facie, propter conditionis verba, non admitti videbatur : ſed cum in fideicommiſſis voluntatem ſpectari conveniat, abſurdum eſſe reſpondi, ceſſante prima ſubſtitutione, partis nepti petitionem denegari, quam totum habere voluit avus, ſi noviſſimus fratris quoque portionem ſuſcepiſſet. *l.* 57. §. 1. *ff. ad Senat. Trebell.*

We have ſet down in the Caſe of this Article, that the Children of the Brother who died firſt, died before their Uncle : For if they had ſurvived their Uncle, it might be ſaid according to the Sentiments of one of the moſt learned Interpreters who has commented on this Text, that it would be very hard they ſhould be excluded from the Succeſſion of their Uncle by a Couſin who wat ſubſtituted to her Uncles, only in caſe both the one and the other ſhould die without Children. V. l. pen. C. de impub. et al. ſubſt.

XIX.

19. *Another Example in an unforeſeen Caſe.*

If a Teſtator had inſtituted for his Heir or Executor, the Child who ſhould be born of his Daughter then big with Child, and that before this Teſtator had made his Will, his Daughter was already brought to bed without his knowing any thing thereof ; they not happening to meet together in the ſame Place ; this Inſtitution of a Child to be born would have its effect for this Child altho already born : For it was the ſame Child on

which this Teſtator had a mind to ſettle his Eſtate *u*.

u Lucius Titius, cum ſuprema ſua ordinaret in civitate, & haberet neptem ex filia prægnantem, rure agentem : ſcripſit, id quod in utero haberet, ex parte hæredem. Quæro, cum ipſa die qua Titius ordinaret teſtamentum in civitate, hora diei ſexta (eodem die) albeſcente cœlo, rure ſit enixa Mævia maſculum, an inſtitutio hæredis valeat, cum, quo tempore ſcriberetur teſtamentum, jam editus eſſet partus. Paulus reſpondit, verba quidem teſtamenti ad eum pronepotem directa videri, qui poſt teſtamentum factum naſceretur : ſed ſi (ut proponitur) eadem die qua teſtamentum factum eſt neptis teſtatoris antequam teſtamentum ſcriberetur, enixa eſſet, licet ignorante teſtatore, tamen inſtitutionem jure factam videri (recte) reſponderi. *l.* 25. §. 1. *ff. de lib. & poſt. hared. inſt.*

This Example appears to be ſuperfluous, for it is not poſſible it ſhould enter into the Mind of any one to doubt of the Deciſion. But ſeeing it is conſonant to the Law, and that it may be of uſe for the Application of this Rule to other Caſes that are leſs evident, we have thought fit to add it to the others.

XX.

20. *Another Example in another Caſe unforeſeen.*

We may add to the Caſe explained in the preceding Article, another like to it, in that the Terms in which the Teſtator expreſſes himſelf do not agree with the Event, but where his Intention does nevertheleſs ſerve as a Rule. It is the Caſe where a Father who had only two Children under Age, had ſubſtituted one of his Relations or Friends to the Child that ſhould die the laſt, not having attained the Age of Puberty, that is fourteen Years compleat in the Male Sex, and twelve in the Female ; which is done by that kind of Subſtitution called Pupillary, which ſhall be treated of in its place *x* ; if it happened in this Caſe that theſe two Children died together, ſo that it could not be known if they died both at the ſame inſtant, or if one of the two had ſurvived the other, this Subſtitution would ſeem to ceaſe, by the Expreſſion which called the Perſon ſubſtituted to ſucceed only to him who ſhould die the laſt, ſince it cannot be ſaid of any one of the two that he died firſt or laſt. But becauſe the Intention of the Teſtator was, that the Survivor of the Brothers ſhould ſucceed to the other, and that the Perſon ſubſtituted ſhould inherit both the Succeſſions, in that which ſhould fall laſt of all ; the Subſtitution to the longeſt Liver includes the Caſe where the two dying together, neither of them outlives the other : For neither of them remains to exclude the Perſon ſubſtituted ; and with regard to him both the one and the other may be conſidered as dead in the firſt Place, and as dead in the laſt Place, ſince neither of them died before the other, nor after the other *y*.

x *See the ſecond Title of the fifth Book.*

y Ex duobus impuberibus ei, qui ſupremus moreretur, hæredem ſubſtituit. Si ſimul morerentur : utrique hæredem eſſe reſpondit : quia ſupremus non is demum, qui poſt aliquem, ſed etiam poſt quem nemo ſit intelligatur. Sicut & e contrario proximus non ſolum is, qui ante aliquem, ſed etiam is, ante quem nemo ſit, intelligitur. *l.* 34. *ff. de vulg. & pup. ſubſt.*

Qui ex liberis meis impubes ſupremus morietur, ei Titius hæres eſto. Duobus peregre defunctis, ſi ſubſtitutus ignoret, uter noviſſimus deceſſerit : admittenda eſt Juliani ſententia, qui propter incertum conditionis, etiam prioris poſſe peti poſſeſſionem bonorum reſpondit. *l.* 11. *ff. de bon. poſſ. ſec. tabul.*

Qui duos impuberes filios habebat : ei, qui ſupremus moritur, Titium ſubſtituit : duo impuberes ſimul in nave perierunt. Quæſitum eſt, an ſubſtituto, & cujus hæreditas deferatur. Dixi : ſi ordine vita deceſſiſſent : priori mortuo frater ab inteſtato hæres erit. Poſteriori ſubſtitutus : in ea tamen hæreditate etiam ante defuncti filii habebit hæreditatem. In propoſita autem quæſtione, ubi ſimul perierunt : quia cum neutri frater ſuperſtes fuit, quaſi utrique ultimi deciſſiſſe (ſibi) videantur? an vero neutri quia comparatio poſterioris decedentis ex facto prioris mortui ſumitur ? Sed ſuperior ſententia magis admittenda eſt, ut utrique hæres ſit. Nam & qui unicum filium habet, ſi ſupremum morienti ſubſtituit, non videtur inutiliter ſubſtituiſſe. Et proximus adgnatus intelligitur etiam, qui ſolus eſt, quique neminem antecedit. Et hic utrique, quia neutri eorum alter ſuperſtes fuit, ultimi primique obierunt. *l.* 9. *ff. de reb. dub.*

XXI.

21. *Another Example.*

If a Teſtator, who had no Child, had inſtituted him that ſhould be born of his Marriage, or had made ſome other Diſpoſition in favour of the ſaid Child ; as if he had added to the ſaid Inſtitution, that if he had ſeveral Children, they ſhould all be his Heirs or Executors, and that the eldeſt ſhould have ſomething over and above his equal Share with the others, which he ſhould explain; and it happened that the Wife of the ſaid Teſtator being dead, without leaving him any Children, he had married another, by whom he had Children ; theſe Bequeſts would have with reſpect to them the Effect which they would have had for the Children of the firſt Marriage, if there had been any. For the Intention of this Teſtator had in view the Children which he might have afterwards *z*.

z Placet, omnem maſculum poſſe poſtumum hæredem ſcribere, ſive jam maritus ſit, ſive nondum uxorem duxerit. Nam & maritus uxorem repudiare poteſt : & qui non duxit uxorem, poſtea maritus effici. Nam & cum maritus poſtumum hæredem ſcribit : non utique is ſolus poſtumus ſcriptus videtur, qui ex ea quam habet uxorem, ei natus eſt, vel is

is qui tunc in utero eſt: verum is quoque, qui ex quacumque uxore naſcatur. Ideoque qui poſtumum hæredem inſtituit, ſi poſt teſtamentum factum mutavit matrimonium: is inſtitutus videtur, qui ex poſteriore matrimonio natus eſt. *l.* 4. ſ 1 & *l.* 5. *ff. de lib. & poſt. hared. inſt.*

¶ We have added to the Caſe explained in this Text, which relates only to the ſimple Inſtitution of the Heir or Executor, the Caſe of ſome Advantage left to the eldeſt Son over and above his equal Share with the other Children. For if there were only a bare Inſtitution of a Child, or of ſeveral Children, it would be the ſame thing for making them ſucceed as Heirs to their Father, whether there were any Teſtament or not. So that what is remarkable in this Text conſiſts in this, To ſhew that the Diſpoſition of the Father, of which it might be doubted whether, the ſame being made with a View to Children of a firſt Marriage, it ſhould have its Effect with regard to thoſe of a ſecond, ought to be executed in favour of the Children of this ſecond Marriage, as it would have been for thoſe of the firſt Marriage, if there had been any Iſſue by it. And as to the Liberty of inſtituting a poſthumous Child, which ſeems to be the principal Subject of this Text, we have inſerted nothing thereof in this Article; becauſe we have ſpoke of it in its proper Place in the twenty ſecond Article of the ſecond Section of Teſtaments, and in the thirteenth Article of the ſecond Section of Heirs and Executors in general.

XXII.

22. *The Validity of a Bequeſt is independent of the Motive explained by the Teſtator.*

When a Teſtator has fully explained himſelf, either as to the Inſtitution of the Executor, or Deviſe of a Legacy, and that he adds thereto ſome Motive of his Diſpoſition, the ſaid Diſpoſition will nevertheleſs have its Effect, altho it ſhould be found that the Fact explained by the Teſtator as his Motive were not true. Thus, for Example, if the Teſtator had ſaid, I give to ſuch a one, becauſe he has done me ſuch a piece of Service; altho this Service had not been done, yet the Will of the Teſtator, which would be ſufficient alone, altho he ſhould give no Reaſon for it, would make this Bequeſt valid; and the Motive that is added thereto, marks only either that the Teſtator has been deceived, or that he had a mind to make his Bequeſt more favourable. But if he had explained his Motive in ſuch a manner, that it appeared that his Intention was to make it a Condition on which the Effect of his Bequeſt ſhould depend; as if he had ſaid, My Will is that there be paid to ſuch a one the Sum of ſo much, in caſe it ſhall appear that he has done ſuch a Buſineſs, or on Condition that he do it; theſe Bequeſts, and others of the like kind, would be conditional, and would depend on the Execution of that which the Teſtator had explained *a*.

a Quod juris eſt in falſa demonſtratione, hoc vel magis eſt in falſa cauſa. Veluti ita. *Titio fundum do, quia negotia mea curavit.* Item *fundum Titius filius meus præcipito, quia frater ejus (ipſe) ex arca tot aureos ſumpſit.* Licet enim frater hujus pecuniam ex arca non ſumpſit, utile legatum. *l.* 17. §. 2. *ff. de condit. & demonſt.*

Falſam cauſam legato non obeſſe, verius eſt: quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, ſi probetur alias legaturus non fuiſſe. *l.* 72. §. 6. *eod.*

At ſi conditionaliter concepta ſit cauſa, veluti hoc modo: *Titio, ſi negotia mea curavit, fundum do: Titius filius meus, ſi frater ejus centum ex arca ſumpſit, fundum præcipito:* Ita utile erit legatum, ſi & ille negotia curavit, & hujus frater centum ex arca ſumpſit. *d. l.* 17. §. 3. See the tenth and eleventh Articles of the eighth Section.

XXIII.

23. *Diſpoſitions of Teſtators which are not to be executed.*

Sometimes it is neceſſary not to follow the Diſpoſitions of the Teſtator, altho he has clearly enough explained his Intention; whether it be that there was ground to preſume that he was ignorant of ſome Fact, the Knowledge of which would have obliged him to make another Diſpoſition, or becauſe what he had ordered was really unjuſt or unreaſonable. Thus, for Example, if the Teſtator had named one to be Tutor to his Children, or to have the Care of their Education, whom the Relations and the Judge knew to be ſo unfit for it, that this Choice ought not to be confirmed; or if a Teſtator had directed extravagant Expences for his Burying, or if he had made any Diſpoſitions contrary to good Manners, or even to good Senſe, by ſome Folly; all ſuch ſorts of Diſpoſitions would not be executed. And a proper Proviſion would be made for the Guardianſhip of the Children, the Funeral Expences, or other Things neceſſary to be regulated, either by the Teſtator's Relations, or the Judge, according to the Quality and Circumſtances of the Fact *b*.

b Utilitatem pupillorum prætor ſequitur, non ſcripturam teſtamenti, vel codicillorum. Nam patris voluntatem prætor ita accipere debet, ſi non fuit ignarus ſcilicet eorum, quæ ipſe prætor de tutore comperto habet. *l.* 10. *ff. de confirm. tut.*

Nec tamen ſemper voluntas aut juſſum (teſtatoris) conſervari debet: veluti, ſi prætor doctus ſit, non expedire pupillum eo morari, ubi pater juſſerit, prop-

ter vitium, quod pater forte ignoravit in eis perſonis eſſe, apud quas morari juſſit. Si autem pro cibariis eorum in annos ſingulos aurei decem relicti ſunt, ſive hoc ſermone ſignificantur, apud quos morari mater pupillos voluerit; ſive ita acceperimus hunc ſermonem, ut ipſis filiis id legatum debeatur, utile erit. Et magis enim eſt ut providentia filiorum ſuorum hoc feciſſe videatur. Et in omnibus ubi auctoritas ſola teſtatoris eſt, neque omnimodo ſpernenda, neque omnimodo obſervanda eſt: ſed interventu judicis hæc omnia debent, ſi non ad turpem cauſam feruntur, ad effectum perduci. *l.* 7. *in f. ff. de ann. legat. & fid.*

Quid ergo ſi ex voluntate teſtatoris impenſum eſt? ſciendum eſt nec voluntatem ſequendam, ſi res egrediatur juſtam ſumptus rationem. Pro modo autem facultatum ſumptum fieri. *l.* 14. §. 6. *in f. ff. de relig.*

Ineptas voluntates defunctorum circa ſepulturam, veluti veſtes aut ſi qua alia ſupervacua ut in funus impendantur, non valere Papinianus ſcribit. *l.* 113. §. *ult. ff. de legat.*

XXIV.

24. *In what Senſe Teſtators may, or may not, derogate from the Laws.*

The Rules which declare that Teſtators cannot, by any Clauſe in their Teſtaments, exempt their Diſpoſitions from being ſubject to the Law, nor order any thing therein contrary to Law *c*, ought to be underſtood only of Diſpoſitions which ſome Law had rendered illegal, and which ſhould be contrary to the Spirit of the Law. Thus, for example, it would be to no purpoſe for a Teſtator to ordain that his Teſtament ſhould not be null, altho he had called only three Witneſſes to atteſt it. Thus, it would ſignify nothing to impoſe either upon his Executor, or a Legatary, a Condition which the Law would not allow him to perform; as, if he ſhould bequeath any thing to an Infant, on condition that he ſhould marry before he were fourteen Years of Age. Thus, a Teſtator cannot forbid his Heir or Executor to take that Quality upon him with the Benefit of an Inventary. For all theſe Diſpoſitions would be directly contrary both to the Letter and Spirit of the Law, and of no other Uſe but to gratify a fantaſtick Humour. But if a Diſpoſition of a Teſtator ſhould derogate from the Proviſion of any Law only in a Caſe where the Spirit of the Law would not be tranſgreſſed, and upon a Motive which the Laws would not diſapprove of, ſuch ſorts of Diſpoſitions would have nothing in them contrary to Law, and therefore would ſubſiſt. Thus, for example, altho the Laws ordain that the Father ſhall have the Uſufruct of the Goods acquired by his Son that is not emancipated, yet they permit a Teſtator, who has a mind to leave a Legacy to a Son that is under his Father's Power, to deprive the Father of the Legatary of his Right to the Uſufruct of the Thing bequeathed *d*. Thus, altho the Law does not allow Minors to oblige themſelves, nor alienate their Goods during their Minority, yet if a Teſtator had left to a Minor either a Sum of Money, or other Thing, on condition that he ſhould become bound to one of the Creditors of this Teſtator, or that he ſhould ſell one of his Lands or Tenements for a certain Price to a Perſon named in the Teſtament; theſe Conditions would have their Effect, and the Infant-Legatary, who ſhould accept of this Legacy, would be bound to perform them, without being able to free himſelf from them under pretext of his Minority, except by renouncing the Legacy, in caſe the ſaid Conditions ſhould make it diſadvantageous. Thus in general, in all the Caſes where the Point in queſtion is to know whether the Clauſe of a Teſtament which ſeems oppoſite to ſome Law, or to derogate from it, ought to ſubſiſt, we ought to judge thereof by the Spirit of the ſaid Rule, by diſtinguiſhing that which of it ſelf is illegal, or contrary to the Proviſion of ſome Law, underſtood according to its Intention, according to its Spirit, and according to its Motive, from that which may have its Effect without tranſgreſſing the Spirit of the Law, altho it may be in Appearance contrary to the Terms thereof.

c Nemo poteſt in teſtamento ſuo cavere, ne leges in ſuo teſtamento locum habeant. *l.* 55. *ff. de legat.* 1.

d Hoc itaque non ſolum parentibus, ſed etiam omni perſonæ licere præcipimus, donare, aut etiam per ultimam relinquere voluntatem, ſub hac definitione atque conditione ſi voluerint, ut pater aut qui omnino eos (quibus donatur vel relinquitur) habent in poteſtate, in his rebus neque uſumfructum, neque quodlibet penitus habeant participium. *Nov.* 117. *c.* 1.

XXV.

25. *Two different Teſtaments that ſubſiſt.*

If there ſhould be found two different Teſtaments of one and the ſame Perſon, of the ſame Date, and both in due Form, and that in the one the Teſtator had named other Executors than thoſe named in the other; theſe two Teſtaments would only make one which ſhould ſubſiſt; and all theſe ſeveral Executors would divide the Succeſſion among them. For theſe Teſtaments being made at the ſame time, neither of the two would be revoked by the other. And it would be preſumed either that the Teſtator had a mind to keep ſecret the Diſpoſitions of one of theſe Teſtaments,

ments, ſhewing only the other, or that ſome other Motive had engaged him to divide them *e*.

e Sed etſi in duobus codicibus ſimul ſignatis alios atque alios hæredes ſcripſerit, & utrumque extet: ex utroque quaſi ex uno competit bonorum poſſeſſio, quia pro unis tabulis habendum eſt, & ſupremum utrumque accipiemus. *l.* 1. §. 6. *ff. de bonor. poſſ. ſec. tab.*

XXVI.

26. Divers Views for the Interpretation of Teſtaments.

It follows from the Rules explained in this and the foregoing Section, that the Doubts which may ariſe in Teſtaments, are decided differently, according to the different Cauſes from whence they may proceed; according to the different Preſumptions whereby we may judge of the Intention of the Teſtator, either by diſcovering what he had in his view, or even ſupplying that in the Caſes where any of the Rules that have been juſt now explained may oblige us to do it; according as the Diſpoſitions of the Teſtaments are conformable to the Laws, or are contrary thereto; and according to the other Views that the ſeveral Rules may give, and the Circumſtances demand. Thus, ſometimes it is neceſſary to obſerve literally the Terms of the Expreſſions; and ſometimes they ought to be interpreted either by a Temperament of Equity when they will admit thereof, and when it is neceſſary *f*; or by the Conſideration of one of the Perſons intereſted, if the Caſe is ſuch, that this Conſideration ought to be of any weight *g*. Thus, when the Difficulty ariſes from the very Words of the Teſtator, it ought to be reſolved by the Rules explained in the foregoing Section. And if it proceeds from any where elſe beſides the Teſtament, and that ſome unforeſeen Accident has given occaſion to it, it ought to be decided in the manner that Equity tells us the Teſtator himſelf would have decided it *h*, purſuant to the Rules which have been juſt now explained. And in general, it is the Duty of the Judge, and his Wiſdom will direct him, to apply in every Caſe the Rules that are moſt ſuitable to it *i*.

f In re dubia benigniorem interpretationem ſequi non minus juſtius eſt quam tutius. *l.* 3. *ff. de his quæ in teſtam. delent.*

In ambiguis rebus humaniorem ſententiam ſequi oportet. *l.* 10. *in f. ff. de reb. dub.*

g See the ſecond Article, and thoſe which follow.

h In his quæ extra teſtamentum occurrerent, poſſunt res ex bono & æquo interpretationem capere. Ea vero quæ ex ipſo teſtamento orirentur, neceſſe eſt ſecundum ſcripti juris rationem expediri. *l.* 16. *ff. de condit. & demonſtr.*

i Voluntatis defuncti quæſtio in æſtimatione judicis eſt. *l.* 7. *C. de fideic.*

See the laſt Article of the preceding Section.

SECT. VIII.

Of the Conditions, Charges, Deſtinations, Motives, Deſcriptions, and Terms of Time, which Teſtators may add to their Diſpoſitions.

SINCE the Diſpoſitions of Teſtators ought to be proportioned to their Intentions, which they ought to explain, and the ſaid Intentions are diverſified according to the different Views which they may have from the Conjunctures in which they happen to be, and the different Regards which they ought to have to the Circumſtances which they are to conſider, and to the Events which they are to foreſee; this Diverſity obliges them to take different Precautions for the Execution of their Wills. And it is this that has naturally given Riſe to the Uſe of Conditions, Charges, and other Additions to Bequeſts in Teſtaments, which ſhall be the Subject-matter of this Section. Thus, the Rules which are here explained, as well as thoſe of the foregoing Sections, relate to all ſorts of Diſpoſitions in proſpect of Death, Inſtitutions of Executors, Subſtitutions, Legacies, and others, according as each Rule may be applied either to all theſe ſorts of Diſpoſitions, or to ſome of them.

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I.

1. *Definition of Conditions in Teſtaments.*

Conditions in Teſtaments are particular Diſpoſitions, which are part of the other Diſpoſitions of the Teſtator, and which he adds to them, in order to regulate the Effect which he is willing they ſhould have, if a Caſe which he foreſees does or does not happen; whether it be that he makes the Validity of what he orders in this Manner to depend on this Event, or that he is only willing to make ſome Change therein, according to the Caſe that ſhall happen. Thus, for example, a Teſtator may bequeath a Marriage-Portion to his Daughter in Caſe ſhe marries, and this Legacy will depend on the Event of her Marriage, and will not have its Effect till ſhe does marry. Thus, a Teſtator may deviſe a Land or Tenement on condition, that if the Legatary leaves Children behind him, he ſhall have the Property thereof, and tranſmit it to them; and that if he has no Children, he ſhall only have the bare Uſufruct of it; and that after his Death the Property ſhall go to another: Which will make this Legacy to have different Effects, according as it happens that the Legatary has Children, or has none *a*.

a Si navis ex Aſia venerit: ſi decem dederit: ſi capitolium aſcenderit. *l.* 2. *ff. de condit. & dem.*

See what has been ſaid of Conditions in Covenants, in the fourth Section of Covenants.

II.

2. *Definition of Charges.*

Charges are Engagements which the Teſtator impoſes on his Executor, or other Perſon to whom he leaves any thing by his Will; as if he charges his Executor, or a Legatary, with the Uſufruct of ſome Land or Tenement, with a Service, with

with an Annuity, in favour of a third Perſon *b*.

b Damnas eſto hæres Titium ſinere in illa domo habitare, quoad vivet. *l.* 15. *ff. de uſu. & uſufr. leg.* Uti dent Gaio Seio ſororis meæ filio in honorem Conſulatus quadraginta. *l.* 36. *ff. de condit. & dem.*

III.

3. *Definition of Deſtinations.* Deſtinations are Directions given by the Teſtator, whereby he appropriates to certain Uſes the things which he bequeaths. Thus, for inſtance, if a Teſtator leaves a Sum of Money to an Hoſpital, to be laid out on a Building, or on Moveables, or ſome other thing, this is a Deſtination which he makes of this Legacy *c*.

c Quod ſi cui in hoc legatum ſit, ut ex eo aliquid faceret, veluti monumentum teſtatori, vel opus, aut epulum municipibus, ſub modo legatum videtur. *l.* 17. §. *ult. ff. de condit. & dem.*

IV.

4. *Definition of Motives.* Motives are the Cauſes which Teſtators ſometimes expreſs as the Reaſon that has induced them to make certain Bequeſts; and they are of two kinds. One is of the Motives which relate to the time paſt, and which precede the Diſpoſition of the Teſtator: And the other is of the Motives which regard a Fact that is to come, the Hopes and Expectation of which engages the Teſtator to make ſome Diſpoſition. Thus, for the time paſt, the Conſiderations of Affection, Eſteem, and Gratitude for good Offices and Services done, are Motives which engage one to name an Executor, or to leave a Legacy *d*. Thus, for the time to come, the Hopes or Expectation that a Relation and Friend of the Teſtator's will be willing to take upon him the Guardianſhip of his Children, is a Motive which engages the Teſtator to leave him a Legacy. And theſe Motives, whether for the time paſt, or the time to come, may make the Diſpoſitions conditional, or may not have that effect, according as the Teſtator ſhall have declared his Intention; as ſhall be explained hereafter *e*.

d Titio, quia me abſente negotia mea curavit, Stichum do, lego. §. 31. *Inſt. de leg.*

e *See the tenth Article.*

V.

5. *Definition of Deſcription.* Deſcription is an Expreſſion which the Teſtator makes uſe of inſtead of the Name of the Perſon, or Thing, which he means, or which he adds to ſpecify it more expreſly, and to diſtinguiſh it. As if inſtead of naming an Executor, or a Legatary, he deſcribes him by his Quality; if he gives to the eldeſt Son of ſuch a one; if having deviſed an Eſtate, he adds its Situation and its Bounds; if having bequeathed a Picture of ſuch a Hiſtory, he adds the Name of the Painter, or mentions from whom he had the Picture *f*.

f Demonſtratio plerumque vice nominis ſungitur. *l.* 34. *ff. de cond. & dem.*

Servum Stichum, quem de Titio emi, fundum Tuſculanum, qui mihi a Seio donatus eſt. *l.* 17. *ff. de condit. & dem.* See the eleventh Article.

VI.

6. *Definition of the Terms of Time.* The Terms of Time are the Delays which the Teſtator adds to his Diſpoſitions, whether it be to defer the Execution of them, or to make their Validity to depend thereon, as ſhall be explained in the twelfth Article. And theſe Terms or Delays are of two ſorts: One is of a certain Time, as to the firſt Day of ſuch a Year, or within ſo many Years to be reckoned from ſuch a Day *g*: The other of an uncertain Time, as at the Time of the Death of ſome Perſon, or at the Time of his Marriage *h*.

g Annua bina trina die dato. *l.* 30. *ff. de legat.* 1.

h Dies autem incertus eſt, cum ita ſcribitur: hæres meus cum morietur, decem dato. *l.* 1. §. 2. *ff. de cond. & dem.* See the twelfth and thirteenth Articles

VII.

7. *The Charges, Deſtinations, and Conditions are often confounded together.* Altho the Conditions, the Charges, and Deſtinations are diſtinguiſhed in the manner that has been juſt now explained, yet as the Word Condition is commonly uſed in our Language, it comprehends often the Charges and Deſtinations; and the Word Charge takes in likewiſe the Conditions. Thus, it is ſaid of a Legacy or Deviſe, that charges the Deviſee of a Land or Tenement with a Service, that this Deviſe is left on condition that the ſaid Deviſee ſhould ſuffer ſuch a Service: Thus it is ſaid of the Legacy of a Sum of Money deſtin'd for a Building, that the ſaid Legacy is left on condition that the Legatary ſhould build. Thus we ſay of a Legacy left on condition that the Legatary ſhould reſtore to the Executor a certain Writing, a Moveable, or other thing, that this Legacy is left with the Charge of reſtoring the ſaid Writing or Moveable. And in fine it is ſaid of a Legacy deſtined for ſome Purchaſe, or for ſome Work,

Work, that it is left with this Charge, or upon this Condition, that the ſaid Purchaſe or Work be made or done by him who is charged with it. But we muſt take care with reſpect to this Uſage which confounds theſe Words in one and the ſame Senſe, that we do not for all that, confound Charges, Deſtinations and Conditions together: For altho they have often the ſame effect, yet their Natures are different; which it is neceſſary to diſtinguiſh for the right uſe of the Rules *i*, as will appear by the following Articles.

i See the following Articles. The Uſage of theſe Words, Charges and Conditions, are commonly confounded in our Language.

VIII.

8. The Charges may be conceiv'd either as Conditions, or ſimply as Charges.

The Charges may be conceived two ways: One, in ſuch a manner that they may make in reality Conditions on which the Effect of the Teſtator's Diſpoſitions may depend; and the other, ſo as not to have the uſe of Conditions. Thus, for Example, if a Teſtator bequeaths to a Creditor of one of his Friend a Sum of Money, or ſome other thing, with Charge to the ſaid Legatary to reſtore to the ſaid Friend the Bond or Obligation of what he owes him, or with Charge to deſiſt from a Law-Suit which he has commenced againſt him; theſe Charges make the ſaid Legacy conditional, and are in effect Conditions, without the Performance of which the Legatary ſhall have no part of the Legacy. But if a Teſtator deviſes an Eſtate of a thouſand Livres yearly Income, with the Charge of paying out of it every Year a Rent of two hundred Livres for a Foundation; this Charge will not be a Condition upon which the Effect of the ſaid Deviſe will depend, but will only give to thoſe to whom this Rent ought to be paid, a Right to diſtrain the Fruits of the ſaid Eſtate, and the other Goods of the Legatary, if having accepted the Legacy, he does not acquit the Charge *l*.

l This is a Conſequence of the preceding Articles.

IX.

9. The Deſtinations may, or may not, have the Effect of Conditions.

The Deſtinations as well as the Charges, may be conceived either in Terms which make them to be a Condition, or to have the Effect thereof; or in other Terms, and without this Effect. Thus, for inſtance, if a Teſtator charges his Executors to give a Sum of Money to a young Woman when ſhe marries, to be to her inſtead of a Marriage Portion, this Deſtination will have the Effect of a Condition; and if this young Woman does not marry, or if ſhe dies before ſhe is of Age to marry, this Legacy will be null *m*. Thus on the contrary, if a Teſtator leaves a Sum of Money to an Hoſpital, to be laid out there on ſome Edifice; altho this Edifice ſhould happen to be built by ſome other means, or ſhould not be neceſſary to the ſaid Hoſpital, yet this Deſtination would be no Obſtacle why the Sum ſhould not be due, that it may be laid out upon ſome other Work, of an equal or greater Advantage for the ſaid Houſe: For the Intention of the Teſtator was not, that this Deſtination ſhould have the Effect to make the Legacy conditional *n*.

m In legatis & fideicommiſſis etiam modus adſcriptus pro conditione obſervatur. *l.* 1. *C. de his quæ ſub. mod.*

n Pecuniam eo legatam, in id quod maxime neceſſarium videretur, conferre permittitur. *l.* 4. *ff. de adm. rer. ad civit. pert.*

X.

10. The Motives may either be inſtead of Conditions, or not have the Effect thereof.

The Motives, as well as the Charges and Deſtinations, may be conceived either in Terms which make them to have the Effect of a Condition, or in ſuch Terms that make them not to be conſider'd as a Condition; whether it be that the ſaid Motives reſpect the time paſt, or the time to come. Thus, for Example, for the time paſt, if a Teſtator bequeaths a Sum of Money to one of his Friends, becauſe he has taken care of his Affairs, this Legacy will not be conditional: And altho this Legatary may not have taken this Care, yet the Legacy will nevertheleſs be due *o*, according to the Rule explained in the xxiid Article of the viith Section. But if the Teſtator has explained this Motive in the Terms of a Condition, the Legacy will not be due unleſs it appear that the Legatary has ſatisfied it; as if the Teſtator had ſaid, I bequeath to ſuch a one, if it ſhall appear that he has done ſuch a Buſineſs *p*. And it is by the Expreſſion of the Teſtator, and by the Circumſtances,

o Falſa cauſa adjecta non nocet: veluti cum quis ita dixerit, *Titio quia me abſente negotia mea curavit, Stichum do, lego:* vel ita, *Titio quia patrocinio ejus capitali crimine liberatus ſum do, lego.* Licet enim neque negotia teſtatoris unquam geſſerit Titius, neque patrocinio ejus liberatus ſit, legatum tamen valet. §. 31. *inſt. de legat.*

p Sed ſi conditionaliter enuntiata fuerit cauſa, aliud juris eſt. Veluti, hoc modo, *Titio ſi negotia mea curavit, fundum meum do, lego.* d. §. 31. in f. l. 17. §. 3. ff. de cond. & dem.

that

that we are to judge whether theſe ſorts of Legacies are pure and ſimple, or whether they are conditional *q*. Thus with reſpect to the time to come, if a Teſtator bequeaths to one of his Relations, or Friends, a Sum of Money to be paid after his Death, adding to the Legacy, that he hopes the Legatary will aſſiſt the Teſtator's Children with his Counſel and good Offices when there ſhall be occaſion; this Motive will oblige the Legatary only in point of Honour, and this Legacy, which is payable before the ſaid good Offices, will not be revoked, altho they are not performed. But if a Teſtator leaves a Sum of Money to an Attorney or Sollicitor, that he may take care of inſtructing and ſolliciting a Law-Suit, that is either already commenced or to be commenced, this Motive will be inſtead of a Condition; and this Legatary will not be entitled to the Legacy, unleſs he perform the Condition according to the Will of the Teſtator, and the State of things. Thus, for another Example, if a Teſtator leaves a Sum of Money to one of his Relations or Friends, to engage him to accept the Guardianſhip of his Children, and the Legatary refuſes it, he ſhall have no right to the Legacy *r*.

q Falſam cauſam legato non obeſſe verius eſt. Quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, ſi probatur aliàs legaturus non fuiſſe. *l.* 72. §. 6. *ff. de condit. & dem.*

r Etiam ſi partis bonorum ſe excuſaverit tutor, (puta Italicarum vel Provincialium rerum) totum quod teſtamento datum eſt ei auferetur. *l.* 111. *ff. de legat.* 1.

XI.

11. *The Deſcriptions may ſometimes imply a Condition.*

Deſcriptions do not uſually imply a Condition, but are diſtinguiſhed from Conditions in this, that they for the moſt part have regard to the paſt and preſent time, whereas the greateſt part of Conditions reſpect the time to come *s*. But there may be Deſcriptions conceived in Terms which give them the Nature of Conditions. Thus there is no Condition, when a Teſtator, the better to deſcribe a Land or Tenement that is deviſed, and ſufficiently ſpecified, adds that it is the Land or Tenement which he purchaſed of ſuch a one, or that ſuch a one gave him; and this Legacy is independent of the Truth of this Deſcription, ſo that altho it were falſe, yet the Legacy would nevertheleſs have its effect: For the Teſtator may have been deceived as to theſe Circumſtances; and it is ſufficient that what he had a mind to give is well enough known otherwiſe *t*. Thus on the contrary, if a Teſtator had bequeathed that which was due to him by a Debtor whom he named, this Legacy would imply the Condition that there was a Debt owing, and if nothing was due, the Legacy would be null. Thus, in like manner, if a Teſtator had bequeathed the Fruits that ſhould be gather'd in ſuch a Ground the Year of his Death, this Deſcription would imply the Condition that there ſhould be ſome Crop, and if there were none, the Legacy would be without any effect *u*. But if the Teſtator having bequeathed a Sum of Money, ſhould add afterwards that the ſaid Sum ſhould be paid to the Legatary out of the Produce of ſuch a Crop, or out of the Moneys which ſhould be found in ſuch a Place; theſe Deſcriptions being added only to ſhew his Heirs or Executors whence they might eaſily pay the ſaid Legacy, would not make it conditional, unleſs they were expreſſed in ſuch Terms as might make one judge that the Teſtator had a mind to bequeath only what could be made of ſuch a Crop, or other thing, which he had thus ſpecified *x*.

s Inter demonſtrationem & conditionem hoc intereſt, quod demonſtratio plerumque factam rem oſtendit, conditio futuram. *l.* 34. §. 1. *ff. de condit. & dem.*

t Demonſtratio plerumque vice nominis fungitur, nec intereſt falſa an vera ſit, ſi certum ſit quem teſtator demonſtraverit. *d. l.* 34. *ff. de condit. & dem.*

Demonſtratio falſa eſt, veluti ſi ita ſcriptum ſit: *Servum Stichum quem de Titio emi: fundum Tuſculanum qui mihi a Seio donatus eſt.* Nam ſi conſtat de quo homine, de quo fundo ſenſerit teſtator, ſi ad rem non pertinet, is quem emiſſe ſignificavit, donatus eſſet: aut, quem donatum ſibi eſſe ſignificaverat, emerit. *l.* 17. *eod.*

u Si mihi, *quod Titius debet*, fuerit legatum, neque Titius debeat, ſciendum eſt nullum eſſe legatum. *l.* 75. §. 1. *de leg.* 1. Ineſt conditio legati veluti cum ita legamus, fructus qui ex fundo percepti fuerint hæres dato. *l.* 1. §. *ult. ff. de condit. & dem.*

x Quidam teſtamento, vel codicillis, ita legavit, *aureos quadringentos Pamphilæ dari volo ita, ut infra ſcriptum eſt: ab Julio auctore aureos tot, & in caſtris quos habet, tot, & in numerato quos habeo, tot.* Poſt multos annos eadem voluntate manente, deceſſit: cum omnes ſummæ in alios uſus eſſent tranſlatæ. Quæro an debeatur fideicommiſſum? Reſpondi, veriſimilius eſt, patrem familias demonſtrare potius hæredibus voluiſſe, unde aureos quadringentos ſine incommodo rei familiaris contrahere poſſint, quam conditionem fideicommiſſo injeciſſe, quod initio pure datum eſſet: & ideo quadringenti Pamphilæ debebuntur. *l.* 96. *ff. de leg.* 1.

Firmio Heliodoro fratri meo dari volo quinquaginta ex reditu prædiorum meorum futuri anni. Poſtea non videri conditionem additam, ſed tempus ſolvendæ pecuniæ prolatum videri reſpondit: fructibus fini relictæ pecuniæ non perceptis, ubertatem

tem esse necessariam anni secundi. *l.* 26. *ff. quand. dies leg. ced.*

XII.

12. *The Term of an uncertain time makes the Legacy conditional.*

The Terms of Legacies fixed to a certain Day, such as the first Day of such a Year, or within such a time, do not make a Condition on which the Legacy may depend; and the effect of these Terms is only to defer the Delivery of the Legacy, the Right of which is already acquired to the Legatary, and which, were it not for the Term, would be due instantly *y*; but the Term of an uncertain Day implies a Condition on which the Legacy depends. *Example.* Thus, for example, if a Testator bequeaths any thing to an Infant when he shall have attain'd the Age of fourteen or one and twenty Years compleat, to a Friend when he shall purchase such an Office, to a young Woman when she shall be married; these Legacies imply the Condition that the said time shall happen, that the Legatary shall be of Age, that he shall purchase such an Office, that the young Woman shall be married; and this Condition is the same as if the Testator had left the Legacy in case the Legatary should live to that Term, and that if he died before, the Legacy should be null *z*. Thus we must not confound the Legacies which are made payable at an uncertain time, with the Legacies payable at a certain Term.

y Si dies apposita legato non est, præsens debetur, aut confestim ad eum pertinet, cui datum est. Adjecta, quamvis longa sit, si certa est, veluti *Kalendis Januariis centesimis*, dies quidem statim cedit, sed ante diem peti non potest. *l.* 21. *ff. quand. dies leg. vel fid. ced.*

z Dies incertus conditionem in testamento facit *l.* 75. *de cond. & dem.*

Si incerta (dies) (quasi *cum pubes erit, cum in familia nupserit, cum magistratum inierit, cum aliquid demum*, quod scribendo comprehendere sit commodum, *fecerit*) nisi tempus conditione obtigit, neque res pertinere, neque dies legati cedere potest. *l.* 21. *ff. quand. dies legat. ced.*

Si Titio *cum is annorum quatuordecim esset factus*, legatum fuerit, & is ante quartumdecimum annum decesserit, verum est ad hæredem ejus legatum non transire: quoniam non solum diem, sed etiam conditionem hoc legatum in se continet, si effectus esset annorum quatuordecim. *l.* 22. *eod. v. l. un.* §. 7. *C. de caduc. toll.* See the following Article, with the Remark on it; and the sixteenth Article of the ninth Section of Legacies. See, touching Legacies at the Age of fourteen Years, the same sixteenth Article of the ninth Section of Legacies, and the Remark that is there made on it.

XIII.

13. *Another Example.*

The Uncertainty of the times on which depend the Legacies explained in the foregoing Article consists in this, that it is uncertain if those times will ever happen; for it may not happen that the Legatary lives to be of Age, or that he has such an Office, or that a young Woman marries. But there are times uncertain in another manner, altho it be certain that they will happen, and which do nevertheless make the Disposition of the Testator to be conditional; as, for instance, if he charges his Heir or Executor to restore at his Death either the whole Inheritance, or a certain Land or Tenement to another Person: For in this case, altho it is certain that the Time of the Death of this Heir or Executor will happen; yet since it is uncertain, if, when it does happen, the Person in whose favour the said Disposition is made, is not dead, this Uncertainty renders the Disposition conditional, and implies the Condition that this Person do survive the said Heir or Executor *a*.

a Hæres meus cum ipse morietur centum Titio dato. Legatum sub conditione relictum est: quamvis enim hæredem moriturum certum sit, tamen incertum est an legatario vivo dies legati non cedat: & non est certum ad eum legatum perventurum. *l.* 79. §. 1. *ff. de condit. & dem.*

Dies autem incertus est cum ita scribitur, *Hæres meus cum morietur decem dato.* Nam diem incertum mors habet ejus. Et ideo si legatarius ante decesserit, ad hæredem ejus legatum non transit: quia non cessit dies vivo eo, quamvis certum fuerit moriturum hæredem. *l.* 1. §. 2. *ff. de cond. & dem.*

Si, *cum hæres morietur*, legetur, conditionale legatum est. Denique vivo hærede defunctus legatarius ad hæredem non transfert. Si vero, *cum ipse legatarius morietur*, legetur ei, certum est legatum ad hæredem transmitti. *l.* 4. *ff. quando dies legat. vel fideic. ced.* See the seventeenth Article of the ninth Section of Legacies.

¶ We have not put down in the Article what is said in the last of these Texts, that the Legacy due at the time of the Legatary's death is not conditional, and that he transmits it to his Heir or Executor. For it does not seem probable, that it will ever come into any one's mind to leave a Legacy so useless to the Legatary, and of which no one could have any Benefit, except the Legatary's Heir or Executor, who perhaps might be no Relation to the Testator, nor so much as known to him. And if the Testator had had a mind to leave only to the Children of this Legatary, and after his Death, he would have expressed himself in another manner. But altho this Case should never happen, yet we make this Remark here on occasion of this Text, that we may add at the same time the Reason why the Uncertainty of the time of the Legatary's Death does not make the Legacy conditional, as the Uncertainty of the time of the Executor's Death does.

Which

Which proceeds from this, That in the Caſe of a Legacy due at the time of the Executor's Death, it may happen that the Legatary may die before him, in which Caſe there will be neither Legacy nor Legatary; whereas, in the Caſe of a Legacy due at the time of the Legatary's Death, it cannot happen that the Legatary ſhould die before the Time in which the Legacy ought to begin to have its Effect, which is the Time in which he dies. Thus it will be in the laſt Moment that he paſſes from Life to Death that this Legacy will have its Effect, to paſs from the Legatary to his Heir or Executor.

XIV.

14. *It is neceſſary to diſtinguiſh the different ſorts of Diſpoſitions, to be able to judge aright of them.*

It follows from theſe different Manners in which Teſtators may diverſify their Diſpoſitions, that in all the Caſes where the Queſtion is to interpret any one of them, it is neceſſary to examine its Nature, to know whether it is pure and ſimple, or conditional, and whether it contains any of the other Characters which have been juſt now mentioned, in order to diſcover by the ſaid Characters, and by the Expreſſions of the Teſtator, what may have been his Intention, and how his Diſpoſition ought to be executed *b*. Which depends on the preceding Rules, and thoſe that follow, and which relate chiefly to Conditions.

b This is a Conſequence of the preceding Rules. See the Articles which follow.

XV.

15. *Three ſorts of Conditions with reſpect to the divers ſorts of Facts or Events on which they depend.*

Conditions are of ſeveral ſorts, and may be diſtingniſh'd into different Claſſes, according to the different Views under which they are conſidered. If we conſider them with reſpect to the divers ſorts of Facts, or Events, on which they depend, there are three ſorts of them. The firſt, is of thoſe which depend ſolely on the Deed of the Perſon to whom the Condition is enjoined: The ſecond, of thoſe which depend on Events in which the Deed of that Perſon has no Share: And the third, is of thoſe which depend partly on the Deed of the ſaid Perſon, and partly on an Event that is independent of his Deed. The Condition, that a Legatary ſhall give a Sum of Money, do ſome Work, diſcharge what is owing him by one of his Debtors, that he ſhall not raiſe a Building ſo high as to prejudice the Light and Proſpect of a Houſe belonging to a Friend of the Teſtator's, and other ſuch like Conditions, are of the firſt of theſe three kinds. A Legacy of a Sum of Money, on Condition that there be ſo much clear got of a Law-Suit that is ſtill depending, or in a Commerce which is not as yet ended, would be of the ſecond kind. And we may give for an Example of the third ſort, the Condition impoſed on a Legatary to buy a Houſe of a third Perſon, either in order to give it to ſome other Perſon, or to fit up an Apartment in it for an Hoſpital: For this Condition would depend partly on the Deed of him on whom it was impos'd, and partly on the Will of the Owner of the ſaid Houſe, or perhaps even on a Caſualty, which might render it impoſſible. As, if the Situation of the ſaid Houſe ſhould expoſe it, together with the Ground on which it ſtood, to be deſtroyed by the Over-flowing of a River, or by a Torrent, and that in fact the Houſe and Ground ſhould happen to periſh *c*.

c In facto conſiſtentes conditiones varietatem habent: & quaſi tripartitam recipiunt diviſionem: *Ut quid detur, ut quid fiat, ut quid obtingat.* Vel retro, *ne detur, ne fiat, ne obtingat.* Ex his, dandi faciendique conditiones in perſonas collocantur, aut ipſorum quibus quid relinquitur, aut aliorum. Tertia ſpecies in eventu ponetur. *l.* 60. *ff. de condit. & demon.*

XVI.

16. *Three ſorts of Conditions with reſpect to Time.*

Conditions may likewiſe be diſtinguiſhed into three kinds, according to the Times to which they may have relation. One is of thoſe which reſpect the Time paſt: As if a Teſtator bequeaths a Sum of Money, in caſe the ſame ſhall be found to be due to him from a Buſineſs already begun in his Abſence by ſome Friend of his, whom he had intruſted with it, but the Event of which he did not as yet know. The ſecond kind, is of the Conditions which relate to the preſent Time: As, if a Teſtator leaves a Legacy to a Stranger, or Alien, in caſe he be naturalized at the Time of making the Teſtament, or at the Time of the Teſtator's Death, which will be the preſent Time of the Succeſſion's being open. The third is, of Conditions which have reſpect to the Time to come: As, if the Teſtator leaves a Legacy in caſe the Legatary ſhall happen to purchaſe an Office. But it is only, properly ſpeaking, this third kind which has the true Character of a Condition, which is to ſuſpend, until the ſame does happen, the Diſpoſition of the Teſtator which depended on it: Whereas the Conditions which relate either to the Time paſt or preſent, do not ſuſpend any thing; and that at the Moment of making the Teſtament, or of the Death of the Teſtator,

it is determined either that the Diſpoſition is null, if the Condition has not happened, or if it has happened, that the Legacy ſhall have its Effect. And there is nothing in ſuſpenſe but the Knowledge whether it has happened, or not *d*.

d Multum intereſt qualis conditio poſita fuerit. Nam aut in præteritum, aut in præſens, aut in futurum. *l.* 16. *ff. de inj. rupt.*

Si in præteritum collata ſit conditio, vel ad præſens, non videtur ſub conditione inſtitutus. Aut enim impleta eſt conditio, & pure inſtitutus eſt: aut non eſt, & nec hæres inſtitutus eſt. *l.* 3. §. 13. *ff. de bon. libert.*

Nulla eſt conditio quæ in præteritum confertur, vel quæ in præſens: veluti ſi Rex Parthorum vivit; ſi navis in portu ſtat. *l.* 10. *in f. ff. de condit. inſt.*

XVII.

17. *Two ſorts of Conditions, expreſs or tacit.*

We muſt likewiſe diſtinguiſh under another View two ſorts of Conditions, which comprehend them all. One is of thoſe which are expreſs, and the other of thoſe which are called tacit. The expreſs Conditions are all thoſe which the Teſtators expreſs in Terms of Conditions, or other Terms equivalent: And thoſe Conditions are called Tacit, which without being expreſſed, are tacitly implied in the Clauſes of the Teſtament. Thus, when a Teſtator bequeaths the Fruits of ſuch a Ground, of ſuch a Year, or the Profits which ariſe from ſuch an Affair; theſe ſorts of Legacies imply the tacit Condition, that there ſhall be Fruits gathered in the ſaid Ground, and that ſome Profit ſhall be made of the ſaid Affair when it ſhall be ended *e*. But theſe ſorts of Conditions which are implied, do not make the Legacies of this kind conditional with this Effect, ſo as to make the Right of the Legatary to depend on them. For before that it be certain, in the Caſe of the Legacy of a Crop, whether there will be any Fruits, or not; and in the Caſe of the Legacy of the Profits ariſing from ſuch a Buſineſs, whether there will be Profit or Loſs thereby; the Legatary has acquired his Right to what Fruits the Ground may produce, or to what Profit may ariſe from the ſaid Buſineſs. And the Legatary has ſo fully acquired this Right before the Event gives him the Uſe of the Legacy, that if he ſhould happen to die in the mean while, he would tranſmit his Right to his Heir. So that the Effect of this Condition is not ſuch, as that the Validity of the Legacy depends thereon, but it is only ſuch, that the Legacy without being null, may happen to be of no manner of Profit to the Legatary *f*.

e Ineſt conditio legati, veluti cum ita legamus: *Fructus qui ex fundo percepti fuerint hæres dato.* l. 1. §. ult. ff. de condit. & dem.

f Conditiones extrinſecus non ex teſtamento venientes, id eſt, quæ tacite ineſſe videantur, non faciunt legata conditionalia. *l.* 99. *ff. de condit. & dem.*

XVIII.

18. *Impoſſible Conditions.*

Another kind of Conditions is made up of thoſe which are impoſſible. And we muſt reckon in this Number not only that which is impoſſible by Nature, but likewiſe that which is contrary to Law, good Manners, or Decency. As, for example, if a Teſtator had bequeathed a Marriage-Portion to a young Woman of ten Years of Age, on condition that ſhe ſhould marry within a Year; or if he had left a Legacy on condition that the Legatary ſhould fix his Domicil in a certain Place. For the Condition of this Marriage would be contrary to Law; and that of fixing his Domicil in a certain Place being contrary to the juſt and natural Liberty that every one has to chuſe his Dwelling-Place, would be in ſome manner contrary to good Manners and Decency. Thus, theſe ſorts of Conditions oblige to nothing at all, no more than thoſe which are naturally impoſſible, and they are held to be the ſame as if they were not written. For that is conſidered as impoſſible which cannot be done without Breach of the Law, or of good Manners and Decency. And if there were in a Teſtament Conditions either naturally impoſſible, or contrary to Law and good Manners, the Diſpoſitions which the Teſtator ſhould make to depend on them would nevertheleſs have their Effect, although theſe Conditions ſhould have none *g*.

g Obtinuit impoſſibiles conditiones teſtamento adſcriptas pro nullis habendas. *l.* 3. *ff. de condit. & dem.*

Sub impoſſibili conditione, vel alio mendo factam inſtitutionem placet non vitiari. *l.* 1. *ff. de condit. inſt.*

Conditiones contra edicta Imperatorum, aut contra leges, aut quæ legis vicem obtinent, ſcriptæ, vel quæ contra bonos mores, vel deriſoriæ ſunt, aut hujuſmodi quas prætores improbaverunt, pro non ſcriptis habentur. Et perinde, ac ſi conditio hæreditati, ſive legato adjecta non eſſet, capitur hæreditas legatumve. *l.* 14. *ff. de condit. inſt.*

Titio centum relicta ſunt ita *ut à monumento meo non recedat, veluti in illa civitate domicilium habeat:* poteſt dici, non eſſe locum cautioni per quam jus libertatis infringitur. *l.* 71. §. 2. *ff. de condit. & demonſtr.*

Quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, & (ut generaliter dixerim) contra bonos mores fiunt, nec facere nos poſſe credendum eſt. *l.* 15. *ff. de condit. inſt.*

See the twelfth Article of the fourth Section of Covenants.

XIX.

XIX.

19. *Another kind of impoſſible Conditions.*

There may be Conditions which, without being naturally impoſſible, and without having any thing in them contrary to Law and good Manners, cannot be fulfilled, becauſe of ſome Event which makes the Performance of them impoſſible: And in that Caſe the Diſpoſition which depended on ſuch a Condition will have its Effect, or will not have it, according as the Quality of the Condition may mark what was the Intention of the Teſtator. Thus, for example, if a Teſtator had deviſed a Tenement, or other thing, on condition that the Legatary ſhould give a Sum of Money to ſome Perſon before the Legacy ſhould be delivered to him, and that the ſaid Perſon ſhould happen to die before the Teſtator; the Non-performance of ſuch a Condition that is become impoſſible, would be of no prejudice to the Legacy, and the Legatary would have it without paying the Sum of Money: For the Intention of this Teſtator was to leave two Legacies; one to this Legatary, and the other to that Perſon. So that the Fruitleſneſs of the one Legacy does not annul the other, no more than in the Caſes of the twenty ninth Article *h*. Thus, on the contrary, if a Teſtator had left a Legacy to a young Woman, in caſe ſhe ſhould happen to be married to ſuch a Relation or Friend of the Teſtator's, and that the ſaid Relation or Friend ſhould chance to die before the ſaid Marriage, the Legacy would be null. For the Intention of this Teſtator had for its Object only this Marriage *i*.

h See the twenty ninth Article of this Section.

i Legatum ſive fideicommiſſum à patruo tuo relictum tibi, ſub conditione *ſi filio ejus nupſiſſes*, cum mortuo filio, priuſquam matrimonium cum eo contraheres, conditio defecerit, nulla ratione deberi tibi exiſtimas. *l. 4. C. de condit. inſt. tam legat. quam fid. v. ff. de condit. & dem.*

XX.

20. *Diſpoſitions made with a View to procure others, are unlawful.*

We ought to reckon among the Conditions that are contrary to good Manners, thoſe which a Teſtator adds to a Diſpoſition in favour of ſome Perſon, in order to procure to himſelf the like Benefit. As, if he ſhould inſtitute ſuch a one for his Heir or Executor, in caſe the ſaid Perſon hath on his part named this Teſtator to be his Heir or Executor. And it would be the ſame thing in a Legacy left on ſuch a Condition. And in general, in what manner ſoever thoſe Diſpoſitions are conceived, which tend to the procuring of others from thoſe Perſons in whoſe favour they are made, whether it be that the Teſtator expects the ſaid Diſpoſitions to be made in his own favour, or in favour of other Perſons; or that he gives to one Perſon, in order to get from another; all theſe kinds of Diſpoſitions are contrary to good Manners, and are unlawful *l*.

l Captatorias inſtitutiones non eas Senatus improbavit, quæ mutuis affectionibus judicia provocaverunt: ſed quarum conditio confertur ad ſecretum alienæ voluntatis. *l.* 70. *ff. de hæred. inſtit. l.* 11. *C. de teſt. mil.* Qua ex parte me Titius hæredem ſcriptum in tabulis ſuis recitaverit, ex ea parte hæres eſto. *l.* 1. *in f. ff. de his quæ pro non ſcript.*

Captatoriæ ſcripturæ ſimili modo neque in hæreditatibus, neque in legatis valent. *l.* 64. *ff. de leg.* 1.

Sed illud quæri poteſt, an idem ſervandum ſit quod Senatus cenſuit, etiam ſi in aliam perſonam captionem direxerit: veluti, ſi ita ſcripſerit, *Titius ſi Mævium tabulis teſtamenti ſui hæredem à ſe ſcriptum oſtenderit probaveritque, hæres eſto.* Quod in ſententiam Senatuſconſulti incidere non eſt dubium. *l.* 71. §. 1. *ff. de hæred. inſtit. v. l.* 2. *eod. l.* 29. *eod.*

¶ Theſe ſorts of Diſpoſitions ſo mean and ſordid, which are mentioned in this Article, muſt needs have been very frequent at *Rome*, ſeeing it was neceſſary to have a Law to repreſs them, which was a Decree of the Senate, of which mention is made in the Texts cited on this Article. This Rule is not very neceſſary with us; for altho we have other unfair Ways enough practiſed among us in order to procure favourable Diſpoſitions from Teſtators, yet we ſee but few Perſons who think of laying ſuch Snares as theſe, and as few who ſuffer themſelves to be caught in them.

We are not to reckon in the Number of the Diſpoſitions ſpoke of in this Article, the mutual Teſtaments of two Perſons, who inſtitute reciprocally one another Heir or Executor: For neither of the two anticipates the Will of the other, in order to procure the ſaid Inſtitution in his Favour; but both the one and the other having a reciprocal Affection, which can only proceed from juſt Cauſes, there is no reaſon why the one and the other ſhould not expreſs it by ſuch an Inſtitution as this is. And it is expreſly enough approved of by theſe Words of the firſt of the Texts quoted on this Article; *Non eas (inſtitutiones) Senatus improbavit quæ mutuis affectionibus judicia provocaverunt.* It is for theſe Reaſons that the reciprocal Teſtaments have been approved of by the Novel of the Emperor *Valentinian*, *De Teſtamentis*, and by our Uſage,

Uſage, and likewiſe between Husband and Wife in ſome Cuſtoms.

XXI.

21. *Not thoſe which are made as an Acknowledgment of a former Benefit.*

If the Teſtator did not make his Diſpoſition in favour of a Perſon, to depend on what he ſhould expect from him; but that having known, for example, that a Perſon had left him ſomething by his Teſtament, he on his part, out of a Senſe of Gratitude, ſhould leave ſomething to the ſaid Perſon, or to ſome of his Children, or Friends, on his account; ſuch a Bequeſt, not being made with a view to procure the like from the ſaid Perſon, would have nothing unlawful in it *m*.

m Illæ inſtitutiones captatoriæ non ſunt, veluti, ſi ita hæredem quis inſtituat, *qua ex parte Titius me hæredem inſtituit, ex ea parte Mævius hæres eſto.* Quia in præteritum non in futurum inſtitutio collata eſt. *l.* 71. *ff. de hæred. inſt.*

In the Article we have not made uſe of the Expreſſion inſtanced in this Text, I inſtitute ſuch a one my Heir or Executor, for the ſame Share or Portion that another has inſtituted me his Heir or Executor. *For altho the ſaid Diſpoſition does not ſeem to be made with a Deſign to procure another, and that on the contrary it ſeems to preſuppoſe the other to be already made; yet ſeeing it may have relation to the Teſtament of a Perſon who is ſtill alive, and who may make another: And ſeeing it implies the Condition, that this Teſtator ſhall be Heir or Executor to the other, ſince he gives only in proportion to what the other ſhall have left him; ſuch a Diſpoſition as this does not ſeem to be very decent, and is not agreeable to our Uſage. Wherefore we have put down in the Article another Caſe which may ſuit with our Uſage, and which points out the Character by which we are to diſtinguiſh in Diſpoſitions which are relative to others, thoſe which may be reckoned lawful, from thoſe which are not, according to the Principles explained in this and the foregoing Texts.*

XXII.

22. *One or more Conditions of the ſame Diſpoſition.*

Since Conditions depend on the Will of the Teſtator, and are arbitrary, one may make a Diſpoſition to depend not only on one, but on more Conditions, whether they be in relation to a Fact in the Power of the Perſon whom the ſaid Diſpoſition concerns, or of another Nature. And if there be ſeveral Conditions joined together, ſo as that the Teſtator impoſes them all together, the fulfilling of one of the Conditions will not be ſufficient to validate a Bequeſt which depends on the Accompliſhment of them all. But if it depends only upon one or the other, the Accompliſhment of the firſt will give it the Effect which it ought to have *n*.

n Si hæredi plures conditiones conjunctim datæ ſint, omnibus parendum eſt, quia unius loco habentur: ſi disjunctim ſint, cuilibet. *l.* 5. *ff. de condit. inſtit.*

XXIII.

23. *The Will of the Teſtator is the firſt Rule whereby to interpret the Conditions, and other ſorts of Diſpoſitions.*

In all the Caſes where there may ariſe Diffiulties concerning Conditions, Charges, Deſtinations, Motives, Deſcriptions, and Terms of Time, the firſt general Rule, and which is common to all theſe ſorts of Difficulties, is always the Will of the Teſtator. Thus it is by the Knowledge that we may have of his Intention, that we are to regulate them *o*. And the Uſe of this general Rule depends in particular on the preceding Rules, and thoſe which follow.

o In conditionibus primum locum voluntas defuncti obtinet, eaque regit conditiones. *l.* 19. *ff. de condit. & dem.*

XXIV.

24. *Conditions which depend on the Deed of the Executor or Legatee.*

The Conditions which depend ſolely on the Fact of the Perſon to whom the Teſtator has enjoined them, ought to be fulfilled in the manner that he has regulated, and as ſoon as they can conveniently be performed. And his Diſpoſition hath its Effect, or ceaſeth to have it, according as the ſaid Perſon accompliſheth, or doth not accompliſh the Condition, whether it conſiſt in doing or not doing, in acquitting or giving, or in ſuffering ſome Charge, or what other Nature ſoever it be of; provided only that the Condition have nothing in it that is impoſſible, or contrary to Law and good Manners *p*.

p Hæc conditio, *Si in capitolium aſcenderit*, ſic accipienda eſt, ſi cum primum potuerit capitolium aſcendere. *l.* 29. *ff. de condit. & dem.* Verbum *facere* omnem omnino faciendi cauſam complectitur dandi, ſolvendi, numerandi, judicandi, ambulandi. *l.* 218. *ff. de verb. ſign.*

XXV.

25. *Condition of not doing ſomething.*

As to the Conditions which oblige not to do ſomething; as, for inſtance, not to raiſe a Building ſo high as to hinder the Light or Proſpect of a Houſe, Proviſion ought to be made for the Security of the Perſon intereſted, according to the Nature of the Condition, whether it be by the bare Submiſſion of the Perſon on whom the Condition is impoſed, or otherwiſe, according to the Circumſtances *q*.

q Mutianæ cautionis utilitas conſiſtit in conditionibus quæ in non faciendo ſunt conceptæ. *l.* 7. *ff. de cond. & dem. v. Nov.* 22. *C.* 44. See the forty ſixth Article.

XXVI.

XXVI.

26. Conditions which do not depend on the Deed of the Executor, or Legatee.

The Conditions which depend upon Events in which the Deed of the Heir, or Executor, or Legatee, has no ſhare, have their Effect by the Event it ſelf, whenever the Caſe happens, or fail to have it, if the Caſe does not happen *r*. Thus, for example, a Legacy of a Sum of Money upon condition that ſo much clear Gain ſhall be made by a Buſineſs or Commerce that is not as yet ended, will be in ſuſpenſe till the Event; and if there be any clear Profit, the Legacy will have its Effect, either in whole, or in part, according to the Quantity of the Profit that is made, or will remain without Effect, if there be no Profit at at all.

r Si navis ex Aſia venerit. *l.* 2. *&* *l.* 10. §. 1. *de condit. & dem.*

XXVII.

27. Conditions which depend on the Deed of third Perſons.

We muſt reckon in the number of Conditions which depend on Events wherein the Fact of the Heir, or Executor, or Legatee has no ſhare, thoſe which depend upon the Fact of third Perſons; as if a Teſtator had left a Legacy of a Sum of Money to be laid out according to his Intention, in caſe the ſame ſhould be approved by a Perſon whom he ſhould name, ſuch as the Executor of his Teſtament, or other Perſon, leaving it to the ſaid Perſon to execute or not to execute his Intention which he had explained to him; as for example, if it was for making a Reſtitution which the Teſtator was in doubt whether he was obliged to make or not, and the Deciſion of which Doubt he was willing ſhould depend on the ſaid Perſon *s*.

s In arbitrium alterius conferri legatum, veluti conditio poteſt. Quid enim intereſt, ſi *Titius Capitolium aſcenderit mihi legetur, an, ſi voluerit?* l. 1. ff. de legat. 2. *See the thirty firſt Article.*

XXVIII.

28. Conditions which depend on the Combinations of Facts and of Events.

The Conditions which depend partly on the Deed of the Executor or Legatee, and partly on ſome Event, whether it be the Fact of third Perſons, or a Caſualty, have differently their Effect, or have it not, according to the Nature of the Conditions, and the Circumſtances, by the Rules which follow *t*.

t *See the following Articles.*

XXIX.

29. Example of Conditions which depend partly on the Fact of him who is charged with 'em, and partly on the Fact of other Perſons.

If the Executor or Legatee were charged with a Condition which did not ſolely depend on his Deed, but which ſhould depend alſo on the Fact of another Perſon whom the Diſpoſition of the Teſtator might concern, and who ſhould refuſe to do what was neceſſary to be done on his part towards accompliſhing the Condition, it would be ſufficient if the Executor or Legatee did on his part all that depended on him. Thus, for example, if the Condition were, to give a Sum of Money to a Perſon, or to build ſomething in a publick Place, or for the uſe of a particular Perſon, and thoſe whom the ſaid Diſpoſitions did concern, would not accept of the Sum of Money, nor ſuffer the Work to be done, it would be the ſame thing as if the Condition were accompliſhed *u*.

u Si ita hæres inſtitutus ſim, ſi decem dedero, & accipere nolit, cui dare juſſus ſum: pro impleta conditione habetur. l. 3. *ff. de condit. inſt.*

Jure Civili receptum eſt, quoties per eum, cujus intereſt conditionem impleri, ſit, quominus impleatur, ut perinde habeatur ac ſi impleta conditio fuiſſet. Quod plerique & ad legata, & ad hæredum inſtitutiones perduxerunt. Quibus exemplis ſtipulationes quoque committi quidam recte putaverunt: cum per promiſſorem factum eſſet, quominus ſtipulator conditioni pareret. *l.* 24. *ff. de cond. & dem. l.* 81. §. *eod. l.* 5. §. 5. *ff. quand. dies leg. ced.*

Titius, ſi ſtatuas in municipio poſuerit, hæres eſto. Si paratus eſt ponere, ſed locus a municipibus ei non datur; Sabinus, Proculus, hæredem eum fore, ſed legato idem juris eſſe dicunt. *l.* 14. *ff. de cond. & dem.* See the following Article.

XXX.

30. Another Example of the ſame.

If the Condition ſhould depend partly on the Fact of him on whom it is impoſed, and partly on the Fact of another Perſon without whom the ſaid Condition could not have its literal Accompliſhment; but that it ſhould be poſſible to ſupply in another manner that which the Intention of the Teſtator might ſeem to demand of the Executor or Legatee, who is charged with the Condition, he might ſatisfy it by accompliſhing the ſaid Intention in the manner that were poſſible. Thus, for example, if an Executor or Legatee were charged to buy a Houſe or other Tenement for ſome Perſon to whom the Teſtator had a mind to give it, and the Proprietor would not ſell the ſaid Houſe or Tenement, or would not ſell it but for an extravagant Price; the Executor or Legatee would ſatisfy the Condition

dition by paying down the juſt Value of the ſaid Houſe or Tenement to the Perſon to whom the Teſtator had a mind to give it *x*.

x Non videtur defectus conditione, ſi parere conditioni non poſſit: implenda eſt enim voluntas, ſi poteſt. *l.* 8. §. 2. *in f. ff. de condit. inſt.*

Si cui legatum eſt, *ut alienam rem redimat, vel præſtet:* ſi redimere non poſſit, quod dominus non vendat, vel immodico pretio vendat, juſtam æſtimationem inferat. *l.* 14. §. 2. *ff. de legat.* 3.

XXXI.

31. *If the Condition depends intirely on the Fact of a third Perſon.*

If the Condition were entirely dependent on a third Perſon, as in the Caſe of the twenty ſeventh Article, the Diſpoſition of the Teſtament would have its effect, ſuch as ſhould be regulated by the ſaid third Perſon, according to the Power given him in that matter by the Teſtator *y*.

y This is a Conſequence of the twenty ſeventh Article.

XXXII.

32. *Example of a Condition which altho depending on the Fact of other Perſons, muſt be accompliſhed.*

It is not always enough that an Executor or a Legatee do all that is in his power towards accompliſhing a Condition which depends partly on his Fact, and partly on the Fact of other Perſons: For there are Conditions which are of ſuch a nature that no ſort of Obſtacle can diſpenſe with them, and which muſt neceſſarily be accompliſhed in order to give effect to the Diſpoſitions which depend on them. Thus, for inſtance, if a Teſtator had inſtituted a Foreigner his Executor, or given him a Legacy, on condition that he ſhould be naturalized at the time of the Death of the Teſtator, and that having uſed his Endeavours he could not obtain his Naturalization in time, this Inſtitution and this Legacy would be without effect, becauſe the ſaid Executor or the ſaid Legatee would remain ſtill under the Incapacity which the ſaid Condition was to have removed, and which could not be removed by any other way *z*.

z In tempus capiendæ hæreditatis inſtitui hæredem poſſe benevolentiæ eſt. Veluti Lucius Titius cum capere poterit, hæres eſto. Idem eſt in legato. *l* 62. *ff. de hared. inſtit.*

XXXIII.

33. *Another Example.*

We ſee by the Example explained in the preceding Article, a Caſe where the Incapacity of the Legatee is joined with the Non-performance of the Condition; but there may be Caſes where without the Incapacity of the Legatee the Legacy would be null, altho it ſhould be no ways his fault that a Condition which depended on his Fact and on that of other Perſons were not accompliſhed. Thus, for Example, if a Teſtator having left a Sum of Money to one of his Friends, on condition that he ſhould accept and exerciſe the Tuition of his Children, and that in caſe he did not exerciſe it, the Legacy ſhould be reduced to a leſſer Sum, or be wholly null; it had happened that the Legatee being willing to accept and exerciſe the Tuition, it was judged to be for the Benefit of the Minors that another Tutor ſhould be aſſigned them, and accordingly another was actually named, the Condition not being fulfilled, the Legacy would be either wholly null, or diminiſhed, according to the Diſpoſition of the Teſtator. And altho the Condition depended not only on the Fact of the Legatee, but alſo on the Fact of other Perſons, and that it was the fault of the Legatee that it was not executed, yet his good Will would not be enough to ſatisfy the Condition. For beſides that the Relations and the Judge who were the other Perſons whoſe Fact was neceſſary for accompliſhing the Condition, had no Intereſt whether the Legacy ſhould ſubſiſt or not; this Legacy was given out of a Motive of recompenſing a good Office, and upon condition that the ſame ſhould be effectually performed *a*.

a Conditionum verba, quæ teſtamento præſcribuntur, pro voluntate conſiderantur. Et ideo, cum tutores teſtamento dati, quoniam interea puer adoleverat, id egerit, ut curatores ipſi conſtituerentur, conditio fideicommiſſi talis præſcripta, *ſi tutelam in annum octavum decimum geſſerint*, deficiſſe non videbitur. *l.* 101. §. 2. *ff. de cond. & dem.* See the tenth Article.

In order to underſtand this Text, it is neceſſary to remark that by the Roman *Law, as has been ſaid in the Preamble of the Title of Tutors, the Tuition ended when the Pupil arrived at the Age of Puberty, which was fourteen Years in Males, and twelve in Females; and during the reſt of the Minority to the Age of five and twenty Years compleat, Curators were aſſigned them. So that in the caſe of this Text the Legatees having exerciſed the Tuition to the Age of fourteen Years, and the Curatorſhip to the Age of eighteen Years, the Queſtion was, to know, if the Teſtator having put down for a Condition, that the Legatees ſhould act as Tutors till the Pupil ſhould attain the Age of eighteen Years, they had ſatisfy'd the Condition, having been Tutors only to the Age of fourteen, and Curators to the Age of eighteen Years. But the Intention of the Teſtator being that they ſhould take care of all the Concerns of the Children till they*

they ſhould be full eighteen Years old, the Condition is fulfilled, altho the Expreſſion be not in the literal Senſe. Seeing the Caſe of this Text does not agree with our Uſage, where the Tutorſhip laſts to the Age of twenty five Years compleat, we have put another Caſe to ſerve for the Rule explained in this Article. This Rule reſults from this Text by the Reaſon of Contraries.

[In *England* we do not obſerve this Diſtinction between Tutor and Curator, which was in uſe among the *Romans*: For we call him a *Guardian*, whom the *Romans* termed Tutor and Curator. And the Guardianſhip with us takes in both the Tutorſhip and Curatorſhip, that is, the whole Space of time that the Infant is in Minority, or under the Age of one and twenty Years compleat. Which Word of *Guardian* we have from the *Normans*, from whoſe Cuſtoms many Parts of the Common Law of *England* are derived. *Cowel's Inſtit. of the Laws of* England, *Book* 1. *Tit.* 13.

But in *Scotland* they ſtill obſerve the Diſtinction of the *Roman* Law between Tutor and Curator. The Adminiſtration of the Tutor expires, whenever the Pupil attains the Age of Puberty, that is fourteen Years compleat in Males and twelve in Females; after which time the Minor chuſes his Curators, who are approved of by the Judge, in the manner which the Laws there preſcribe. *Mackenzie's Inſtit. of the Laws of* Scotland, *Book* 1. *Tit.* 7.]

XXXIV.

34. *A Rule for Conditions which depend partly on the Fact of thoſe to whom they are enjoined, and partly on the Fact of others.*

It follows from the Rules explained in the foregoing Articles, that in the Caſes where Teſtators charge their Executors or Legatees with Conditions which depend partly on their own Fact, and partly on the Fact of other Perſons, it cannot be laid down as a fixed and general Rule, either that thoſe Bequeſts are all null, if the Condition is not effectually accompliſhed, or that they all have their effect, and are held to be accompliſhed, if it is not the fault of the Executor or Legatee that the Condition is not fulfilled: For there are ſome Caſes where the Conditions are held to be accompliſhed, altho they be not ſo in effect, provided that the Perſon who was to ſatisfy the Condition has done all that was in his power towards it; and there are others where it is abſolutely neceſſary that the Conditions be accompliſhed. But the only general Rule, and which is common to all theſe ſorts of Conditions, is, that we muſt judge of them by their Nature, by the Quality of the Facts on which they depend, by the Intereſts of the Perſons whom the Teſtator has conſider'd, by the Motive which he had in his view; that we muſt diſtinguiſh among the Motives, thoſe where it appears that the Teſtators have abſolutely intended that the Condition ſhould be accompliſhed, as in the Caſe of the preceding Article, from thoſe where it may be reaſonably preſumed that the Teſtators have required only the Fact of the Perſon on whom the Condition was impoſed, as in the Caſe of the twenty ninth Article. And it is by all theſe Views, and others which may help to diſcover the Intention of the Teſtator, that we are to judge of Conditions, giving them ſuch an Effect as the Intention of the Teſtator may ſeem to demand *b*.

b This is a Conſequence of the preceding Rules.

XXXV.

35. *A Rule whereby to diſtinguiſh conditional Diſpoſitions from thoſe which are not ſo.*

It is not enough as to what concerns Conditions, to diſcern between thoſe which depend on the Fact of the Perſons on whom they are impoſed, and thoſe which may depend on ſomething elſe, and to make the other Diſtinctions of Conditions explain'd in the fifteenth, ſixteenth, and other following Articles; but it is neceſſary likewiſe to diſtinguiſh among the ſeveral ſorts of Diſpoſitions which contain Charges, Deſtinations, Motives, Deſcriptions, and Terms of Time, thoſe which are conceived in the Nature of Conditions, and which have the Effect thereof, from thoſe which do not make Conditions, according to the Rules and Examples which have been explained in the ſeventh, eighth, and other following Articles. Thus, for another Example, in the Caſe of a Motive and a Deſtination ſpecified in the Teſtament, if a Teſtator had bequeathed a Rent, a Penſion, or ſome Uſufruct to one of his Friends for his Maintenance, this Motive explained after this manner, would not make a Condition which would give the Executor a Right to require ſome Security from the Legatee, that he ſhould employ the ſaid Legacy on his Maintenance, or to oblige him to account to him for it. For altho this Diſpoſition implies, with reſpect to the Legatee, the Intention of the Teſtator that this Legacy ſhould ſerve for that uſe, yet this Motive reſpecting only the Perſon of the Legatee, would leave to his Management the uſe of the Legacy, unleſs the Teſtator had directed ſome Precaution independent on the Will of the Legatee, and that for particular Reaſons, ſuch as the Poverty of the Legatee and his want of Conduct. Thus, on the contrary, if a Teſtator had left to a young Woman a Sum of Money for her Portion when ſhe ſhould marry, this Motive, this Deſtination, and this Time marked by the Teſtator would make the Legacy conditional;

and if the ſaid young Woman ſhould die before ſhe married, it would remain null *c*.

c See the other Articles quoted in this.

XXXVI.

36. It is neceſſary to conſider in Diſpoſitions whether they contain Conditions, and what is the Effect of them.

There are two things to be conſider'd in the Diſpoſitions of Teſtators as to Conditions: one is to know whether the Diſpoſition be conditional or not, which depends on the preceding Rules; and the ſecond is to know what ought to be the Effect of the Condition when the Diſpoſition is conditional, which depends on the Relation which the Conditions have to the Events. And ſeeing the Differences of Events are infinite, and that the Examples of ſome facilitate in all the reſt the uſe of the Rules, and are even given in the Laws for Rules; we ſhall perceive more and more this uſe in the Examples and Rules which follow *d*.

d See the following Articles.

XXXVII.

37. The Condition which ought to diſtinguiſh two Heirs or Executors not happening, they ſucceed equally.

If a Teſtator had inſtituted his two Brothers his Heirs or Executors, on condition that whichſoever of the two ſhould purchaſe ſuch an Office he ſhould have two thirds of the Eſtate, and the other a third, and one of the two ſhould accompliſh the Condition, he would have the two thirds: But if neither of the two ſhould buy the Office, whether it were that they were not able or not willing to do it, they would ſhare the Eſtate equally between them. For both the one and the other were called to the Succeſſion, and they ought not to be diſtinguiſhed except by the Condition if it ſhould happen *e*.

e Uter ex fratribus meis conſobrinam noſtram duxerit uxorem, ex dodrante; qui non duxerit, ex quadrante hæres eſto. Aut nubit alteri, aut non vult nubere. Conſobrinam qui ex his duxit (uxorem) habebit dodrantem, erit alterius quadrans. Si neuter eam duxerit uxorem, non quia ipſi ducere noluerunt, ſed quia illa nubere noluerit, ambo in partes æquales admittuntur: plerumque enim hæc conditio: *Si uxorem duxerit; ſi dederit; ſi fecerit*, ita accipi oportet; quod per eum non ſtet, quominus ducat, det, aut faciat. *l.* 23. *ff. de condit. inſt.*

Qui ex fratribus meis Titiam conſobrinam uxorem duxerit, ex beſſe hæres eſto. Qui non duxerit ex triente hæres eſto. Vivo teſtatore conſobrina defuncta, ambo ad hæreditatem venientes ſemiſſes habebunt. Quia verum eſt eos hæredes inſtitutos, ſed emolumento portionum eventu nuptiarum diſcretos. *l.* 24. *eod.*

XXXVIII.

38. A Condition may chance to be accompliſhed in the Teſtator's Life-time.

The greateſt part of Conditions ought to be accompliſhed only after the Death of the Teſtator, and in obedience to his Will; but there may be ſome Conditions which happen to be accompliſhed in the Teſtator's Life-time without this view, and which have nevertheleſs their effect *f*. Thus, for inſtance, if a Legacy of a Sum of Money is left on condition that the Legatee buy ſuch an Office, or marry the Teſtator's Daughter, and he have bought the ſaid Office, or married the Daughter before the Teſtator's Death, he ſhall have the Legacy: For in theſe ſorts of Conditions it is equal for the Effect of the Diſpoſition of the Teſtator, whether they come to paſs before or after his Death; and it is ſufficient that his Will be found to be performed in the manner that it ought to be, if the Condition be ſuch as that it ought to be fulfilled only once for all *g*. But if it can be reiterated, it muſt be ſatisfy'd in the manner which ſhall be explained in the following Article.

f Sciendum eſt promiſcuas conditiones poſt mortem impleri oportere, ſi in hoc fiant, ut teſtamento pareatur: veluti, *Si capitolium aſcenderit*, & ſimilia. Non promiſcuas, etiam vivo teſtatore exiſtere poſſe: veluti, *Si Titius Conſul factus fuerit.* l. 11. §. 1. ff. de condit. & dem.

Conditionum quædam ſunt, quæ quandoque impleri poſſunt etiam vivo teſtatore: ut puta, *ſi navis ex Aſia venerit.* Nam quandoque venerit navis, conditioni paritum videtur. Quædam quæ non niſi poſt mortem teſtatoris: *Si decem dederit, ſi capitolium aſcenderit.* l. 2. eod.

g Hæc conditio, filiæ meæ cum nupſerit: talis eſt: ut, qui teſtatus eſt, impleri ſolummodo conditionem voluerit: non ſatis egerit, quando. Et ideo (&) ſi vivo teſtatore nupſerit poſt teſtamentum factum, impleta conditio videtur. Præſertim cum conditio hæc talis eſt, ut ſemel impleri debeat. *l.* 10. *eod.*

XXXIX.

39. If this Condition is a Fact that may be reiterated, it muſt be accompliſhed.

If in the Caſe of the foregoing Article the Condition did depend on a Fact which might be reiterated; as if it was to give a Sum of Money to an Hoſpital, and he who was charged with the Condition had already given the like Sum to the ſame Hoſpital before he knew any thing of the Teſtament, he would nevertheleſs be bound to give ſuch another Sum to fulfil the Condition; eſpecially if the Teſtator knew of the Gift which the Legatee had already made: For this Liberality may be reiterated *h*. And the Gift which he had made of his own accord, not being an Effect of the Diſpoſition

h Si jam facta ſint quæ conditionis loco ponuntur, & ſciat teſtator: quæ iterum fieri poſſunt, expectentur, ut fiant. Si vero neſciat, præſenti debeantur. *l.* 11. *ff. de condit. & dem.*

of this Teſtator, who intended that this Gift ſhould proceed from his Bounty, was, with regard to the Intention of this Teſtator, only a Chance, which not ſatisfying his Intention, did not accompliſh the Condition *i*.

i Ut paruiſſe quis conditioni videatur, etiam ſcire debet hanc conditionem incertam: nam ſi fato fecerit, non videtur obtemperaſſe voluntati. *l.* 2. *in f. ff. eod.*

XL.

40. *If there be a Term joined to the Condition, it is neceſſary to wait till the Term.*

If a Teſtator requires his Executor, or a Legatee, to give a Sum of Money to ſome Perſon, in caſe that within a certain Time the ſaid Executor or Legatee have no Child, or upon ſome other Condition, and the ſaid Executor or Legatee happens to die without Children, or the other Condition chances to be accompliſhed, before the Time ſpecified; the Legacy will not be payable till the Term be expired. For altho it be already certain by the Event that the Legacy is due, ſeeing the Condition is come to paſs, yet the Expreſſion of the Teſtator implies the Term of Payment to be after the ſaid Time ſhall be expired *k*.

k Si ita ſcriptum ſit: *Si in quinquennio proximo Titio filius natus non erit, tum decem Seiæ hæres dato*; Si Titius ante mortuus ſit; non ſtatim Seiæ decem deberi: quia hic articulus tum extremi quinquennii tempus ſignificat. *l.* 4. §. 1. *ff. de condit. & demit.*

XLI.

41. *Conditions do not admit of a Diviſion.*

Conditions do not admit of a Diviſion, ſo as that an Executor, or a Legatee, may pretend to content himſelf with a part of what is given him, he performing only a part of the Condition that is enjoined him; but he can have nothing at all unleſs he accompliſhes the whole Condition. Thus, for example, if a Tenement is deviſed on condition that the Legatee pay a Sum of Money to every one of the Executors, or to other Perſons, or that he acquit ſome Debts of the Succeſſion which ſhall be ſpecified to him; he cannot divide the Legacy by dividing the Condition, in order to have part of the Legacy in proportion to what part of the Debts he has been able or willing to acquit; but he ought to pay and acquit the whole, unleſs he will renounce the Legacy *m*.

m Cui fundus legatus eſt, *ſi decem dederit*, partem fundi conſequi non poteſt, niſi totam pecuniam numeraſſet. *l.* 56. *ff. de condit. & dem.*

Qui duobus hæredibus decem dare juſſus eſt, & fundum ſibi habere, verius eſt, ut conditionem ſcindere non poſſit, ne etiam legatum ſcindatur. Igitur quamvis alteri quinque dederit, nullam partem fundi vindicabit: niſi alteri quoque adeunti hæreditatem reliqua quinque numeraverit: aut illo omittente hæreditatem, ei qui ſolus adierit hæreditatem, tota decem dederit. *l.* 23. *eod.*

XLII.

42. *The Condition impos'd upon ſeveral Perſons may be divided among them.*

If one only Condition which is impoſed on two Legatees be ſuch as that it may be divided, as if a Teſtator deviſes a Land or Tenement to two of his Friends, on condition that they acquit a certain Sum of Money, they divide the Condition between them, and pay each his Share of the Sum, in order to ſhare the Legacy between them. And if one of them alone, upon the other's Refuſal, acquits the whole Sum, he ſhall have the whole Legacy. Or if there be only one of them who acquits his Proportion, and the other fails to acquit his, he ſhall have a part of the Legacy proportionably to what he ſhall have acquitted, if the Will of the Teſtator can bear that the Condition and the Legacy be divided. But if the Condition is indiviſible, as if the Legacy was given on condition that the Legatees ſhould do ſome Work; the Legacy cannot be divided, ſo as to give a Share of it to one of the Legatees in proportion to what he ſhould pretend to do of the Work; but the Legacy would either be divided between them, if both of them together had filfilled the Condition, or given entirely to one of them who ſhould fulfil it *n*.

n Cui fundus legatus eſt *ſi decem dederit*, partem fundi conſequi non poteſt, niſi totam pecuniam numeraſſet. Diſſimilis eſt cauſa, cum duobus eadem res ſub conditione legata eſt. In hac enim quæſtione ſtatim à teſtamento, quo pluribus conditio adpoſita eſt, diviſa quoque in ſingulas perſonas videri poteſt, & ideo ſinguli cum ſua parte & conditioni parere, & legatum capere poſſunt. Nam quamvis ſumma univerſæ conditionis ſit adſcripta, enumeratione perſonarum poteſt videri eſſe diviſa. In eo vero quod uni ſub conditione legatum eſt, ſcindi ex accidenti conditio non debet: & omnis numerus eorum qui in locum ejus ſubſtituuntur, pro ſingulari perſona eſt habendus. *l.* 56. *ff. de condit. & dem.*

De illo quoque quæritur: fundus quibuſdam legatus eſt, ſi pecuniam certam in funus, impenſamque perferendi corporis in aliam regionem dediſſent. Nam, niſi uterque dederit, neutri ſit legatum: quoniam conditio, niſi per utrumque expleri non poteſt. Sed hæc humanius interpretari ſolemus. Ut cum duobus fundus legatus ſit, ſi decem dediſſent: & alteri dando partem, legatum quoque debeatur. *l.* 112. §. 2. *eod.*

Si plures perſonæ unam conditionem implere fuerint juſſæ: apud Ulpianum dubitabatur, utrumne omnes ſimul eandem facere debeant, an ſinguli quaſi ſoli implere eam compellantur. Videtur autem nobis unumquemque neceſſitatem habere conditionem implere, & pro portione ſibi contingente accipere quidquid ex hoc ſibi commodi eſt: ut hi quidem, qui compleverint juſſa ad lucrum vocentur:

qui autem neglexerint, ſibi imputent ſi ab hujuſmodi commodo repellantur. *l. 6. C. de condit. inſ. tam leg. q. fid.*

XLIII.

43. *A Legacy for a Work is to be regulated according to the Eſtate of the Teſtator.*

If a Teſtator had charged his Executor, or a Legatee, to build ſome Edifice, whether it were for publick Conveniency, or Ornament, or for ſome pious Uſe, ſuch as a Church for a Pariſh, or an Apartment in ſome Hoſpital, and had regulated the Sum for defraying the Charges thereof, the Executor would be bound to pay what had been regulated by the Teſtator. But if he had not declared the Sum, nor ſpecified the Manner in which the Edifice was to be built, the ſame would be regulated according to the Eſtate and Quality of the Teſtator, and the Uſe for which the ſaid Building was deſigned *o*.

o In teſtamento quidam ſcripſerat. *Ut ſibi monumentum ad exemplum ejus, quod in via Salaria eſſet Publii Septimii Demetrii, fieret: niſi factum eſſet, hæredes magna pecunia mulctare.* Et cum id monumentum Publii Septimii Demetrii nullum reperiebatur, ſed Publii Septimii Damæ erat, ad quod exemplum ſuſpicabatur eum, qui teſtamentum fecerat, monumentum ſibi fieri voluiſſe: quærebant hæredes cujuſmodi monumentum ſe facere oporteret, & ſi ob eam rem nullum monumentum feciſſent, quia non reperirent, ad quod exemplum facerent, num pœna tenerentur. Reſpondit: ſi intelligeretur, quod monumentum demonſtrare voluiſſet is, qui teſtamentum feciſſet, tametſi in ſcriptura non tum eſſet, tamen ad id quod ille ſe demonſtrare animo ſenſiſſet, fieri debere. Sin autem voluntas ejus ignoraretur: pœnam quidem nullam vim habere, quoniam ad quod exemplum fieri juſſiſſet, id nuſquam extaret: monumentum tamen omnimodo ſecundum ſubſtantiam & dignitatem defuncti extruere debere. *l. 27. ff. de condit. & dem.*

XLIV.

44. *The Condition, If the Teſtator ſhould die without Children, is fulfilled, if the Father and Son die at the ſame time.*

If a Legacy, or a fiduciary Bequeſt, being left to a Perſon in caſe the Executor or Legatee who is burdened with it ſhould die without Children, it had happened that the ſaid Executor or Legatee, having only one Child, periſhed with him either in a Battle, or in a Shipwrack, or by ſome other Accident, ſo that it were impoſſible to know whether both the one and the other died in the ſame Inſtant, or if one of them ſurvived the other, and which of the two; the Intention of the Teſtator having been, that the fiduciary Legatee ſhould be preferred to all others, except a Child of the Executor's, or Legatee's, and there remaining no Child who has Right to exclude him, the Caſe of the fiduciary Bequeſt would be come to paſs *p*.

p Si quis ſuſceperit quidem filium, verum vivus amiſerit: videbitur ſine liberis deceſſiſſe. Sed ſi naufragio, vel ruina, vel adgreſſu, vel quo alio modo ſimul cum patre perierit: an conditio defecerit, videamus. Et magis non defeciſſe arbitror. Quia non eſt verum, filium ejus ſupervixiſſe. Aut igitur filius ſupervixit patri, & extinxit conditionem fidei commiſſi, aut non ſupervixit, & extitit conditio. Cum autem, quis ante, & quis poſtea deceſſerit, non apparet: extitiſſe conditionem fideicommiſſi magis dicendum eſt. *l. 17. §. 7. ff. ad Senat. Trebell.* See the ſeventh Article of the ſecond Section of Pupillary Subſtitution, and the eighteenth Article of the Section of direct Subſtitutions. See the eleventh and twelfth Articles of the ſecond Section, in what manner Children ſucceed, and the Remarks which are there made.

XLV.

45. *The Diſpenſation of Age does not accompliſh the Condition of Majority.*

If the Diſpoſition of a Teſtator, whether it were the Inſtitution of an Executor, or other Diſpoſition, ſhould contain the Condition of Majority in the Executor or Legatee; this Condition would not be accompliſhed any other way than by the Age of Majority. And the Diſpenſation of Age, which might be obtained by the Perſon whom the Teſtator required to be of full Age, would not ſatisfy the Condition *q*.

q Si quis aliquid dari vel fieri voluerit, legitimæ ætatis fecerit mentionem: vel ſi abſolute dixerit perfectæ ætatis: illam tantummodo ætatem intellectum eſſe videri volumus quæ 25 annorum curriculis completur, non quæ ab Imperiali beneficio ſuppletur. *l. ult. C. de his qui ven. at. imp.*

XLVI.

46. *Divers Ways of providing for the Execution of Conditions, and other Diſpoſitions.*

The conditional Diſpoſitions of Teſtators, and the others, which may oblige the Executor or Legatee to ſome Security or Precaution, are executed according as the Intention of the Teſtator and the Circumſtances may ſeem to demand. And Proviſion is made in this matter different ways; either according to what the Teſtator himſelf has ordained, if he has explained himſelf about it, or in the manner which may beſt ſuit with the Intereſt of the Perſons who may be concerned in the ſaid Bequeſts *r*. Thus, a Teſtator may, for the greater ſecurity of his Legacies, and of the other Charges with which he burdens his Succeſſion, name an Executor of his Teſtament, who ſhall take

r Inter omnes convenit, hæredem ſub conditione pendente conditione poſſidentem hæreditatem, ſubſtituto cavere debere de hæreditate: Et, ſi defecerit conditio adeuntem hæreditatem ſubſtitutum & petere hæreditatem poſſe: & ſi obtinuerit committi ſtipulationem. Et plerumque ipſe prætor & ante conditionem exiſtentem, & ante diem petitionis venientem, ex cauſa jubere ſolet ſtipulationem interponi. *l. 12. ff. qui ſatiſd. cod. cog.*

Sed & ſi plures ſubſtituti ſint, ſingulis cavendum eſt. *l. 13. eod.*

This Word Cavere, *in theſe Texts, does not ſignify the giving of Surety, but only to oblige himſelf, or to promiſe, or to make, as it is called, his Submiſſion.*

poſ-

poſſeſſion of all his Goods, in order to acquit the Legacies and the Debts, and to reſtore to the Heir the Goods which may remain after payment of the Debts and Legacies, as ſhall be explained in the eleventh Section. Thus, the Heir or Executor of a Teſtament may retain the Fund of a Legacy of a Sum of Money which is deſtined for ſome Uſe, until it be applied to the ſaid Uſe. Thus, in a Legacy left on condition that the Legatee ſhall remit to one of his Debtors the Debt which he owes him, the Heir or Executor may oblige him, upon delivering the Legacy, to give up the ſaid Debtor's Bond, or to give an Acquittance of the Debt, if he had no Bond for it. Thus, a Legacy of a Rent to be paid out of a certain Land or Tenement, would have its Security upon the ſaid Land or Tenement, and upon the other Goods of the Succeſſion, and of the Heir or Executor. Thus, in the different Charges and Conditions, whether it be to give, to do, or not to do, it is by the Circumſtances that we ought to regulate what ought to depend ſolely on the Faith and Integrity of the Executor or Legatee, and what may demand ſome other kind of Security *s*. Thus, in general, the Legatees, as well as Creditors, who may have ground to fear that the Executor is not in good Circumſtances, and that he may miſapply the Effects of the Succeſſion, may ſecure them by having them ſealed up by Order of the Judge, unleſs the Executor gives them Satisfaction either by finding Sureties, or by other ways *t*.

s Mutianæ cautionis utilitas conſiſtit in conditionibus, quæ in non faciendo ſunt conceptæ: ut puta *Si in capitolium non aſcenderit, ſi Stichum non manumiſerit*, & in ſimilibus. Et ita Ariſtoni, & Neratio, & Juliano viſum eſt. Quæ ſententia & conſtitutione Divi Pii comprobata eſt. Nec ſolum in legatis placuit: verum in hæreditatibus quoque idem remedium admiſſum eſt. Unde ſi uxor maritum ſuum, cui dotem promiſerat, ita hæredem ſcripſerit ex parte. *Si dotem, quam ei promiſi, neque petierit, neque exegerit.* Denunciare eum poſſe cohæredi, paratum ſe accepto facere dotem, vel cavere: & ita adire poſſe hæreditatem. Sed ſi ex aſſe ſit inſtitutus maritus ſub ea conditione: quoniam non eſt cui caveat: non impediri eum, quominus adeat hæreditatem. Nam jure ipſo videtur impleta conditio, eo quod non eſt, quem poſſit de dote convenire ipſe adeundo hæreditatem. *l.* 7. *d. l.* §. 1. *ff. de condit. & dem.*

Is, cui ſub conditione non faciendi aliquid relictum eſt, ei ſcilicet cavere debet Mutiana cautione, ad quem Jure Civili, deficiente conditione, hoc legatum, eave hæreditas pertinere poteſt. *l.* 18. *eod. v. Nov.* 22. *c.* 44.

t Legatorum nomine ſatiſdari oportere prætor putavit: ut, quibus teſtator dari fierive voluit, his diebus detur vel fiat. *l.* 1. *ff. ut legat. ſeu fideicom. ſerv. cauſ. cav.*

Nec ſine ratione hoc prætori viſum eſt, ſicuti hæres incumbit poſſeſſioni bonorum, ita legatarios quoque carere non debere bonis defuncti: ſed aut ſatiſdabitur eis: aut ſi ſatis non datur, in poſſeſſionem bonorum venire prætor voluit. *d. l.* §. 2.

XLVII.

We muſt not reckon in the Number of conditional Bequeſts, a Legacy which the Teſtator has bequeathed in Terms that ſeem to demand the Approbation or Conſent of his Executor. As, if he had bequeathed a Sum of Money, if his Executor ſhould think well of it, or ſhould judge it to be juſt and reaſonable, or that he had added ſome other ſuch like Expreſſion, even although he had left the Legacy on condition that his Executor ſhould be pleaſed with it. For theſe Terms would not make the Legacy to depend on the Will of the ſaid Executor; but they would ſhew only that the Teſtator had conſidered his Executor as a reaſonable Perſon, whom he was willing to engage by this Civility to execute his Intention with Pleaſure and Chearfulneſs *u*.

47. *A Legacy which is given on condition that the Executor does approve thereof, is not conditional.*

u Si ſic legatum vel fideicommiſſum ſit relictum, *Si æſtimaverit hæres, ſi comprobaverit, ſi juſtum putaverit:* & legatum & fideicommiſſum debebitur. Quoniam quaſi vivo potius bono ei commiſſum eſt, non in meram voluntatem hæredis collatum. *l.* 75. *ff. de legat.* 1.

SECT. IX.

Of the Right of Accretion.

THE Right of Accretion is the Right which each of two Heirs to the ſame Succeſſion, or of two Legatees of the ſame Thing, has to take the Share or Portion of the other, who either cannot or will not take it himſelf.

The Right of Accretion in Legal Succeſſions.

In order to underſtand well what this Right is, it is neceſſary to conſider it in a Caſe where we may eaſily diſcover what its Nature is, and what its Origin. If we ſuppoſe that a Father leaving behind him two Children, there is one of them who renounces the Succeſſion, or renders himſelf unworthy of it, or is incapable of it by reaſon of ſome Condemnation, or otherwiſe, or who is juſtly diſinherited; his Share or Portion, which he either could not or would not take, remaining in the Maſs of the Inheritance, it will belong entirely to his Brother, who will be the only Perſon left

left to ſucceed as Heir. And it would be the ſame thing in collateral Succeſſions of Brothers, or other more remote Relations, if two or more Coheirs, called together to the ſame Succeſſion, one of them either would not or could not take his Part therein.

This Right of the Heir, who acquires the Portions of the others, is called Accretion, becauſe the Portion of the Perſon who does not ſucceed, accrues to him who ſucceeds alone; ſo that he has the whole.

We ſee in theſe Caſes of Legal Succeſſions, that this Right of Accretionis altogether natural in them, being founded on this, That the Law which calls the Heirs of Blood to Succeſſions, calls them thereto according to their Number, and in ſuch a manner, that if they are two or more in Number, they ſhare among them the Inheritance by equal Portions; and if there be only one, he alone has the whole. For it follows from this Rule, that it is only the Concurrence of ſeveral Coheirs together, which divides the Succeſſion among them; and that therefore, as any one of them ceaſes to take his Share or Portion, it remains in the Inheritance, and is acquired to the others by virtue of the Right which they have to the whole; which will remain entire to one alone, if there be no more Heirs than one.

The Right of Accretion in Teſtamentary Succeſſions.

As to Teſtamentary Succeſſions, it may be ſaid, that the Right of Accretion is not ſo evidently juſt and natural in them, as it is in the Legal Succeſſions. For, if in the Caſe of two Teſtamentary Heirs, who are not Heirs of Blood, one of them not being willing or capable to ſucceed, it ſhould be neceſſary to decide to whom his Share or Portion ſhould belong, whether to the Teſtamentary Coheir, or to the Heir of Blood; the Right of this Teſtamentary Heir would not be ſo perfectly evident againſt the Heir of Blood, as is in the Caſe of a Succeſſion to an Inteſtate, the Right of the Heir of Blood, who is found to be ſole Heir by the Default of his Coheir, who cannot or will not take any Share or Part in the Inheritance. For in this ſecond Caſe, the Right of this Heir of Blood cannot be controverted by any Perſon whatſoever; and in the firſt Caſe of the Teſtamentary Coheirs, the Heir of Blood would have ſtrong Reaſons to urge againſt the Teſtamentary Heir who ſhould claim the Share or Portion of the other; as ſhall be remarked hereafter.

This Queſtion is decided by the *Roman* Law in favour of the Teſtamentary Heirs. And ſeeing the Right of Accretion is natural to the Heirs at Law, and that the Quality of Heir, which is common to the Teſtamentary Heir, and to the Heir at Law, makes the Heir univerſal Succeſſor to all the Goods of the Deceaſed, the *Roman* Law has regulated, that the Teſtator having had a mind to exclude his Heirs at Law, or next of Kin, from his Succeſſion, and to diſpoſe of it by Will, the Teſtamentary Heirs were the only Perſons called to the whole Inheritance; and that therefore he who was inſtituted Heir only for a part, became Heir to the whole, if the Heir to the other part would not or could not accept it. It was probably upon this Principle, which makes the Quality of Heir to give an univerſal Right, by which the whole Inheritance is acquired to him among the Heirs who proves to be the only one who is willing or capable to accept of it, that this other Rule of the *Roman* Law was founded, to wit, that a Succeſſion cannot be regulated partly by Teſtament, and partly without it *a*: ſo as that a Teſtator ſhould be able to diſpoſe by Teſtament only of one Part of his Eſtate, inſtituting, for example, an Heir or Executor for one Half of it, without diſpoſing alſo of the other Half. For in this Caſe the Heir or Executor, who was inſtituted for one Half, was Heir to the Whole, and excluded from the other Half the Heir at Law, or next of Kin, who was not called by the Teſtament. And even altho the Heir named by the Teſtament had been inſtituted Heir only in a certain Land or Tenement, which is properly ſpeaking no more than a Legacy, yet the Quality of Heir being given him, he was univerſal Heir to all the Goods of the Succeſſion *b*.

It reſults from this firſt Remark on the Right of Accretion among Heirs at Law, and on that which takes place among Teſtamentary Heirs, that there is this Difference between theſe two ſorts of Accretion, that it may be ſaid of that among Heirs at Law, that it is of the ſame natural Right as the Law which gives them the Succeſſion. For as it is naturally juſt and equitable, that if two Heirs of Blood be equally cal-

a l. 7. *ff. de reg. Jur.* §. 5. *inſt. de hæred. inſt.*

b V. l. 41. *in fin. de vulg. & pup. ſubſt. l.* 2. §. 2. *ff. de bon. poſſ. Secŭ. ab.* §. 5. *inſt. de hæred. inſtit.*

led

led by their Proximity, they ought to ſhare the Succeſſion between them; ſo the ſame Equity demands that the Inheritance ſhould remain intire to him who proves to be ſole Heir by the Excluſion of others. But it may be ſaid of the Accretion in teſtamentary Succeſſions, that it derives its Force more from the Poſitive Law than the Law of Nature. For if in the Caſe of a Teſtament which calls to the Inheritance other Heirs than thoſe who are the Heirs of Blood, the Law had ordained that there ſhould be no Right of Accretion among them, unleſs the Teſtator had expreſly order'd it to be ſo; but that the Share or Portion of him who would not or could not be Heir, ſhould go to the Heir at Law, together with the Charges of the Teſtament, and that ſo there ſhould be two Heirs, one by Teſtament and the other by Law, it could not be ſaid of ſuch a Law that it were contrary to the Law of Nature. And it might even be alledg'd in favour of the Heir at Law, that it would be natural enough, ſeeing the Teſtator intended to give to each of the Heirs named by his Teſtament only a Portion of the Inheritance, that each of them ſhould be reduced to his Portion; and that the Share of the Teſtamentary Heir who either could not, or would not ſucceed, ſhould be left to the Heir at Law, in the ſame manner as he would have the whole if none of the Teſtamentary Heirs did ſucceed. And the Right of the Heir at Law to the vacant Portion, would be with much more reaſon juſt and natural, if the Teſtator had inſtituted one only Heir for a Moiety or other Portion of the Inheritance, or even only for one ſingle Tenement; ſeeing in theſe Caſes propoſed in the *Roman* Law, as has been already obſerved, the Preſumption would be natural enough, that the Teſtator had a mind that the reſt of his Goods ſhould go to his Heir at Law. And although it would happen by the Law which in theſe Caſes ſhould call the Heir at Law to ſucceed with the Heir by Teſtament, that he to whom the Teſtator had given the Title of Heir, would not be univerſal Heir, and that the Succeſſion would be regulated, partly by Teſtament, and partly as of one dead inteſtate; yet there would be nothing in theſe two Events contrary to the Law of Nature, and which an arbitrary Law could not ordain. For as to the firſt, altho the Teſtamentary Heir who ſhould remain the only one of the two inſtituted by the Teſtator, would not be univerſal Heir, and that the Heir at Law would ſhare the Inheritance with him, it would nevertheleſs be always true that the Title of Heir would be univerſal, but divided between two Heirs, as it happens as often as there are more Heirs than one, whether they be Heirs by Teſtament, or Heirs at Law. And as to the ſecond, altho one part of the Succeſſion would belong to the Teſtamentary Heir, and the other to the Heir at Law, the Teſtament having its effect only for one of the Heirs whom the Teſtator had named in it, yet this Event would do nothing elſe but give to two different Laws the natural Effect both of the one and of the other: For it would give to the Law of Nature the Effect of making the Heir of Blood to inherit, and to the Law which permits the making of an Heir by a Teſtament, the Effect of giving to the Teſtamentary Heir, who ſhould be found capable of ſucceeding, the Portion of the Inheritance which the Teſtator had a mind to give him. Thus the Intention of the Teſtator being accompliſhed, the Law which permits the uſe of Teſtaments would be ſo likewiſe. To which we may add, that it is ſo far from being contrary to the Law of Nature, for a Teſtamentary Heir to ſhare the Inheritance with the Heir at Law, and for one to ſucceed by Teſtament, and the other by the bare Effect of Conſanguinity, that in our Cuſtoms there can be no Inſtitution of an Heir, who is called univerſal Legatee, where we do not ſee the Succeſſion regulated partly by Law, as of one dead inteſtate, and partly by Teſtament; ſince the univerſal Legatee ſucceeds by the Teſtament, and the Heir at Law ſucceeds by the Law, and that even againſt the Teſtament. Which does not hinder both the one and the other from having an univerſal Title as two Coheirs have, whether they ſucceed as next of kin to an Inteſtate, or by Teſtament, who divide the Succeſſion between them. And we ſee likewiſe in the *Roman* Law, that not only divers ſorts of Goods go to divers ſorts of Heirs *c*, as well as by our Cuoſtms, but that he who had a right to make a Military Teſtament had power to leave his Succeſſion partly regulated by Teſtament, and partly by the Diſpoſition of the Law as dying inteſtate *d*.

c See the ſecond Section of the ſecond Title of the ſecond Book.

d l. 6. ff. de teſt. mil. l. 2. cod. eod.

And

And it is known that ſeveral Interpreters have been of opinion, that in divers Caſes every Teſtator, altho he had not the Privilege of making a Military Teſtament, left Part of his Succeſſion to be diſpoſed of by Law, while he diſpoſed of the other Part by Teſtament. And even in the Caſes where the Right of Accretion was to take place by the *Roman* Law, it might happen that the Succeſſion might be divided, and go part of it to one of the Heirs by Teſtament, and part of it to the Exchequer, when by the Fiſcal Laws the Exchequer ſeized on the Share or Portion of the Heir who could not ſucceed, and excluded the Coheir from it, who had it not been for the ſaid Fiſcal Laws, would have had the Right of Accretion *e*. So that we may reaſonably conclude that which has been already advanced to be now ſufficiently proved, that whereas the Right of Accretion in Legal Succeſſions is a part of the Law of Nature, in Teſtamentary Succeſſions it derives its Force only from a Poſitive Law *f*.

The Right of Accretion which hath been mentioned hitherto, reſpects only Coheirs; but it was extended to Legatees, to whom one and the ſame thing is bequeathed in Terms which ought to have that Effect: For this Right doth not always take place among Legatees of the ſame thing, as it does among Coheirs of the ſame Succeſſion. But according to the different Expreſſions made uſe of by the Teſtators, there might or there might not be a Right of Accretion among the Legatees, which depends on the Rules that ſhall be explained hereafter.

Cauſes of the Difficulties in the Matter of the Right of Accretion.

It may be remarked as a Conſequence of the Reflections which have been juſt now made on this Right of Accretion, which takes place among Teſtamentary Heirs as well as Legatees, that whereas this Accretion derives its Force only from the Poſitive Law, and in legal Succeſſions it may be ſaid to be a part of the Law of Nature; this is an Effect of that Difference between theſe two ſorts of Accretion, that as for that Accretion which naturally belongs to the Heirs at Law, there does not ſeem to ariſe any Difficulties from it; whereas there occur many Difficulties in the Accretion which takes place in Teſtamentary Diſpoſitions, as we ſee by Experience in the *Roman* Law. For altho mention be made there of the Right of Accretion in Legal Succeſſions *g*, yet we find no Difficulties or Queſtions ſtarted concerning the Right of Accretion except in Teſtamentary Succeſſions; which proceeds from hence, becauſe the Right of Accretion in legal Succeſſions being a neceſſary Conſequence of a Principle that is ſimple and natural, which is the Right that the Law gives to the Heir of Blood to have the whole Succeſſion, when he happens to be the only Heir; there is nothing more eaſy than to know whether this Right takes place. But on the contrary, the Right of Accretion in the Diſpoſitions of Teſtators depends on two Principles which are arbitrary, and ſubject to different Interpretations. One is the Will of Teſtators, whoſe Diſpoſitions may either give occaſion to the Right of Accretion, or prevent the ſame. And the other is the Law preſcribed by divers Rules which the *Roman* Law hath eſtabliſhed concerning this matter. So that as it may be ſaid that theſe Rules are not there explained with that Order and Clearneſs that is neceſſary for underſtanding them aright, ſo as one may be able to judge thereof by their Connexion, and that the Diſpoſitions of Teſtators, which are oftentimes conceived in obſcure Terms, and the different Combinations of the Circumſtances which ariſe from the Events, make it oftentimes very uncertain how to find out the true Will of the Teſtators, as well as how to apply the Rules which may relate thereto; this Matter of the Right of Accretion has been render'd ſo intricate, that ſome Interpreters have ſaid, that there is not one matter in the Law of ſo great difficulty as this is; altho it be likewiſe true that there is no Matter in the Law of which the uſe is leſs neceſſary; ſince we might have been very well without the Rules of the Right of Accretion, if it had been limited to legal Succeſſions, and to the Caſes where the Teſtator ſhould appoint it to take place. A Law of this Simplicity and Eaſineſs would have prevented the trouble of a great many Rules, and a great many Law-Suits, and would have been attended with no manner of Inconve-

e Ulp. Tit. 24. §. 12.

f See concerning all that has been ſaid for the Heir at Law, the Remark on the ſixth Article.

g Si ex pluribus legitimis hæredibus quidam omiſerint adire hæreditatem, vel morte, vel qua alia ratione impediti fuerint, quominus adeant, reliquis qui adierit adcreſcit illorum portio. *l.* 9. *ff. de ſuis & legit. hæred.*

nience.

nience. For where would be the Inconvenience, if the Share or Portion which one of the teſtamentary Heirs could not or would not take, ſhould remain to the Heir at Law, the other Teſtamentary Heir having what the Teſtator left him; or if that which one of the Legatees refuſed, or could not take, ſhould go to the Heir, the other Legatee contenting himſelf with the Share or Portion left him by the Teſtament; or, in fine, if a Teſtamentary Heir who ſhould be inſtituted alone, and only for a Share or Portion of the Inheritance, according to the Examples which we ſee of ſuch-like Inſtitutions in the *Roman* Law, or for ſome one Land or Tenement in particular, were reduced to that which the Teſtator had left him?

It would ſeem that if any Law had regulated things in this manner, either it would not be ſaid that theſe Events are Inconveniencies, or if they ſhould be thought ſo, yet they would ſtill appear leſs than that of the Difficulties which ariſe from the Law concerning the Right of Accretion, in the manner that we find it regulated by the *Roman* Law.

We have made here all theſe Remarks on the Right of Accretion, in order to give an Idea of its Origin, of its Nature, and of the general Principles relating to this matter. And we have thought proper to add here occaſionally the Reflections which have been made for diſtinguiſhing in the Matter of Accretion that which is of the Law of Nature from that which it has from the Poſitive Law, eſtabliſhed by pure arbitrary Laws, and which might have been otherwiſe regulated. We have made theſe Reflections, as alſo thoſe which ſhall hereafter be explained, only with a view to unravel the Difficulties of this Matter, which the Interpreters own to be ſo great in the *Roman* Law. For to underſtand rightly any Matter whatſoever, and the Difficulties which may ariſe in it, it is neceſſary, or at leaſt uſeful, to diſtinguiſh exactly in the common Ideas which are given us of it, between that which is eſſential to its Nature, and that which is not. And altho this View having engag'd us in an Enquiry into the Principles of the *Roman* Law, which have been the Foundation of the Right of Accretion in Teſtamentary Succeſſions, we have been obliged to remark on the Nature of theſe Principles, that the Law of Accretion could have been very well ſpared, except in Succeſſions of Inteſtates, and in the Caſes where the Teſtators had particularly directed it to take place in their Diſpoſitions; yet we did not pretend to leave out of this Book the Rules of the *Roman* Law relating to this Matter; ſince on the contrary they compoſe this Section, and are even preſuppoſed as the Foundation of the Remarks which are ſtill to be made. But we thought our ſelves at liberty to make theſe Reflections, and that even thoſe who ſhould not approve of them, would not however condemn the Liberty of propoſing them as bare Speculations, without requiring any Perſon's Approbation of them.

After theſe general Remarks on the Right of Accretion, it remains only that we add ſome other particular Obſervations on the Detail of this matter, and which are neceſſary for clearing up the Difficulties in it.

Seeing the Right of Accretion in Legal Succeſſions hath its Foundation in this, that the Co-heirs are joined together by the Tie which is made between them by the Succeſſion that is common to them; the Right of the Heir who is called to inherit the Shares or Portions which become vacant, is in effect a ſimple and natural Right to take the whole, becauſe none of the other Heirs take any part of it from him. So that one may as well ſay, and with as much or more reaſon, that he has the whole, becauſe his Right to the whole ſuffers no Diminution by the Concurrence of other Heirs; as to ſay, that he has the whole by the Accretion of the Portions of the others. It is in Imitation of this Right of the Heirs at Law, that the *Roman* Law hath given to Teſtamentary Heirs the Right of Accretion, as has been already explain'd; ſo that the Foundation of their Right of Accretion is their Union with one another, becauſe of the Quality of Co-heirs or Co-executors of a Suceſſion that is common to them; which is the reaſon why they are ſaid to be conjoined, that is, jointly called to the Inheritance; as it is alſo ſaid of two or more Legatees of one and the ſame thing, that they are jointly called to the Legacy that is common to them. And ſeeing Teſtators who inſtitute ſeveral Executors, or who give to ſeveral Legatees one and the ſame thing, may expreſs themſelves in different manners, and may join them together by divers Expreſſions which may have different Effects; the *Roman* Law has diſtinguiſhed three

Manners in which Executors and Legatees of one and the ſame thing, may be linked or joined together in a Teſtament *h*.

The firſt is that which joins them by the thing itſelf that is deviſed to them, altho they be not joined by one common Expreſſion *i*; as, if a Teſtator inſtitutes in the firſt place one Executor, and then inſtitutes a ſecond by another Clauſe, without diſtinguiſhing their Shares or Portions; or if he gives a Houſe to a Legatee, and gives afterwards and ſeparately the ſame Houſe to another Legatee by another Clauſe. We make choice of this Example, becauſe altho this manner of deviſing may ſeem to be whimſical to us, and to be very improper for a Teſtator who has any Senſe, or who is uſed to be any ways exact in his Affairs, yet the Examples of it are frequent in the *Roman* Law.

The ſecond manner is that which joins together the Executors or Legatees, both by the thing and by the Expreſſion of the Teſtator *l*; as if he inſtitutes ſuch a one and ſuch a one his Executors; or if he gives to ſuch a one and ſuch a one a Houſe or ſome Land.

The third is that which joins the Perſons together only by Word, and not by the thing; as if a Teſtator deviſes a Land or Tenement to ſuch a one and ſuch a one by equal Portions *m*.

We expreſs here theſe three Manners of deviſing juſt as they are explained in the Laws which make mention of them; but we muſt not take this Diſtinction of the Manners in which a Teſtator may join together Executors or Legatees of one and the ſame thing, to be a Diviſion of a Geometrical or Metaphyſical Exactneſs, ſo as that it may agree equally to Executors and to Legatees, and as if each of theſe Manners had always the ſame Effect indifferently for Legatees as for Executors, in what concerns the Right of Accretion. One ſhould be often miſtaken if they always underſtood it ſo; and one would find even that an Expreſſion which in ſome Laws is given for an Example of one of theſe Manners, is given elſewhere for an Example of another. Thus it is ſaid in one Law, that this Expreſſion, *I inſtitute ſuch and ſuch a one my Heirs, each of them for a half*, makes a Conjunction both by the thing and by Word *n*. And in another Law this Expreſſion, *I give and bequeath to ſuch and to ſuch a one, ſuch a Land or Tenement by equal Portions*, makes only a Conjunction by Words, and not by the thing *o*.

We ſee that theſe two Expreſſions are exactly like to one another; for to inſtitute or bequeath by Moiety, or by equal Portions, is the ſame thing: and yet nevertheleſs they are given for an Example of two ſorts of Conjunction wholly different from one another, and ſo vaſtly different, that in one there is a Right of Accretion, and not in the other; but the Laws in which theſe Inſtances are given, do not mark in what manner we ought to reconcile this apparent Contrariety, which proceeds from the Difference between Legacies and an Inheritance. This Difference conſiſts in that which hath been already remarked, that as to what concerns an Inheritance or Succeſſion, in what manner ſoever one inſtitutes two Heirs or Succeſſors, whether by one and the ſame Clauſe, or ſeparately, whether one expreſſes their Shares or Portions, or makes no mention of them; yet nevertheleſs they are joined together by the thing, that is, the Inheritance, which one conſiders as indiviſible, and there is always between them a Right of Accretion, for the Reaſons which have been explained: And it is for theſe Reaſons that with regard to an Inheritance, this Expreſſion, *I inſtitute ſuch and ſuch a one my Heirs, each for a half*, makes a Conjunction or Union by the thing. But as for Legacies, if a thing is bequeathed to two Perſons by Portions, whether equal or unequal, ſeeing the thing bequeathed may be divided either by its Parts if it is diviſible, or by its Eſtimation, if it is indiviſible; this Expreſſion, *I give and deviſe to ſuch and to ſuch a one, ſuch a Land or Tenement by equal Portions*, makes no Conjunction by the thing. Thus each Legatee hath his Right limited to his Share or Portion; and if one of the Legatees either cannot or will not take his Portion, it will not be therefore vacant and without an Owner, but the Heir will have the Be-

h Triplici modo conjunctio intelligitur. Aut enim re per ſe conjunctio contingit; aut re & verbis, aut verbis tantum. *l.* 142. *ff. de verb. ſignif.*

i Re conjuncti videntur, non etiam verbis, cum duobus ſeparatim eadem res legatur. *l.* 89. *ff. de legat.* 3.

l Re & verbis. *l.* 142. *ff. de verb. ſignif.* Qui & re & verbis conjunctus eſt. *l.* 89. *ff. de legat.* 3.

m Item verbis, non etiam re, *Titio & Seio fundum æquis partibus do, lego.* d. l. 89. de legat. 3.

n Conjuncti ſunt quos & nominum & rei complexus jungit: veluti, *Titius & Mævius ex parte dimidia hæredes ſunto.* l. 142. ff. de verb. ſignif.

o Item verbis, non etiam re. *Titio & Seio fundum æquis partibus do, lego.* l. 89. ff. de legat. 3.

nefit,

nefit of it, and the other Legatee will have all that the Teſtator had a mind to give him, that is, the Portion which he left him.

It is according to this Diſtinction that we muſt underſtand the divers Effects of theſe Expreſſions, which are perfectly like to one another, and which perplex the Reader if they are not taken differently every one in its proper Senſe. But this is not the only Difficulty that we find neceſſary to be cleared up in this matter; for we meet with other Difficulties in other Laws. Thus, for example, it is ſaid in ſome Laws, that when two Legatees are joined together, the Thing is given entire to every one of them, and that it is divided only when they concur and meet together; and that therefore there is between them a Right of Accretion. *Conjunctim hæredes inſtitui, aut conjunctim legari, hoc eſt, totam hæreditatem, & tota legata ſingulis data eſſe, partes autem concurſu fieri. l.* 80. *ff. de legat.* 3. And we ſee in other Laws, that if the Legatees of one and the ſame thing are disjoined, they have each of them the whole, ſo that if they concur they ſhare the Legacy between them: And if one of the two does not take his part, it accrues to the other. *Si disjunctorum aliqui deficiant, cæteri totum habebunt. l. un.* §. 11. *Cod. de cad. toll. l.* 33. *ff. de leg.* 1. It would ſeem to follow from theſe two Texts, that the Conjunction and Disjunction having equally the Effect to give the Right of Accretion to the Legatees, they will always have it in what manner ſoever they be Legatees of one and the ſame thing; which does not hold true of thoſe to whom the Legacy divides the thing; for between them there is no Accretion. So that to reconcile theſe ſeveral Rules, it is neceſſary to underſtand in the firſt of theſe two Texts the Word *conjoined*, of Legatees who are conjoined by the thing; as, if a Teſtator bequeaths one and the ſame thing to two Perſons without diſtinction of Portions: And in the ſecond, we muſt underſtand the Word *disjoined*, of thoſe who are disjoined only by the Words, and who are conjoined by the thing; as, if a Teſtator having bequeathed a thing to a Legatee, bequeaths the ſame thing to another Perſon by another Clauſe, as it has been already remarked.

We ſhall not enlarge here on the Detail of the other particular Difficulties which we meet with in the Laws concerning this Matter; for ſuch a particular Enquiry would only perplex the Reader to no purpoſe: As, for example, the Differences which the antient *Roman* Law made in the Right of Accretion, between a Legacy which was called *per damnationem*, by which the Heir was required to give a Thing to a Legatee; and the Legacy which they called *per vindicationem*, by which the Thing was given to the Legatee, ſo as that he himſelf might take it out of the Inheritance; as, if the Teſtator had ſaid, I will that ſuch a one take ſuch a Thing *p*. According to theſe divers manners of bequeathing one and the ſame Thing to two Legatees, the Right of Accretion might take place, or not take place between them *q*. And it ſuffices to remark in general on all the Difficulties of this Matter, that they remain ſuch both in the antient and modern Law of the *Romans*; that even the Laws which explain the Principles and general Rules thereof, contain Expreſſions which the Interpreters explain by Senſes quite oppoſite to one another, to which the ſaid Expreſſions give juſt occaſion, as appears by ſome of the Texts which have been taken notice of in this Preamble, and in others, in which they have ſuffered the antient Difference between theſe two ſorts of Legacies, which have been juſt now mentioned, to ſubſiſt, altho it had been aboliſhed by *Juſtinian*. Which is one of the Cauſes of the Difficulties in this Matter; and it has given occaſion to one of the ableſt of the Interpreters to charge thoſe with Stupidity or Negligence, who were employed to collect out of the Books of the antient Lawyers the Extracts which compoſe the Digeſt, for not having taken due care to keep out of the ſaid Extracts that which was aboliſhed of the antient Law, and for having by that means left in ſeveral places Texts contrary to others which they have inſerted *r*.

One may judge by all theſe Reflexions, that the Difficulties which ariſe in this Matter of the Right of Accretion are almoſt of the ſame Nature with thoſe of Codicillary Clauſes in Teſtaments. But there is this Difference between theſe two Matters, that as for Codicillary Clauſes, there are no Rules certain enough in the *Roman* Law, from which

p §. 2. *Inſt. de leg. Ulpian. Tit.* 24. §. 3, & 4.
q Ulpian. Tit. 24. §. 12, & 13.
r Ut plane jam ex eo appareat, quam hebetes aut indiligentes fuerint hi, quibus ſtudium fuit pandectarum capita ex veterum Juriſconſultorum libris decerpere. *Cujac. ad Titul.* 24. *Ulp.*

we could gather a fixed and ſtated Law in relation to them, as has been remarked in the fourth Section; and for that reaſon we have not been able to give any particular Rules concerning them. But as for the Right of Accretion, ſeeing the Diſpoſitions of Teſtators may oft-times give occaſion to it, and ſeeing we have in the *Roman* Law many Rules concerning it which may be rendred clear and certain, we have compos'd this Section of them; and we have endeavoured to ſet them in that Light and Order which is neceſſary to make them eaſy, as much as we have been able amidſt the Difficulties which we have juſt now explained. For altho *Juſtinian* did make a Law *s*, one part whereof is in relation to this Matter, and that it is there ſaid, that he had judged it neceſſary to examine it thoroughly, fully, and with Exactneſs, in order to make it clear to every one's Underſtanding, yet this Project ſeems to be very lamely executed.

After all that has been ſaid of the Right of Accretion in this Preamble, the Reader is ſufficiently advertiſed that this Matter is of the Number of thoſe which are common to Teſtamentary Inſtitutions and to Legacies, to fiduciary Bequeſts and Subſtitutions, and that the Rules which ſhall be explained in this Section, relate chiefly only to Teſtamentary Succeſſions. For altho in the beginning of this Preamble we have given for an example of the Right of Accretion, that which hath place among Heirs at Law, yet that was only to make the Nature of this Right more intelligible in teſtamentary Succeſſions, to which the Uſe of the Rules concerning this Matter ought to be reſtrained, ſince in legal Succeſſions there can happen no Difficulty, every Heir having his natural Right to the whole when he is left all alone. So that as to the Right of Accretion in legal Succeſſions, we ſhall make no expreſs mention thereof, except in the third Article; which however will be no Hindrance why we may not apply to them whatever is in the other Articles, that may ſuit with them.

s His ita definitis, cum in ſuperiore parte noſtræ ſanctionis in pluribus locis conjuncti fecimus mentionem: neceſſarium eſſe duximus omnem inſpectionem hujus articuli latius & cum ſubtiliori tractatu dirimere, ut ſit omnibus & hoc apertiſſime conſtiturum. *l. un.* §. 10. *C. de caduc. toll.*

[*This Right of Accretion in the Civil Law, is the ſame as the Right of Survivorſhip in the Common Law of* England; *and* Bracton, de Legibus, lib. 4. fol. 262. b. *ſpeaking of Survivorſhip, calls it expreſly by the Name of* Jus accreſcendi. *Which ſhews that the Law of Survivorſhip is originally derived from the Civil Law, and therefore the Rules laid down in the Civil Law, touching the Right of Accretion, muſt be of great Uſe to decide any Difficulties that may ariſe in relation to Survivorſhip. But there is this Difference to be taken notice of between Survivorſhip at Common Law, and the Right of Accretion in the Civil Law; that Survivorſhip at Common Law takes place not only in Succeſſions and Inheritances, but likewiſe in Grants and other Conveyances; whereas the Right of Accretion by the Civil Law takes place only in Succeſſions of Inteſtates, and all Teſtamentary Diſpoſitions, but not in Contracts and Deeds of Gift.* Perez. in Cod. lib. 6. tit. 51. numb. 9.]

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I.

1. Uſe of the Right of Accretion.

When there are two or more Heirs or Executors of one and the ſame Succeſſion, or two or more Legatees of one and the ſame thing, and that ſome one of the ſaid Executors or Legatees takes no part of the Inheritance or Legacy, whether it be that he renounces it, or that he is found to be incapable or unworthy of it, or that he chances to die before the Teſtator; the Portion which he

he was to have had, goes to the other Executors, or other Legatees, according as the Diſpoſition of the Teſtator ought to have this Effect; which depends on the Rules that follow. And it is the ſame thing among ſeveral Perſons, to whom an Inheritance or a Legacy is left by Subſtitution or a fiduciary Bequeſt *a*.

a See the following Articles.

II.

2. Definition of this Right.

The Right which Executors, Legatees, and the Perſons ſubſtituted to them, have to reap the Benefit of the Portions of one another, when there are any among them who will not or cannot take the Portions belonging to them, is called Right of Accretion, becauſe the vacant Portion accrues to the Portions of the others *b*.

b See the Articles which follow.

III.

3. Accretion among Coheirs at Law.

Among Coheirs at Law there is always a Right of Accretion: For the Inheritance belongs to the neareſt of Kin who is capable of ſucceeding. Thus, he ought to have it entire, if there be no Coheir, or if thoſe who were called to the Inheritance with him would not or could not take their Part in it *c*. But if one of the Coheirs ſhould die after the Succeſſion was open, when he did not know that it was, or before he had accepted it, he would tranſmit his Right to his Heirs, and his Coheir would have no part in his Portion by Accretion *d*.

c Si ex pluribus legitimis hæredibus quidam omiſerint adirehæreditatem, vel morte, vel qua alia ratione impediti fuerint, quominus adeant, reliquis, qui adierint accreſcit illorum portio. *l.* 9. *ff. de ſuis & legit. hæred.*

d This is a Conſequence of our Rule, that the Dead gives Seiſin to the Living. *For this Heir having ſucceeded before his Death, his Right would be veſted in him, and would paſs to his Heirs.*

IV.

4. In Teſtaments, it depends on the manner in which the Executors or Legatees are joined together.

The Right of Accretion in Teſtamentary Diſpoſitions, depends on the manner in which the Teſtator hath explained his Intention among ſeveral Executors, ſeveral Legatees, or ſeveral Perſons ſubſtituted to them, and on the Conjunction which the Words of the Teſtator make among them. For it is according as they are joined tegether by one and the ſame Right, or that their Portions are diſtinct, that they have the Right of Accretion, or that they have it not; which depends on the Rules that follow *e*.

e See the Articles which follow. See the eighth Article.

V.

5. Three Manners in which Executors or Legatees may be conjoined.

Two or more Executors or Legatees may be joined, or called jointly to the ſame Inheritance, or to the ſame Legacy, in three manners. The firſt is, when they are conjoined only by the Inheritance, or the Thing that is left them, and called to it by different and ſeparate Expreſſions: as, if a Teſtator inſtitutes one Executor by a firſt Clauſe, and by a ſecond another Executor; or, if he bequeaths a Thing to one Legatee, and afterwards calls another Legatee to the ſame Thing. The ſecond Manner is, when the Teſtator joins the Perſons both by the Thing and by the Expreſſion; as, if in one and the ſame Clauſe he inſtitutes two Executors, or names two Legatees of the ſame Thing. The third is, when the Teſtator joins the Perſons only by the Words, and diſtinguiſhes their Portions; as, if he ſhould inſtitute two Executors, or bequeath the ſame Thing to two Perſons by equal Portions *f*. We ſhall ſee in the Articles which follow the Uſe of theſe three ſorts of Conjunction or Union.

f Triplici modo conjunctio intelligitur. Aut enim re per ſe conjunctio contingit: aut re & verbis: aut verbis tantum. *l.* 142. *ff. de reg. jur.*

Re conjuncti videntur non etiam verbis, cum duobus ſeparatim eadem res legatur. Item verbis, non etiam re, *Titio & Seio fundum æquis partibus do, lego.* l. 89. ff. de legat. 3.

Altho this Diſtinction has been explained in the Preamble, yet it was neceſſary to repeat it here. For we were obliged to ſpeak of it in the Preamble, in order to help the explaining of the Difficulties mentioned there; and it ought to be placed here, as being a part of the Rules.

We ſhall ſee in the three following Articles, the reaſon why in the third of theſe Manners, the Example is given only of Legatees, and not of Heirs or Executors.

VI.

6. Among Coheirs or Co-Executors there is always a Right of Accretion.

When the Queſtion is about the Inheritance or Succeſſion, in what manner ſoever it be that the Heirs or Executors are called to it, whether jointly or ſeparately, and whether their Portions be diſtinguiſhed or not, there is always among them a Right of Accretion. For as the Right to the Inheritance is an univerſal Right, which comprehends all the Goods and all the Charges, and that this Right is indiviſible, that is, that one cannot be Heir only for a part, ſo as that the other part remain vacant, and be without Heirs; the Portions

tions of thoſe who are not willing, or who are not capable to ſucceed, are acquired to the others. Thus, the Heir who has once accepted his own Portion, will ſucceed to that which ſhall be vacant, without having the Liberty to renounce it, and he will be liable to bear the Charges of it. Which is to be underſtood not only of the Heirs inſtituted in the firſt place, but alſo of thoſe who are ſubſtituted to them; whether it be that the ſeveral Heirs are ſubſtituted one to another, or that other Perſons are ſubſtituted to the Heirs. For in all theſe Caſes he who hath acquired one Portion of the Inheritance, whether as being inſtituted in the firſt place, or as being ſubſtituted, cannot renounce the other Portions, which by the Effect of the Inſtitution, or Subſtitution, may accrue to him *g*.

g Qui ſemel aliqua ex parte hæres extiterit, deficientium partes etiam invitus excipit: id eſt, tacite ei deficientium partes etiam invito adcreſcunt. *l.* 53. §. 1. *ff. de acq. vel omitt. hæred.*

Si quis hæres inſtitutus ex parte, mox Titio ſubſtitutus, antequam ex cauſa ſubſtitutionis ei deferatur hæreditas, pro hærede geſſerit, erit hæres ex cauſa quoque ſubſtitutionis: quoniam invito ei adcreſcit portio. *l.* 35. *eod.*

Teſtamento jure facto, multis inſtitutis hæredibus, & invicem ſubſtitutis: adeuntibus ſuam portionem, etiam invitis cohæredum repudiantium accreſcit portio. *l.* 6. *C. de impub. & aliis ſubſtit.*

Si quidem cohæredes ſunt omnes conjunctim, vel omnes disjunctim, vel inſtituti vel ſubſtituti, hoc quod fuerit quoquomodo evacuatum, ſi in parte hæreditas vel partibus conſiſtat, aliis cohæredibus cum ſuo gravamine pro hæreditaria parte etiamſi jam defuncti ſunt acquiratur: & hoc nolentibus ipſo jure accreſcat, ſi ſuas partes jam agnoverint. Cum ſit abſurdum ejuſdem hæreditatis partem quidem agnoſcere, partem vero reſpuere. *l. un.* §. 10. *C. de caduc. toll. l.* 2. *C. de hæred. inſt.*

See, as to what is ſaid in this Article, that the Right of the Heir is univerſal and indiviſible, the eleventh and twelfth Articles of the firſt Section of Heirs and Executors in general.

¶ What is ſaid in this Article, that a Portion of the Inheritance cannot remain vacant, and that he to whom it ought to accrue cannot refuſe it, is not contrary to what hath been ſaid in the Preamble of this Section, That it would have been no ways againſt the Law of Nature, if the vacant Portion were left to the Heir at Law; altho in that Caſe it would be true, that this Heir at Law, to whom the vacant Portion ought to belong, might refuſe it. For the Rule which ordains that the vacant Portion cannot be refuſed by him to whom it ought to accrue, preſuppoſes that he has accepted his Portion, either purely and ſimply, or with the Benefit of an Inventary: And it is only in this Caſe that he cannot refuſe the other Portions, on the ſame Condition upon which he has accepted his own. And ſince he would be at liberty to refuſe the other Portions, if he had not accepted his own, ſo it would be equally juſt that this Heir at Law, who had enter'd into no manner of Engagement on account of the Inheritance, ſhould have it in his power either to accept of the vacant Portion, or to refuſe it. There would be in all this nothing contrary to Juſtice nor Equity: And the ſame Things may be ſeen in our Cuſtoms; ſince it is certain, that if it ſhould happen that an Heir at Law having accepted the Inheritance, the univerſal Legatee ſhould renounce the Legacy, this Heir who could have no ſhare in the Goods compriſed in the Legacy, if the Legatee had accepted of it, could not upon the Legatee's Refuſal renounce thoſe Goods, in order to get rid of the Charges; but he would be accountable to the Creditors for all the Debts of the Inheritance, and for the particular Legacies, to the Value of what the Teſtator had power to bequeath.

VII.

When there is a Right of Accretion between ſeveral, who are either inſtituted or ſubſtituted Heirs or Executors, thoſe to whom the vacant Portions accrue, have their Share in them in proportion to the Shares which they have in the Inheritance *h*.

7. *The Accretion among Coheirs or Co-Executors is regulated according to their Portions in the Inheritance.*

h Cum quis ex inſtitutis qui non cum aliquo conjunctim inſtitutus eſt, hæres non eſt, pars ejus omnibus pro portionibus hæreditariis accreſcit. Neque refert primo loco quis inſtitutus, an alicui ſubſtitutus hæres ſit. *l.* 59. §. 3. *ff. de hæred. inſt.*

It is to be remarked on this Text, that for the right underſtanding of theſe Words, non cum aliquo conjunctim, *the Reader needs only to conſult the following Article.*

VIII.

The Right of Accretion among Heirs or Executors is not always ſuch, as that they all have this Right reciprocally between them. For if a Teſtator divides his Succeſſion in Portions, and gives, for inſtance, one half to two or more Heirs, and the other half to ſome others; one of theſe Heirs not ſucceeding, his Portion will remain in the Maſs of that Half of which it was a part, and will accrue to the Coheirs of the ſaid Half, and not to the Coheirs of the other Half. But if there were any one of the Heirs who was inſtituted ſingly by himſelf for a Moiety, or ſome other Portion of the Inheritance, and that

8. *The Coheirs have this Right differently, according as they are conjoined or disjoined from one another.*

that he could not or would not take it, it would accrue entire to all the other Heirs without Diſtinction, according to their Portions in the Inheritance *i*.

i Hæredes ſine partibus utrum conjunctim an ſeparatim ſcribantur, hoc intereſt, quod ſi quis ex conjunctis deceſſit, hoc non ad omnes, ſed ad reliquos qui conjuncti erant pertinet. Si autem ex ſeparatis, ad omnes qui teſtamento eodem ſcripti ſunt hæredes portio ejus pertinet. *l.* 63. *ff. de hæred. inſt.*

Si quidam ex hæredibus inſtitutis vel ſubſtitutis permixti ſunt, & alii conjunctim, alii disjunctim nuncupati: tunc ſi quidem ex conjunctis aliquis deficiat: hoc omnimodo ad ſolos conjunctos cum ſuo veniat onere, id eſt, pro parte hæreditatis quæ ad eos pervenit. Sin autem ex his qui disjunctim ſcripti ſunt, aliquid evaneſcat, hoc non ad ſolos disjunctos, ſed ad omnes tam conjunctos quam etiam disjunctos ſimiliter cum ſuo onere pro portione hæreditatis perveniat. Hoc ita tam varie, quia conjuncti quidem propter unitatem ſermonis quaſi in unum corpus redacti ſunt, & partem conjunctorum ſibi hæredum quaſi ſuam præoccupant: disjuncti vero ab ipſo teſtatoris ſermone apertiſſime ſunt diſcreti, ut ſuum quidem habeant alienum autem non ſoli appetant, ſed cum omnibus cohærodibus ſuis accipiant. *l. un.* §. 10. *C. de caduc. toll.* See the following Article.

IX.

9. *This Right hath place among Coheirs who are not conjoined.*

If in the Caſe of the preceding Article, all thoſe who were called to a Portion diſtinct from the others were incapable of ſucceeding, or ſhould renounce their Portion, the Right of Accretion, which took place only among them for their Parts, as long as any one of them was capable of ſucceeding, would paſs to the other Heirs of the other Portions, and that Portion which ſhould become vacant would accrue to 'em. For in that Caſe, ſeeing that Portion could not remain vacant when there is an Heir to the other, he would have the whole; and he could not confine himſelf to his own Portion, and renounce that which had become vacant, altho it ſhould be found to be burdenſome by reaſon of the Charges laid upon it; becauſe the Inheritance, as has been ſaid in the ſixth Article, is indiviſible: And the Heir who happens to be left alone, altho he was inſtituted Heir only for a Portion, ought to accept the whole Inheritance *l*.

l See the ſixth Article, and the Texts cited on it.

X.

10. *Among Legatees of one and the ſame thing there may be, or may not be a Right of Accretion.*

It is not the ſame thing, as to the Right of Accretion, between Legatees as between Coheirs or Co-Executors; for the Right to the Inheritance being an univerſal Right, and indiviſible, there is always among Coheirs or Co-Executors a Right of Accretion; but Legacies being reſtrained to the Things bequeathed, which may be divided at leaſt by Eſtimation, altho the Things ſhould be indiviſible in their own Nature, it is not neceſſary that there ſhould be always a Right of Accretion among Legatees. But they either have or have not this Right among them, according as the Expreſſion of the Teſtator may give it them, or exclude them from it, as ſhall be explained by the Rules which follow *m*.

m See the following Articles.

XI.

11. *There is a Right of Accretion among Legatees who are conjoined by the thing.*

If a Teſtator bequeaths one and the ſame thing to two or more Legatees, without any mention of Portions, as, if he gives and bequeaths a Houſe to ſuch a one, and ſuch a one, theſe Legatees being conjoined by the thing bequeathed, there will be between them a Right of Accretion, in the ſame manner as if the Teſtator had added, that the thing ſhould belong entirely to him of the two Legatees who ſhould be left alone to reap the Benefit of the Legacy. Thus it is only their Concurrence that divides the Legacy between them, and gives to every one his Part of it: And if one of them cannot, or will not receive his Portion, it remains to thoſe who have taken, or ſhall take theirs *n*.

n Conjunctim hæredes inſtitui, aut conjunctim legari, hoc eſt, totam hæreditatem & tota legata ſingulis data eſſe, partes autem concurſu fieri. *l.* 80. *ff. de legat.* 3.

Toties eſt jus accreſcendi (*uſusfructus*) quoties in duobus qui in ſolidum habuerunt, concurſu diviſus eſt. *l.* 3. *ff. de uſufr. accreſc. Ulp. tit.* 24. §. 12. See the fifteenth Article.

XII.

12. *If the ſame thing is bequeathed to two Perſons by two Clauſes, each has a Right to the whole, but their Concurrence divides it.*

If a Teſtator had bequeath'd the ſame thing to two Legatees by two different Expreſſions and ſeparately, as if having bequeathed a Houſe by a firſt Clauſe to a firſt Legatee, he bequeathed it again afterwards to another Legatee by another Clauſe, ſuch a Legacy might be conceived in three Manners, which would have three different Effects. The firſt in ſuch a manner, as that in the ſecond Legacy the Intention of the Teſtator ſhould appear to be to revoke the former; and in this Caſe the firſt Legacy would remain null. The ſecond, ſo as that he would have each of the Legatees to have the whole Legacy, the Houſe going to one, and the Heir being

being charged to give the Value of it to the other Legatee; which would be executed, provided the ſaid Intention were expreſs and clearly explained. The third is if by the two Clauſes of the Teſtament the Houſe were bequeathed intire to each of the two Legatees; and in this caſe they both accepting the Legacy, their Concurrence would divide it, and each of them would have the half of the thing bequeathed in this manner. But if in this laſt Caſe there ſhould be one of the two Legatees who either could not, or would not have any ſhare in the Legacy, the whole would belong to the other; not ſo much by Right of Accretion, as that becauſe the whole was given him, and that his Right not being diminiſhed by the Concurrence of the other, it would remain intire to him, but with the Charges which ought to paſs to this Legatee, according as the Diſpoſition of the Teſtator ſhould demand it; for there might be ſome of the Charges limited to the Perſon of the other Legatee who would take nothing.

o We make uſe of this Example, which in all appearance will not happen; but it is becauſe it is frequent in the Roman *Law, and that it explains one of the Manners of Union or Conjunction ſpoken of in the fifth Article. It is of this manner that it is ſaid, that one and the ſame thing may be bequeathed to two Perſons ſeparately,* disjunctim, ſeparatim; *and it conjoins the Legatees by the thing. This Conjunction had this Effect in the antient Law of the* Romans, *that each of thoſe Legatees had the whole* *, *that is, one the Thing, and the other the Value of it. Which was altered by* Juſtinian, *and regulated in the manner as it is expreſſed in this Article, as will be ſeen by the Text which follows.*

Ubi legatarii vel fideicommiſſarii duo forte, vel plures ſunt quibus aliquid relictum ſit——Sin autem disjunctim fuerit relictum: ſi quidem omnes hoc accipere & potuerint & maluerint, ſuam quiſque partem pro virili portione accipiat. Et non ſibi blandiantur ut unus quidem rem, alii autem ſinguli ſolidam ejus rei æſtimationem accipere deſiderent: cum hujuſmodi legatariorum avaritiam antiquitas varia mente ſuſceperit, in uno tantum genere legatorum eam accipiens, in aliis reſpuendam eſſe exiſtimans. Nos autem omnimodo repellimus, unam omnibus naturam legatis & fideicommiſſis imponentes, & antiquam diſſonantiam in unam trahentes concordiam. Hoc autem ita fieri ſancimus, niſi teſtator apertiſſime, & expreſſim diſpoſuerit, ut uni quidem res ſolida, aliis autem exiſtimatio rei ſingulis in ſolidum præſtetur. Sin vero non omnes legatarii, quibus ſeparatim res relicta ſit, in ejus acquiſitionem concurrant: ſed unus forte eam accipiat: hæc ſolida ejus ſit, quia ſermo teſtatoris omnibus prima facie ſolidum aſſignare videtur: aliis ſupervenientibus partes a priore abſtrahentibus, ut ex aliorum quidem concurſu prioris legatum minuatur. Sin vero nemo alius veniat, vel venire potuerit, tunc non vacuatur pars quæ deficit, nec aliis accreſcit, ut ejus qui primus accepit, legatum augere videatur, ſed apud ipſum qui habet ſolida remaneat, nullius concurſu diminuta. Et ideo ſi onus fuerit in perſona ejus apud quem remanet legatum adſcriptum: hoc omnimodo impleat, ut voluntati teſtatoris pareatur. Sin autem ad deficientis perſonam hoc onus fuerit collatum, hoc non ſentiat is qui non alienum, ſed ſuum tantum legatum imminutum habet. Sed & varietatis non in occulto ſit ratio: cum ideo videatur teſtator disjunctim hoc reliquiſſe, ut unuſquiſque ſuum onus, non alienum agnoſcat. Nam ſi contrarium volebat, nulla erit difficultas conjunctim ea diſponere. *l. un.* §. 11. *C. de caduc. toll.*

Si quidem evidentiſſime apparuerit, ademptione a priore legatario facta, ad ſecundum legatum teſtatorem convolaſſe, ſolum poſteriorem ad legatum pervenire placet. Sin autem hoc minime apparere poteſt, pro virili portione ad legatum omnes venire: ſcilicet, niſi ipſe teſtator ex ſcriptura manifeſtiſſimus eſt, utrumque eorum ſolidum accipere voluiſſe. *l.* 33. *ff. de legat.* 1.

Altho this laſt Law be taken out of the Digeſts, yet thoſe who are acquainted with the Stile of the antient Lawyers, the Authors of the Texts which are collected together in the Digeſts, and with that of Tribonian, *will eaſily perceive that theſe Expreſſions are of his Stile; and that he has accommodated this Law to the Change which* Juſtinian *had made by the other Law which has been juſt now quoted, having aboliſhed that antient Law which gave the whole thing to each of the Legatees to whom it was bequeathed ſeparately, in the manner explained in this Article.*

We have ſaid at the end of the Article, that the Legatee who ſhall have the whole Legacy ſhall acquit the Charges which ought to paſs to him according to the Diſpoſition of the Teſtator; and we have not ſaid in general, as it is expreſſed at the end of the firſt of theſe two Texts, that he would not be bound for the Charges which the Teſtator had impoſed on the other Legatees of the ſame thing, and who ſhould take no Share in it. For beſides that it is very difficult, not to ſay impoſſible, for a Legatee to refuſe a Legacy, if the Charge does not exceed the Value of it; yet altho this Caſe ſhould happen, it would be by the Circumſtances, and by the manner in which the Teſtator had expreſſed himſelf, that we ought to judge if his Intention was, that the Charge impoſed on the Legatee, who ſhould take no part of the Legacy, ſhould be limited to his Perſon, or that it ſhould affect the thing bequeathed, and that it ought to paſs to the Legatee who ſhould have the whole Legacy to himſelf.

XIII.

13. *Among Legatees by Portions there is no Accretion.*

If the ſame thing is bequeathed to two or more Legatees, but ſo as that the Teſtator divides it among them, as if he bequeaths it to them by equal Portions, or aſſigns to every one his own, there will be no right of Accretion among them: For their Title divides them, and gives to every one his Right to his Legacy ſeperated from that of the others, and reſtrained to his own Portion. So that if any one of the Portions of theſe Legatees ſhould become vacant, the others would have no Right

* *Ulp. Tit.* 24. §. 12. *&* 31.

Right to it *p*; but it would go either to the Heir or Executor, if it was he that was charged with the Legacy, or to a Legatee, if the Teſtator had charged one Legacy with this other; as if he had deviſed a Land or Tenement to a Legatee, and had charged him to give to others either a Portion of the ſaid Land, or the Uſufruct of the whole, or of a part thereof, or a Sum of Money to be divided among them.

p Quoties uſusfructus legatus eſt, ita inter fructuarios eſt jus accreſcendi, ſi conjunctim ſit uſusfructus relictus. Cæterum ſi ſeparatim unicuique partis rei uſusfructus ſit relictus, ſine dubio jus accreſcendi ceſſat. *l.* 1. *ff. de uſufr. accreſc.*

XIV.

14. *Divers Caſes of Accretion between joint Legatees.*

If it ſhould happen that one and the ſame thing being bequeathed jointly, and without diſtinction of Portions, to ſeveral Perſons, as has been mentioned in the eleventh Article, one of the Legatees being a poſthumous Child, ſhould not come into the World, or that another Legatee ſhould happen to be dead before the making of the Teſtament, and the Teſtator knew nothing of it, the Portions which by theſe Events would become vacant would accrue to the others *q*. And it would be the ſame thing if one of theſe Legatees who was alive when the Teſtament was made, ſhould happen to die before the Teſtator *r*.

q Si Titio & poſtumis legatum ſit, non nato poſtumo, totum Titius vindicabit. *l.* 16. §. 2. *ff. de legat.* 1.

In primo itaque ordine, ubi pro non ſcriptis efficiebantur, ea quæ perſonis jam ante teſtamentum mortuis teſtator donaſſet, ſtatutum fuerat, ut ea omnia bona manerent apud eos a quibus fuerant derelicta: niſi vacuatis vel ſubſtitutus ſuppoſitus, vel conjunctus fuerat aggregatus. Tunc enim non deficiebant, ſed ad illos perveniebant, nullo gravamine (niſi perrarò) in hoc pro non ſcripto ſuperveniente. Quod & noſtra majeſtas quaſi antiquæ benevolentiæ conſentaneum, & naturali ratione ſubnixum, intactum atque illibatum præcepit cuſtodiri, in omne tempus valiturum. *l. un.* §. 3. *C. de caduc. toll.*

r Pro ſecundo vero ordine, in quo ea vertebantur, quæ in cauſa caduci fieri contingebant, ſcilicet ubi legatarius vivo teſtatore decedebat: ſi eo caſu ſuperſit conjunctus, ei accreſcit legatum cum onere. *d. l. un.* §. 4.

XV.

15. *Accretion in Legacies and Succeſſions, is a Conſequence of the Conjunction by the thing.*

It reſults from all the Rules which have been here explained, that the Right of Accretion among Heirs or Executors, being an Effect of the Rule which ordains that the Inheritance cannot be divided ſo as that part thereof ſhall go to the teſtamentary Heir, and part thereof to the Heir at Law; the ſaid Right is acquired by the thing it ſelf, that is, by the Inheritance. From whence it follows, that the Inheritance ought to go intire to him who happens to be the only Perſon who is to ſucceed, whether he was united to others by the Expreſſion, or was called to the Succeſſion ſeparately, or that he was even reſtrained to one diſtinct Portion: For ſeeing this Portion cannot remain to him ſingle by itſelf, it draws to him the Portions of the others when they become vacant; ſo that it is always by the thing that Heirs or Executors are conjoined with one another. And among Legatees the Right of Accretion is likewiſe an Effect of their being conjoined by the thing, as appears by the Rules explained in the Articles which relate to the Legacies *s*.

s Si totam, an partem ex qua quis hæres inſtitutus eſt tacite rogatus ſit reſtituere, apparet nihil ei debere accreſcere, *quia rem non videtur habere.* l. 83. ff. de acquir. vel omit. hæred.

We do not quote here this Text becauſe of the Rule that is explained in it, that he who is charged with a tacit Truſt of the Inheritance, or a part of it, has not the Right of Accretion; for if the Fiduciary Bequeſt be in favour of a Perſon to whom the Teſtator could not give any thing, neither the Perſon for whom the Truſt is created, nor the Heir that is charged with it, will have any ſhare in the Fiduciary Bequeſt. And if it be in favour of a Perſon to whom the Teſtator might lawfully give, it will be very evidently the Perſon for whom the Truſt is, who will have the Benefit of the Right of Accretion, if it is to take place; and it will be his Buſineſs to regulate it with the Perſon who is charged to reſtore to him the whole Inheritance, or a part of it. But we have put down here this Text only on account of theſe laſt Words in it, quia rem non videtur habere, *becauſe they ſhew that it is to the Thing that the Right of Accretion is annexed; which is a Principle that we thought neceſſary to be explained in this Article.* See the Texts cited on the eleventh Article.

SECT. X.

Of the Right of Tranſmiſſion.

WHEN an Heir or Executor has accepted a Succeſſion, if he dies afterwards, it is without doubt that he tranſmits the ſaid Succeſſion, that is, makes it to paſs to his Heirs and Executors with his other Goods: If a Legatee dies after he has acquired his Right to the Legacy, he tranſmits it in the ſame manner to his Succeſſor; and it is not of this manner of tranſmitting that we treat here. But if the Heir or Executor, or Legatee dies before he has known or exerciſed his Right, it does not appear to be ſo certain, that they tranſmit it in this caſe to their Heirs and Executors. And this Doubt had

given occaſion in the *Roman* Law to many Queſtions, concerning which ſeveral Rules have been made, which mark differently in what Caſes Heirs and Legatees tranſmit, or do not tranſmit their Right to their Heirs; that is, in what Condition their Right ought to be at the time of their Death, in order to make it paſs from them to their Succeſſors.

Altho the Right of Tranſmiſſion in the *Roman* Law reſpects Succeſſions of Inteſtates as well as Teſtamentary Succeſſions, and that it may ſeem for this Reaſon that we ought to have treated of this Matter among thoſe which are common to the two ſorts of Succeſſions; yet we have placed it among the Matters relating to Teſtaments: For in our Uſage there can be no difficulty as to the Tranſmiſſion of Legal Succeſſions, becauſe of our Rule, *That the Dead gives ſeiſin to the Living*, as ſhall be explained hereafter. Thus the Rules which concern the Difficulties of Tranſmiſſion are in our Uſage limited to teſtamentary Diſpoſitions, whether it be for Legacies, and Fiduciary Bequeſts, or for Inheritances.

We may make the ſame Remark on the Rules of the *Roman* Law which concern the Right of Tranſmiſſion, as we have made on thoſe relating to the Right of Accretion, That the Origin of Tranſmiſſion, as well as that of Accretion, is found in the natural Order of Legal Succeſſions. For as the Right of Accretion between two Children, for example, who ſurvive their Father, is founded upon this, that it is natural, when the two concur together, for them to divide the Inheritance between them, and that if one of the two be left alone, he ſhould have the whole; the Right of Tranſmiſſion is founded upon this, that it is natural alſo, if a Son who has outlived his Father happens to die before he has entred upon the Succeſſion, or even before he knew of his Father's Death, that he ſhould tranſmit to his Children the Right which he had, and that his Children taking his Place ſhould uſe his Right, which becomes theirs. Thus he tranſmits to them the Right which he had acquired by the Death of his Father, and he would tranſmit it in the ſame manner to other Heirs, whether Heirs by Teſtament or Heirs at Law, becauſe this Succeſſion had paſſed naturally to him, and was become a part of the Goods of his own Inheritance. It was in this manner that the Uſe of Tranſmiſſion began in the *Roman* Law; but it was limited to the Children who were under the Power and Juriſdiction of their Father when he died, and who were called *ſui hæredes*. And the Children who were emancipated not being *ſui hæredes*, they had not this Right of Tranſmiſſion, if they died before they knew and had exerciſed their Right to the Inheritance *a*. And it was the ſame thing, and that with much more reaſon, as to the other Heirs of Blood *b*.

As for Teſtamentary Succeſſions, there was no Tranſmiſſion in them, unleſs the Teſtamentary Heir or Executor had known and exerciſed his Right *c*; and even Children who were inſtituted Heirs, or Executors by the Teſtament of their Parents, were deprived of it as well as Strangers, and they began to have the Right of Tranſmiſſion of the Teſtamentary Succeſſions of their Aſcendants only by a Law of the Emperors *Theodoſius* and *Valentinian*, who gave to Children and other Deſcendants this Right of Tranſmiſſion, not indifferently to tranſmit the Teſtamentary Succeſſions of their Aſcendants to their Executors, whether they were Strangers or Relations, but only in favour of their Children and other Deſcendants *d*. And ſeeing this Law ſpeaks only of Teſtamentary Succeſſions, and not of Succeſſions of Inteſtates, the moſt learned of the Interpreters has been of opinion that it made no change in the Succeſſions of Inteſtates, and that the Children who are not *ſui hæredes* have by this new Law the Tranſmiſſion only of what Goods come to them by virtue of the Teſtamentary Diſpoſitions of their Aſcendants; and that as to the Succeſſions of Inteſtates the antient Law ſubſiſts, which does not give the Tranſmiſſion to Children who are emancipated, but only to thoſe who being under the Father's Juriſdiction, were *ſui hæredes*. Thus we ſee that by the *Roman* Law the Tranſmiſſion has place in Teſtamentary Succeſſions only for Children, and in legal Succeſſions only for ſuch Children as were not emancipated. And as for all other Heirs, whether Heirs by Teſtament, or Heirs at Law, they had not this Right if they died before they knew that the Succeſſion was fallen to them,

a *L.* 4. *C. qui adm. ad bon. poſſeſs. poſſ. l.* 2. *C. ad Senat. Orph.*

b *L.* 9. *ff. de ſuis & legit. hared.*

c Hæreditatem, niſi fuerit adita, tranſmitti nec veteres concedebant, nec nos patimur. *L. un.* §. 5. *C. de caduc. toll.*

d *L. un. Cod. de his qui ante apert. tab. l. un.* §. 5. *Cod. de caduc. toll.*

them, or before they had entered upon it *e*. And this Rule was ſo ſtrictly obſerved, that altho it were becauſe of Abſence that the Child was ignorant of the Death of his Father, he had no Right of Tranſmiſſion, if he died in that Ignorance of his Right. And it was out of mere favour that the Emperor *Antonin* excepted the Caſe of Abſence on account of the Publick *f*.

There was another Exception in favour of Heirs, whether Heirs by Teſtament or Heirs to Inteſtates, who died within the time which the Law gave the Heir to deliberate whether he would accept of the Inheritance or refuſe it. And they who died within the ſaid time, without explaining their Intentions therein, tranſmitted their Right to their Heirs *g*.

As to Legatees, their Condition, in what concerned the Right of Tranſmiſſion, was more advantageous in the *Roman* Law than that of the Heirs or Executors: For they acquired their Right the Moment that the Teſtator died, if the Legacy was pure and ſimple; and if the Legacy was conditional, the Right of the Legatee depended in that caſe, as it was but juſt, on the Accompliſhment of the Condition, and he did not acquire it till the Condition was accompliſhed *h*. Thus the Legatee of a Legacy pure and ſimple happening to die after the Teſtator, without knowing any thing of the Legacy, tranſmitted his Right to his Heir; and if the Legacy was conditional, and the Legatee died before the Condition was fulfilled, as he had acquired nothing himſelf, ſo he tranſmitted nothing to others; which was alſo natural and juſt.

This Difference between the Condition of Legatees and that of Heirs or Executors, as to what concerns the Right of Tranſmiſſion, had been eſtabliſhed in order to avoid an Inconvenience, which would have happened if the Right of the Legatee had not veſted in him at the Moment of the Death of the Teſtator. For ſeeing in the *Roman* Law the Validity of the Legacies depended on the Acceptance of the Inheritance, ſo that if the Heir or Executor renounced the Inheritance, the Legacies remained null, as has been explained in its proper Place *i*, it might have happened that if the Right had not veſted in the Legatee but by the Executor's Acceptance of the Succeſſion, which depended on the Executor, and which the Executor might put off, the Legatee who ſhould die in the Interval, between the Death of the Teſtator and the Executor's Acceptance of the Inheritance, would have loſt his Right, and have tranſmitted nothing to his Heirs. It was for the preventing of this Inconvenience, that it was regulated, in regard to Legatees, that the Right to the Legacy ſhould be veſted in them at the Moment of the Death of the Teſtator, that they might have the Right of tranſmitting it to their Heirs. Thus it was a Favour which was granted them, to diſtinguiſh their Condition from that of the Heirs or Executors, in what concerns Tranſmiſſion. And as this Favour was granted only to prevent that Inconvenience, ſo it had not place in the Caſes where the Inconvenience was not to be feared. Thus, for Legacies which could not be tranſmitted, ſuch as a Legacy of the Uſufruct of any thing, or a Legacy of Liberty to a Slave, which are Legacies confined to the Perſons of the Legatees, the Legatees did not acquire their Right to them but from the Day of the Heir's entring upon the Inheritance *l*.

In our Uſage the Tranſmiſſion of Succeſſions of Inteſtates takes place indifferently not only for Children, but alſo for all the next of kin, whether they be Deſcendants, Aſcendants, or Collateral Relations. For according to our

e L. 7. Cod. de Jure delib. l. un. §. 5. C. de caduc. toll.

f L. 86. ff. de acq. vel omitt. hared.

g See the eighth Article of this Section.

There was another Caſe in the Roman *Law, where the teſtamentary Heir tranſmitted his Right, if he died before he entered upon the Inheritance. But ſeeing this Caſe has no Conformity with our Uſage, we do not explain it here; and we only take this notice of it here, to ſatisfy thoſe who might be apt to find fault with the Omiſſion, and thoſe who may have a mind to conſult it in its proper Place.* V. l. 3. §. 30. ff. de Senat. Silan. l. penult. C. de his quib. ut ind.

h See the tenth, eleventh and twelfth Articles of this Section.

i See the nineteenth Article of the fifth Section of this Title, and the Remark that is made upon it.

l L. un. §. 2. ff. quando dies uſusfr. leg. ced. l. 2. & l. 8. ff. quando dies leg. ced.

But if this Legatee of an Uſufruct having ſurvived the Teſtator a whole Year, had died before the Heir had accepted the Succeſſion, would it have been juſt that the Heir of the ſaid Uſufructuary ſhould loſe the Fruits of that Year? This Difficulty cannot happen in our Uſage, where Equity would do juſtice to the Uſufructuary, or to his Heir. And one or other of them would have the Fruits which ought to belong to him from the time that the Succeſſion was open, according to the Diſpoſition of the Teſtator, and according to the Rules of Uſufruct, which have been explained in the Title of that Matter.

Rule, *The Dead gives Seiſin to the Living, his next lineal Heir who is capable of ſucceeding to him*, of which mention has been made in another place *m*, the Heirs of Blood acquire their Right to the Succeſſion the very Moment that it is open, altho the Death of the Perſon to whom they ſucceed be unknown to them, and that they be ignorant of their Right to ſucceed; and do not ſo much as know that the Deceaſed was their Relation. It follows from this Rule, that if the Heir at Law, or next of Kin, who ſurvived but one Moment the Perſon to whom he had Right to ſucceed, happens to die immediately after him, without having exerciſed or known his Right, he tranſmits it to his Heirs.

As for Legacies, our Uſage gives to all Legatees the Right of Tranſmiſſion of pure and ſimple Legacies, which may paſs to their Heirs; and if the Legatee who has ſurvived the Teſtator dies before he had knowledge of the Legacy, he tranſmits it nevertheleſs to his Heir, in the ſame manner as the Heir at Law, or next of Kin, tranſmits to his Heir the Inheritance.

There remains then no other Difficulty, except in the Tranſmiſſion of Teſtamentary Succeſſions; and there would remain none even in that, if the Rule which gives the Right of Tranſmiſſion to Legatees when they have out-lived the Teſtator, had been extended to Teſtamentary Heirs or Executors. A Rule ſo eaſy, and ſo plain as this, would have put an end to many Difficulties which ſtill remain in the Principles of the *Roman* Law concerning this Matter, and would have removed Inconveniences therein, which ſeemed to deſerve that ſome Proviſion ſhould have been made to guard againſt them, as well as thoſe relating to Legatees. For if it would be hard for a Legatee who ſhould die before the Executor's accepting of the Inheritance, that he could not tranſmit his Right to his Heirs, it would not be leſs hard for Children, or other Succeſſors, of an Executor, that becauſe he was ignorant of his Right to the Inheritance, whether through Abſence, or for other Cauſes, he could not tranſmit it if he died in this Ignorance; and that thus a mere Chance ſhould diſtinguiſh his Condition from that of an Executor who ſhould die after he had known of his Right, altho he had made no Step towards exerciſing it. For he would nevertheleſs tranſmit his Right to his Heirs, if he died within the Time which the Law allowed to Teſtamentary Heirs or Executors for deliberating, as has been already obſerved.

It ſeems very ſtrange that by this Law the Teſtamentary Heir, who has known his Right, and neglected it, ſhould tranſmit to his Heirs the Succeſſion that was fallen to him; and that if the ſame Heir had been ignorant of his Right, he could have tranſmitted nothing. This Inconvenience might have been ſufficient to juſtify a Rule, which, at the ſame time that it removed the Inconvenience, would have beſides been uſeful to put an end to all the Difficulties of this matter. And it is without doubt upon this Conſideration, that in one of the Provinces of *France*, where the *Roman* Law is moſt followed, they have eſtabliſhed it as a Rule or Cuſtom, *That the Dead gives Seiſin to the Living, in what manner ſoever he ſucceeds, whether by Teſtament, or without Teſtament n.* And if this Rule be juſt in the *Roman* Law for Legatees, that they ſhould have their Right at the Moment of the Death of the Teſtator, what Injuſtice would there be in it, if it ſhould take place likewiſe for the Teſtamentary Heirs or Executors? ſince it is true of the Teſtamentary Heirs, as well as of Legatees, that they hold their Right by the ſame Title of the Will of the Teſtator, and of the Law which authorizes the ſaid Will; and that this Title is ſtill more favourable for the ſaid Heirs or Executors than for Legatees, whom the Teſtator hath leſs conſider'd than his Heir or Executor; and in a word, that the Teſtament having its Effect by the Death of the Teſtator, it is at the Moment of the ſaid Death that the Teſtamentary Heir ought to take the place of him to whom he ſucceeds. And it is alſo the Rule, that at what time ſoever afterwards the ſaid Heir or Executor accepts of the Inheritance, he is conſidered as if he had accepted it at the Moment of the ſaid Death, and is bound in the ſame manner for all the Charges that were fallen due before he accepted the Succeſſion *o*.

Will it be objected againſt the Tranſmiſſion of an Inheritance in the Caſe where the Teſtamentary Heir died without knowing any thing of the Teſtament, that one cannot acquire a Right

m See the Preface to this ſecond Part, numb. 7.

n See the Cuſtoms of Bourdeaux *and Country of* Guienne, *Article* 74.

o See the fifteenth Article of the firſt Section of Heirs and Executors in general.

which

which they know nothing of; and that the Quality of Heir or Executor, implying Engagements, it is neceſſary for acquiring an Inheritance that the Heir or Executor ſhould know the Right which is fallen to him; and that therefore he having been ignorant of it, has had no Share in the Inheritance, and conſequently could not tranſmit it to his Heirs? But theſe Reaſons would prove in the ſame manner, that there would be no Tranſmiſſion even in Succeſſions of Inteſtates; and they would prove likewiſe, that the Legatees who had known nothing of the Legacies left them, could not tranſmit them to their Heirs, at leaſt thoſe whoſe Legacies ſhould be ſubject to ſome Charges.

Will it be ſaid, that the Teſtator has conſidered only the Perſons of his Executors, and not the Perſons of their Succeſſors, and that therefore the Executor being dead without having acquired the Inheritance, his Heirs or Executors ought to have no Share in it? But this Reaſon would prove the ſame thing as to Legatees; and ſince it proves nothing with reſpect to them, neither ought it to prove any thing with reſpect to Executors. Thus the only natural Effect of this Reaſon would be to prove, that if he who is inſtituted Heir or Executor dies before the Teſtator, the Inſtitution does not paſs to his Heirs; but if the ſaid Heir or Executor ſurvives the Teſtator, it would be againſt his Intention to deprive him of the Right of Tranſmiſſion, ſince every Teſtator means, that if thoſe whom he inſtitutes his Heirs or Executors do ſurvive him, all the Goods of the Inheritance ſhould be theirs in the Moment that his Death ſhall diveſt him of them. To which we may likewiſe add this Conſideration, which is common both to the Executor and to the Legatee, that it is not abſolutely true that the Teſtator hath only conſider'd their Perſons. For it is very uſual for a Friend to inſtitute his Friend his Heir or Executor in conſideration of his Children, and to leave a Legacy to a Friend upon the ſame Motive; ſo that the Tranſmiſſion in theſe Caſes is agreeable to the Intention of the Teſtator. But even in the Caſes where the Intention of the Teſtator is confined to the ſole Perſon of the Executor and Legatee, the Right of Tranſmiſſion is not therefore the leſs comprehended in the Diſpoſition of the Teſtator. For it is for the Intereſt of the Executor and of the Legatee, that the Goods which come to them by a Teſtament ſhould paſs to the Uſe of their Affairs, whether it be to acquit their Debts, or for other Uſes, which cannot be done except by the Right of Tranſmiſſion. Thus it may be ſaid, that the Right of Tranſmiſſion being founded on all theſe Principles of Equity, it was not ſo much a Favour done to the Legatees in the *Roman* Law, as an Act of Juſtice, in giving them the Right of Tranſmiſſion, although they ſhould happen to die before they knew any thing of the Legacy; and that the ſame Juſtice might be likewiſe extended to Teſtamentary Heirs or Executors without any Inconvenience.

It ſeems reaſonable to conclude from all theſe Reflections, that ſince neither natural Equity nor Reaſon render the Condition of the Teſtamentary Heir worſe than that of the Legatee, it would have been juſt to have made it equal as to the Right of Tranſmiſſion; and that the Rule which ſhould have ordered it ſo being founded on Principles ſo natural as theſe, would have been much more uſeful than the ſeveral Subtilties which one meets with in this Matter, as well as in others of the *Roman* Law. So that it would have been convenient that the Rule, *The Dead gives Seiſin to the Living*, had been made common throughout in Succeſſions by Teſtament, as well as thoſe without Teſtament, as we have ſeen that it is in one of the Provinces of *France*, where the *Roman* Law is moſt in uſe, and where they have very prudently judged, that it is much more uſeful to eſtabliſh Tranſmiſſion without diſtinction in all ſorts of Succeſſions, whether it be an Heir that ſucceeds by Teſtament, or without Teſtament, whether he knew of his Right, or died before he knew any thing of it, than to introduce Diſtinctions full of Inconveniences without any Advantage, and ſerving for no other Uſe than to give occaſion to many Law-Suits. It is without doubt upon theſe Conſiderations, that altho this particular Cuſtom in one Province, which is governed by the written Law, ſeems to inſinuate that in the others they follow the *Roman* Law, yet ſome Authors have thought that the Maxim, *That the Dead gives Seiſin to the Living*, is become univerſal throughout the whole Kingdom in Teſtamentary Succeſſions, as well as in Succeſſions of Inteſtates.

It is to be remarked on this Matter of Tranſmiſſion, that it contains ſome particular Rules which would be of neceſſary Uſe, even altho Tranſmiſſion ſhould take

take place in Teſtamentary Succeſſions; as, for example, that which concerns the Tranſmiſſion of conditional Diſpoſitions: And that there are alſo other Rules which relate to the Tranſmiſſion of legal Succeſſions, ſuch as thoſe which are explained in the firſt Articles, which regard in general the Nature of Tranſmiſſion.

All theſe ſeveral ſorts of Rules ſhall be explained in this Section, and ſhall take in every thing that belongs to this Matter of Tranſmiſſion. But ſeeing the Uſe of Rules and Principles is much facilitated by the Application of them to the particular Caſes to which they may agree; and that we have been obliged to explain many of theſe Caſes in the ninth Section of the Title of Legacies; the Reader may be pleas'd to have recourſe to that Section at the ſame time that he reads this.

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I.

1. Definition of Tranſmiſſion.

TRanſmiſſion is the Right which Heirs, or Executors, or Legatees, may have to convey down to their Succeſſors the Inheritance or Legacy which belonged to them, in caſe they die before they have exerciſed their Right *a*.

a Succeſſionem ad hæredes ſuos tranſmittere. *l.* 7. *in f. C. de jure delib.* See the Preamble of this Section.

II.

2. To what Tranſmiſſion is limited.

It reſults from the Definition explained in the preceding Article, that when the Heir or Executor has enter'd upon the Inheritance, and the Legatee has received the Legacy, it is not any longer by the Tranſmiſſion that their Right paſſes to their Heirs, but barely by Succeſſion, in the ſame manner as their other Goods *b*. For Tranſmiſſion is underſtood only of the Right which the Heir, or Executor, or Legatee, may have to convey to his Heirs a Right which he himſelf had never exerciſed, and which may have been altogether unknown to him, as will be ſeen in the Sequel of this Section.

b This is a Conſequence of the Definition of the Right of Tranſmiſſion.

III.

3. Tranſmiſſion takes place when the Right is acquired.

The Heir or Executor, and the Legatee have this in common, that both the one and the other have the Right of Tranſmiſſion, at the ſame time that the Right to the Inheritance, or to the Legacy, veſts in them. For having at that time their Right in their own Perſons, it is a Conſequence thereof, that they ſhould tranſmit it to their Heirs, even although they themſelves ſhould die before they had received any thing, the one of the Inheritance, and the other of the Legacy: As, on the contrary, if when they die they had no manner of Right in their own Perſons, they could tranſmit nothing to their Succeſſors *c*.

c See the following Article, as alſo the eighth and tenth Articles.

See in relation to this Article and thoſe that follow, the ſixth and the other following Articles of the ninth Section of Legacies.

IV.

4. The Tranſmiſſion depends on the Condition in which the Right is at the Time of the Death.

It follows from the preceding Articles, that when the Queſtion is about the Right of Tranſmiſſion, it is neceſſary to conſider in what Condition the Right of the Heir or Executor, and that of the Legatee, was at the time of their Death. And this depends on the Rules which ſhall be explained hereafter *d*.

d This is a Conſequence of the preceding Articles.

V.

V.

5. There is no Tranſmiſſion, if the Teſtamentary Heir or Legatee dies before the Teſtator.

There is likewiſe this common to the Teſtamentary Heir, and to the Legatee, that altho their Rights have the Teſtament for their Title, yet nevertheleſs if it happens that they die before the Teſtator, altho after the making of the Teſtament, there is in that Caſe no Tranſmiſſion; for the Teſtament was not to have its Effect but by the Death of the Teſtator. So that when their Death precedes that of the Teſtator, they have no Right, and conſequently do not tranſmit any thing *e*. And there would be ſtill leſs ground for Tranſmiſſion, if the Teſtamentary Heir or Legatee were already dead before the Teſtament was made, it being poſſible that the Teſtator knew nothing of their Death *f*.

e Pro non ſcriptis ſunt iis relicta qui vivo teſtatore decedunt. *ex* §. 2, *&* 3. *l. un. C. de caduc. toll.*

f Si eo tempore quo alicui legatum adſcribebatur in rebus humanis non erat, pro non ſcripto hoc habebitur. *l.* 4. *ff. de his quæ pro non ſcript.*

VI.

6. The Inſtitution and the Legacy may be conceived in Terms which make them to paſs to the Heirs.

We may add, as another Rule that is common to Teſtamentary Heirs, and to Legatees, that if the Teſtator had conceived his Diſpoſitions in ſuch Terms as to ſhew that it was his Will, that in caſe his Heir, or Executor, or his Legatees, ſhould chance to die before their Right fell to them, the ſaid Right ſhould paſs to their Children, or in general to their Heirs; ſuch a Diſpoſition would have its Effect not ſo much by the Right of Tranſmiſſion, as by the proper Right of the ſaid Children or Heirs of the Teſtamentary Heir or Legatee, who would in this Caſe be called by the Teſtator by way of Subſtitution to the others *g*.

g Since the Will of the Teſtator holds the Place of a Law, nothing would hinder ſuch a Diſpoſition from having its effect. And we have ſet down this Rule here, becauſe it is a Precaution uſed by many for preventing the Events which make the Tranſmiſſion to ceaſe, by taking care to have added to the Diſpoſitions of Teſtators, when it is their Will that it ſhould be ſo, ſome Expreſſion that may have this Effect to make the Inheritance or the Legacy to paſs to the Succeſſors of the Teſtamentary Heir or Legatee in default of them; as is, for example, this Expreſſion, That the Teſtator gives to ſuch a one and his.

VII.

7. The Acceptance of the Inheritance gives the Right of Tranſmiſſion.

If he who is inſtituted Heir by a Teſtament, having accepted of the Inheritance, ſhould chance to die before he touched any thing thereof, he would tranſmit to his Heirs the Right to gather in the Effects belonging to it. For by his Acceptance of it, he had acquired the Quality of Heir, and the Right to the Inheritance *h*. Thus this Right, as well as all the others which he might have, would paſs to his Heirs *i*, and that with much more reaſon than in the Caſe of the Rule that follows.

h See the firſt Article of the third Section, how one acquires an Inheritance.

i Hæres in omne jus mortui non tantum ſingularum rerum dominium ſuccedit. *l.* 37. *ff. de acq. vel om. hæred.*

VIII.

8. The Teſtamentary Heir who dies within the time allowed for deliberating, tranſmits his Right.

If during the Time that the Law gives the Teſtamentary Heir to deliberate in, whether he will accept or refuſe the Succeſſion, he happens to die without having done any one Act as Heir, he knowing of the Teſtament, whether it be that he was really deliberating about it, or that he had not in any manner explained his Mind therein, but only that he had not renounced the Inheritance; the Law preſumes from his Silence that he was deliberating, and he tranſmits his Right to his Heirs, who may in their own Right accept the Inheritance, or renounce it *l*.

l Sancimus ſi quis vel ex teſtamento, vel ab inteſtato, vocatus deliberationem meruerit: vel, ſiquidem hoc non fecerit, non tamen ſucceſſioni renuntiaverit, ut ex hac cauſa deliberare videatur: ſed nec aliquid geſſerit, quod aditionem, vel pro hærede geſtionem inducat: prædictum arbitrium in ſucceſſionem ſuam tranſmittat. ... Et ſi quidem ipſe qui ſciens hæreditatem vel ab inteſtato, vel ex teſtamento ſibi eſſe delatam, deliberatione minime petita, intra annale tempus deceſſerit, hoc jus ad ſuam ſucceſſionem intra annale tempus extendat. *l.* 19. *C. de jure delib.* Sin autem inſtante tempore deceſſerit, reliquum tempus pro adeunda hæreditate ſuis ſucceſſoribus ſine aliqua dubietate relinquat: quo completo, nec hæredibus ejus alius regreſſus in hæreditatem habendam ſervabitur. *d. l.* 19.

¶ We have not ſet down in the Article that which is ſaid in the Text, That the Heirs of the Heir have no more Time for deliberating, than what remained to the Deceaſed. For if there remained only two or three Days, or ſo little Time that it was not poſſible for them to exerciſe their Rights, Equity would require that they ſhould have a longer Delay. And as it is not agreeable to our Uſage to be ſo very rigorous in ſuch like Caſes, it would ſeem juſt to grant unto them the ſame Delay that the Ordinance of 1667. *Tit.* 7. *Art.* 1. gives to Heirs to deliberate in, ſeeing that Delay is only forty Days after the Inventary.

We

We have mentioned in this Article only the Caſe where the Teſtamentary Heir knew of the Teſtament, and died within the Time allowed by the Law for deliberating; and have ſaid nothing of the Caſe where the Heir who knew of the Teſtament had let the Time for deliberating ſlip, without making any Declaration, and died after the ſaid Time was expired. For although by the *Roman* Law, that Heir did not tranſmit his Right to his Heirs *a*, yet our Uſage ſeems to be oppoſite to that Rigour.

And ſeeing by the Ordinance of 1667, the Delay for deliberating is only, as has been already mentioned, of forty Days after the Inventary, whereas by the *Roman* Law they had whole Years to deliberate in, and that this Time of forty Days would be too ſhort a time to take away the Right of Tranſmiſſion, it does not ſuit with our Uſage; as has been likewiſe already taken notice of, to obſerve this Rigour in the Caſes of Non-performance of that which ought to be done within a certain ſpace of Time, unleſs there were ſome Equity in the ſtrict Obſervance of the ſaid Rigour: as, for example, to exclude one who had a Right to diſſolve a Sale by virtue of a Power or Equity of Redemption, and who ſhould not come within the Time fixed for bringing the Action for that purpoſe. Thus the Heir and his Succeſſor would be always received to exerciſe their Right, and would not be refuſed all ſuch Delays as ſhould appear to be juſt and neceſſary *b*.

But if the Teſtamentary Heir ſhould chance to die before he knew of his Right, would he tranſmit it to his Succeſſor, whether he died within the Time allowed for deliberating, or after the ſaid Time? It might be urged in favour of the Tranſmiſſion, that as in the *Roman* Law the Heir who knew of his Right did not tranſmit it, if he died without declaring his Mind, having let the Time paſs which the Law allowed him for deliberating, as has been juſt now obſerved; ſo it would ſeem to follow by the Rule of Contraries, that this Time ought not to run againſt the Heir who ſhould die without knowledge of his Right; in the ſame manner as in the *Roman* Law, the Time given to the Heir at Law to demand the Poſſeſſion of the Goods that were fallen to him, did not run againſt the Heir who was ignorant that the Succeſſion was fallen to him *c*. And if it is juſt to grant a Delay to the living Heir who was ignorant of his Right, altho the Time regulated by the Law be expired, as that Delay is granted by an expreſs Rule of the Ordinance of 1667, *Tit.* 7. *Art.* 4. is it not as equitable to grant to the Succeſſor of this Heir, who begins to know the Right of the Deceaſed, the ſame Delay which would have been granted to the Deceaſed, had he been in a Condition to demand it? And as it has been found juſt in the *Roman* Law, that the Heir who knew of his Right, and died within the Time allowed for deliberating, ſhould tranſmit it to his Succeſſors, altho he had done nothing to ſhew his Acceptance of the Inheritance, provided only that he had not renounced it; may it not be ſaid of the Heir who dies in Ignorance of his Right, that the Time for deliberating ought not to run againſt him? And it having been impoſſible for him to deliberate, ſome Time for deliberating ought not to be refuſed to his Succeſſor. From whence it follows, that the Tranſmiſſion to this Succeſſor is as juſt as that to the Heir of him, who having known his Right had neglected it to the Time of his Death, which happened within the Time allowed for deliberating, and who did nevertheleſs tranſmit the Succeſſion to his Heirs, according to the Rule explained in this Article.

The Reader may join to theſe Conſiderations the Reflexions which have been made on this Subject in the Preamble of this Section, and particularly that which has been remarked touching the Sentiment of thoſe who think that it is at preſent the general Uſage of the Kingdom, that the Rule, *The Dead gives Seiſin to the Living*, extends to Teſtamentary Succeſſions.

a Si ipſe (hæres) poſtquam ei cognitum ſit hæredem eum vocatum fuiſſe, tempore tranſlapſo nihil fecerit, ex quo vel adeundam, vel renuntiandam hæreditatem manifeſtaverit, is cum ſucceſſione ſua, ab hujuſmodi beneficio excludatur. *l.* 19. *C. de jure delib.*

b *See the Ordinance of* 1667, *tit.* 7. *Art.* 4.

c Quacunque die neſcierit, aut non potuerit, nulla dubitatio eſt quin dies ei non cedat. *l.* 2. *ff. quis ordo in bon. poſſ. ſervet.* Quicunque res ex parentum, vel proximorum ſucceſſione jure ſibi competere confidit, ſciat ſibi non obeſſe ſi per ruſticitatem, vel ignorantiam facti, vel abſentiam vel quamcunque aliam rationem, intra præfinitum tempus bonorum poſſeſſionem minime petiiſſe noſcatur. Quoniam hæc ſanctio hujuſmodi conſuetudinis neceſſitatem mutavit. *l.* 8. *C. qui adm. ad bon. poſſeſſ. poſſ.*

IX.

9. *When the Inſtitution or Subſtitution of an*

If an Inſtitution of a Teſtamentary Heir, or a Subſtitution, was conditional, and the Condition not being come to

Heir is conditional, he has no Right to tranſmit, unleſs the Condition be come to paſs.

to paſs at the Time that the Succeſſion fell, or that the Subſtitution could have taken place, the Heir or the Perſon ſubſtituted to him, ſhould happen to die; as he would have had no Right himſelf, ſo he could tranſmit nothing to his Heir. Thus, for example, if a Teſtator had inſtituted or ſubſtituted one of his Relations or Friends, on condition that he had Children, or in caſe he were married, his Death happening before the Condition, whether before or after that the Succeſſion fell, or that the Subſtitution could take place, would have annulled in his Perſon all Uſe of the Right to inherit the Succeſſion, and to tranſmit it *m*.

m Hæres & pure & ſub conditione inſtitui poteſt. §. 9. *inſt. de hæred. inſt.*

It is the Nature of Conditions, that what depends on them ſhould have its Effect, or remain null, according as they happen, or not happen. See the firſt Article of the eighth Section.

X.

10. *Tranſmiſſion of a Legacy that is pure and ſimple.*

As to the Legatee, if the Legacy is pure and ſimple, that is, without Condition, his Right veſts in him at the time of the Teſtator's Death, as is explained in its place *n*: and if he chances to die before he has demanded, or even known of his Legacy, he tranſmits his Right to his Heirs *o*.

n See the Preamble of this Section, and the firſt, ſecond, and third Articles of the ninth Section of Legacies.

o Si purum legatum eſt, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand dies legat. vel fideic. ced. l. un.* §. 1. *in. f. C. de cad. toll.* Si poſt diem legati cedentem legatarius deceſſerit, ad hæredem ſuum transfert legatum. *l.* 5. *ff. quand. dies legat. vel fid. ced.*

XI.

11. *Tranſmiſſion of a conditional Legacy.*

If the Legacy was conditional, that is, if it depended on the Event of a Condition, the Right would not veſt in the Legatee till after the Condition had happened; and if the Legatee died before, as he had no Right to the Legacy himſelf, ſo he would tranſmit none to his Heir. And altho the Condition ſhould afterwards come to paſs after the Death of this Legatee, yet this Event would be uſeleſs to his Heir. Thus, for example, if a Teſtator had left a Legacy on condition that his Heir ſhould die without Children, and it happened that the Legatee died before the Heir, who afterwards died without Children, this Event would be uſeleſs both to the Legatee who was already dead, and to his Heir to whom he had not tranſmitted any Right, he having had none himſelf *p*.

p Legata ſub conditione relicta non ſtatim, ſed cum conditio extiterit, deberi incipiunt: ideoque interim delegari non potuerunt. *l.* 41. *ff. de cond. & dem.*

Intercidit legatum ſi ea perſona deceſſerit, cui legatum eſt ſub conditione. *l.* 59. *eod.*

See the fourth and eleventh Articles of the ninth Section of Legacies.

It is neceſſary to remark on this Article the difference which the Laws make between Conditions in Teſtaments, and thoſe of Covenants. The Difference conſiſts in this, That in the Diſpoſitions of Teſtators, there is only the Teſtator himſelf who regulates the Effect of his Diſpoſition; and if it does not expreſly comprehend the Heirs of him in whoſe Favour the Diſpoſition is made, it is limited to his Perſon, that is, that if the Right is not acquired to that Perſon during his Life, he can tranſmit nothing of it to his Heir. But in Covenants there are two Perſons, who treat both for themſelves and for their Heirs, if they are not excepted. Thus the Effect of Conditions in Covenants paſſes to the Heirs. See the thirteenth Article of the fourth Section of Covenants.

XII.

12. *Tranſmiſſion of a Legacy to an uncertain Day.*

As there are Legacies which are made to uncertain Days, and which are conditional, as has been explained in its Place *q*; theſe ſorts of Legacies are of the ſame nature with thoſe which depend on other ſorts of Conditions: And as to what concerns the Right of Tranſmiſſion, they are regulated in the ſame manner as other conditional Legacies *r*.

q See the twelfth and thirteenth Articles of the eighth Section.

r It is a Conſequence of the Nature of theſe Legacies, which being conditional, are not tranſmitted, except in the Caſe that the Condition be come to paſs before the Death of the Legatee, as has been ſaid in the preceding Article.

XIII.

13. *The Rules of Tranſmiſſion may be applied to Subſtitutions and to fiduciary Bequeſts.*

The Rules which concern the Right of Tranſmiſſion for Teſtamentary Heirs and Legatees, may be applied to thoſe who are ſubſtituted to them, and to thoſe for whoſe Account any thing is deviſed in truſt to others, whether it be the whole Inheritance, or ſome particular thing, which the Heir or a Legatee had been charged to reſtore to them, according as theſe Rules may be applicable to them. Which it is eaſy to diſcern, and therefore no ways neceſſary to repeat the ſame Rules with regard to them. Thus, when a Teſtator hath ſubſtituted to his Heir another Heir, to ſucceed to him in caſe the firſt either could not or would not accept the Succeſſion; or that he has obliged his Heir to reſtore the Inheritance to another Perſon when the ſaid Heir ſhall die; or that a Teſtator hath charged his

Heir, or a Legatee, with a Sum of Money in truſt, or with other Things which ought to paſs after their Death, or within a certain Time, to other Perſons: In all theſe Caſes the Perſons ſubſtituted, and the Perſons for whoſe account the fiduciary Bequeſt is made, ſurviving thoſe after whom they are called, and happening to die afterwards before they knew and exerciſed their Right, or before the Event of the Conditions, if there were any, tranſmit or do not tranſmit their Right in the ſame manner, and according to the ſame Rules, which have been juſt now explained for Heirs and Legatees *s*.

s Si fideicommiſſarius ante (*conditionis eventum*) deceſſerit, ad hæredem ſuum nihil tranſtuliſſe videtur. *l.* 11. §. 6. *ff. de legat.* 3.

Toties videtur hæres inſtitutus etiam in cauſa ſubſtitutionis adiſſe, quoties acquirere ſibi poſſit: nam ſi mortuus eſſet, ad hæredem non transferret ſubſtitutionem. *l.* 81. *ff. de acquir. vel om. hared.*

SECT. XI.

Of the Execution of Teſtaments.

THE Execution of Teſtaments is naturally the Duty of the Teſtamentary Heirs, who remaining Maſters of the Goods, are bound for all the Charges. And the Legatees on their part, and all the other Perſons intereſted in the Execution of the Teſtaments, have the liberty to look after it, and to procure the Execution of what concerns themſelves. But ſeeing there are ſome Diſpoſitions of Teſtators, the Execution of which depends ſolely on the Integrity of the Teſtamentary Heir, and that thoſe very Diſpoſitions of which the Parties concerned may ſue for the Execution, may remain without effect, either by reaſon of their Death, or by their Abſence, or by the Knavery of the Heir, or for other Cauſes; care has been taken, by the Uſe of Executors of Teſtaments, to have the Wills of Teſtators accompliſhed without any regard to the Honeſty or Knavery of their Teſtamentary Heirs.

In the *Roman* Law we ſee very few Examples of the Caſe where the Teſtator commits to other Perſons than to the Teſtamentary Heir himſelf the Execution of his Diſpoſitions; and we do not find there any Rule which hath eſtabliſhed in general the Uſe of Executors of Teſtaments, who are charged with the entire Execution of the Teſtaments; whereas the Uſe of Executors of Teſtaments is ſo much approved and favoured by our Cuſtoms in *France*, that they ordain all the Moveable Goods of the Succeſſion to be put in the hands of thoſe to whom the Teſtator commits this Function; and for this reaſon the Executors are obliged to make an Inventary of the Goods, and the Heir ought to be called to aſſiſt at the making of it: Or the Teſtator may, if he pleaſes, when he names an Executor, order a certain Sum of Money to be put into his hands for executing the Diſpoſitions which he ſhall commit to his Care.

Although theſe Diſpoſitions be not common to all the Cuſtoms, and that in many of them, as well as in divers Places which are governed by the written Law, there is little or no Uſe of Executors of Teſtaments; yet ſeeing it is every where free for Teſtators to name them, and that in general due Care ought to be taken for the Execution of Teſtaments, we ſhall explain in this Section what is eſſential to this Matter, and what may be gathered from the *Roman* Law concerning it.

[*The Law of* England *takes notice of three kinds of Executors, or Perſons, who have to deal with the Execution of dead Mens Wills, and Diſpoſition of their Goods, every one of whom have their ſeveral Offices. The firſt hath his Authority from the* Law, *and that is the Biſhop or Ordinary of every Dioceſe, to whom the Execution of Teſtaments and laſt Wills doth belong, when no Executor is appointed by the Teſtator: and theſe have had the Approbation of Teſtaments within this Realm of* England *for Time immemorial* a. *And he is therefore called* Executor Legitimus, *Legal Executor, becauſe he only is appointed by the Law, where no Executor is appointed by the Teſtator.*

The ſecond kind is, the Executor who deriveth his Authority from the Biſhop or Ordinary, and is he whom we call Adminiſtrator. For when the Executor named in the Teſtament doth refuſe to be, or cannot be Executor, and when no Executor is named in the Will, it is lawful for the Biſhop or Ordinary to commit Adminiſtration, and to annex the Will to the Letters of Adminiſtration b. *And this Adminiſtrator is called* Executor Dativus, *becauſe he is given or aſſigned by the Ordinary, to whom originally, and by Law, this Execution doth appertain.*

The third kind of Executors deriveth his Authority from the Teſtator, and is he that is named Executor in the Teſtament, or to whom the Execution of the Teſtament is committed by the dead Man. This Executor is termed Executor Teſtamentarius, *a Teſtamentary Executor, and hath his Authority immediately from the Teſtator, repreſenting the Perſon of the dead Man, and doth not much*

a Lyndwood Prov. lib. 3. tit. 13. de teſtamentis, cap. Statutum, verb. *approbatis*, verb. *Laicis*, pag. 174. Doct. and Stud. Dial. 2. chap. 28.

b Stat. 31 Edw. 3. cap. 11. 21 Hen. 8. cap. 5. Brook's Abridgment, tit. Teſtament, n. 20.

differ

differ in Nature from him who is called in the Civil Law Hæres *c.*

c Executores univerſales, qui loco Hæredis ſunt. *Lyndwood de Teſtam. cap. Statutum, verb. Inteſtatis, pag.* 172. Swinburn of Teſtaments, part 6. §. 1.

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I.

1. The firſt Security for the Execution of Teſtaments, is, that they be known, and depoſited in ſome publick Place.

The firſt Precaution neceſſary for the Security of the Execution of the Wills of Teſtators, is, that the Teſtaments, or other Acts, which contain their Diſpoſitions, be known to all Perſons who have any Intereſt under them, and that they be depoſited in ſome ſafe Place, where the Parties concerned may have free Acceſs to them as occaſion requires. And it is for this Reaſon that the Teſtaments which are ſealed up, and kept ſecret, are opened in the manner which has been explained in its Place *a*, and that the others remain in the hands of publick Notaries who took down the Minutes or Inſtructions thereof, that they may give out atteſted Copies thereof to ſuch Perſons whom the ſaid Diſpoſitions of the Teſtators may any way concern *b*. And there are even ſome Diſpoſitions which for the greater Security ought to be made publick in a Court of Juſtice, and enrolled, that is, entred in the publick Regiſter, that the Memory of them may be preſerved *c*.

a See the eighteenth and ninteenth Articles of the third Section.

b See the fifteenth Article of the firſt Section of Partitions among Co-heirs, or Co-executors.

c When Teſtaments contain Subſtitutions, they ought to be made publick, as ſhall be ſaid in its proper Place. See the End of the Preamble to the third Title of the fifth Book.

II.

2. The Uſe of Executors of Teſtaments.

Seeing there are often Diſpoſitions in Teſtaments, the Execution of which depends wholly on the Integrity of the Teſtamentary Heirs, and that many Heirs fail in the Performance thereof, it is free for Teſtators to commit to other Perſons the Execution of their Diſpoſitions which they are not willing ſhould depend altogether on their Teſtamentary Heirs; and the Perſons to whom the Teſtators give this Power, are called Executors of Teſtaments *d*.

d In teſtamentis quædam ſcribuntur, quæ ad auctoritatem duntaxat ſcribentis referuntnr, nec obligationem pariunt. Hæc autem talia ſunt, ſi te hæredem ſolum inſtituam & ſcribam; *Uti monumentum mihi certa pecunia facias.* Nullam enim obligationem ea ſcriptura recipit: ſed auctoritatem meam ſervandam poteris ſi velis facere. Aliter atque ſi, cohærede tibi dato item ſcripſero. Nam ſive te ſolum damnavero, *Uti monumentum facias*, cohæres tuus agere tecum poterit familiæ erciſcundæ, uti facias; quoniam intereſt illius. Quin etiamſi utrique juſſi eſtis hoc facere, invicem actionem habebitis. *l. 7. ff. de ann. legat. & fideic.* Si quis Titio decem legaverit, & rogaverit ut ea reſtituat Mævio: Mæviuſque fuerit mortuus, Titii commodo cedit, non hæredis niſi duntaxat ut *miniſtrum* Titium elegit. *l.* 17. *ff. de legat.* 2.

Si teſtator deſignaverit per quem deſiderat redemptionem fieri captivorum, *is* qui ſpecialiter deſignatus eſt legati vel fideicommiſſi habeat exigendi licentiam: & pro ſua conſcientia votum adimpleat teſtatoris: ſin autem perſona non deſignata, teſtator abſolute tantummodo ſummam legati vel fideicommiſſi taxaverit, quæ debeat memoratæ cauſæ proficere, vir reverendiſſimus Epiſcopus illius civitatis, ex qua teſtator oritur, habeat facultatem exigendi qnod hujus rei gratia fuerit derelictum, pium defuncti propoſitum, ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Epiſc. & Cler.*

We ſee in the firſt of theſe Texts, that for want of a Perſon who might oblige the Teſtamentary Heir to execute the Will of the Teſtator, the Heir is left at liberty to do it or not, as he pleaſes; which ſhews the uſe and neceſſity of Executors of Teſtaments.

It may be remarked on the ſecond of theſe Texts, that a Sum of Money might be put into the Hands of a Legatee, that he might diſpoſe thereof as Executor of the Will of the Teſtator, which was known to him, ut miniſtrum.

As for the third Text, it is neceſſary to ſee the ſixth Article, and the Remark upon it.

We ſee in the 68th Novel of the Emperor Leon *the Uſe of Executors of Teſtaments,* quibus teſtatores bona illorum exiſtimatione moti, teſtamentarias de rebus ſuis præſcriptiones committunt.

[*The Character of Executor, as deſcribed in this Article, is more applicable, with us in* England, *to what we call an* Overſeer *of a Will, than to the Executor. For ſome Teſtators having named Executors of their Wills, do alſo appoint ſome Perſons whom they have a more ſpecial Truſt and Confidence in, to be Overſeers of their Wills, that is, to ſee to the due Performance and Execution of all the ſeveral Diſpoſitions in their Wills. But altho there ſhould be no ſuch Overſeers appointed, yet it is not much to be queſtioned, that due Care will be taken to oblige the Executors to a ſtrict Performance of all the Diſpoſitions in the Will, by the Perſons who ſhall have an Intereſt in the ſaid Diſpoſitions, and who will have the Aid of the Law to compel the Executors to perform the Will of the Deceaſed.*]

III.

3. Execution of a Diſpoſition committed

The Teſtator who names ſeveral Teſtamentary Heirs, and who confides more

to the Teſtamentary Heir, or to another Perſon.

more in one of them than in the others, may charge him in particular with the Execution of ſome Diſpoſitions of his Teſtament, impowering him to take out of the Eſtate the Fund which may be neceſſary for the Execution of the ſaid Diſpoſitions: and he may likewiſe commit this Care to a Legatee, or appoint ſome other Perſon for it, altho he ſhould give him nothing for his trouble, in conſideration of the Quality of the Teſtator, and of that of the Executor, or that he ſhould leave him a Legacy for his pains, as it is lawful for him to do *e*.

e Si a pluribus hæredibus legata ſint, eaque unus ex his præcipere jubeatur, & præſtare: In poteſtate eorum quibus ſit legatum, debere eſſe ait, utrumne a ſingulis hæredibus petere velint, an ab eo qui præcipere ſit juſſus. Itaque eum qui præcipere juſſus eſt, cavere debere cohæredibus, indemnes eos præſtari. *l.* 107. *ff. de legat.* 1.

Si ſcriptus ex parte hæres rogatus ſit *præcipere pecuniam, & eis, quibus teſtamento legatum erat, diſtribuere:* id quod ſub conditione legatum eſt, tunc præcipere debebit, cum conditio extiterit: interim aut ei, aut his, quibus legatum eſt, ſatisdari oportet. *l.* 96. §. 3. *eod.*

See the Texts cited on the foregoing Article.

IV.

4. *Security for conditional Legacies.*

If among the Legacies there were any of them conditional, whether it be that the Execution of the Teſtament were committed to one of the Teſtamentary Heirs, or to a particular Executor of the Teſtament; the Fund for paying theſe conditional Legacies would remain with the Teſtamentary Heirs *f*, they giving to the Legatees Security for their Legacies according to the Circumſtances, as has been explained in its Place *g*.

f See the 17th Law, ff. de leg. 2. *cited on the ſecond Article.*

g See the 46th Article of the eighth Section, and the ſeventh Article of the tenth Section of Legacies.

V.

5. *Execution of indefinite Diſpoſitions.*

The Execution of a Teſtament conſiſts not only in the Payment of the Legacies, and Acquittance of the other Charges, which are committed to the Executor of the Teſtament, according as they are regulated in the Teſtament; but there may be ſome Diſpoſitions whereof the Deſtination may depend on the Will of the Executor, or other Perſon to whem the Teſtator ſhall have referred it: as for example, if he had left a Sum of Money to be diſtributed to poor Families, or to redeem Captives, or to be laid out on other charitable Works, without determining any thing in particular; leaving it to the Perſon whom he ſhall have named in his Teſtament to apply the Charity where he ſhall think it moſt proper *h*.

h See the twenty eighth Law, Cod. de Epiſc. & Cler. *cited on the ſecond Article.*

See the following Article, and the Remark upon it.

VI.

6. *Execution of Diſpoſitions which are neglected.*

If the Teſtator having named no body for the Execution of his Teſtament, the Teſtamentary Heir ſhould fail to acquit the charitable Legacies left to ſome Church or Hoſpital, the Officers of Juſtice might take care to ſee the Will of the Deceaſed executed. But if the Legacy were indefinite, ſuch as that of a Sum of Money to be diſtributed to poor People, the Teſtator leaving the Diſpoſal thereof to his Teſtamentary Heir, he could not be ſued at Law for Legacies of this kind; for he may have acquitted them very honeſtly; and nothing would oblige him to give an account thereof, ſeeing the Teſtator had excuſed him from doing it *i*.

i Si perſona non deſignata teſtator abſolute tantummodo ſummam legati vel fideicommiſſi taxaverit quæ debeat memoratæ cauſæ proficere: vir reverendiſſimus Epiſcopus illius civitatis, ex qua teſtator oritur, habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propoſitum, ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Epiſc. & Clerc.*

According to the Uſage in France, *it is the Duty of the King's Councel at Law to apply to the Courts of Juſtice for their Aſſiſtance towards the Execution of theſe ſorts of Diſpoſitions, if they are neglected by the Teſtamentary Heirs, and by the Perſons who ought to take care of the ſaid Diſpoſitions, ſuch as the Governors and Adminiſtrators of Hoſpitals, the Eccleſiaſticks who are entruſted with the Adminiſtration of the Goods belonging to the Churches, and other Perſons who may have any Intereſt in the ſaid Legacies.*

[In *England* it belongs moſt properly to the Biſhops of the reſpective Dioceſes, to ſee that the Legacies left by Teſtators to charitable Uſes be duly applied according to the Intention of the Teſtators. *Swinburn, Part* 6. §. 1. *Lyndwood de teſtam. cap. ſtatutum.* And not only in *England*, but in all Chriſtian Countries, ever ſince the Foundation of Chriſtianity, it has been the peculiar Province of the Biſhops to take care of the due Application of Legacies to charitable Uſes. *l.* 28. *Cod. de Epiſcopis & Clericis.*]

VII.

7. *The Executor is to give an account.*

Seeing the Executor of the Teſtament is to diſcharge that Function out of the Stock of Goods which ſhall be put into his hands either by the Teſtamentary Heir, or by Decree of a Court of Juſtice, he is obliged to give an account

count how he has diſpoſed of the Goods which have been put into his hands, to produce Acquittances of the Legacies, and of the other Charges, except as to what the Teſtator had a mind to truſt to his own Integrity, as in the Caſe of the fifth Article; and he may likewiſe put down in his Account the Charges which he has been at in executing the Teſtament *l*.

l This is the Conſequence of the Function of the Executor of a Teſtament.

TITLE II.

Of an Undutiful Teſtament, and of Diſheriſon.

THE Liberty which the antient *Roman* Law gave to Parents to diſinherit their Children without any Cauſe, as has been obſerved in the Preface to this ſecond Part *a*, was followed by ſo great a number of Diſheriſons *b*, that it was found neceſſary to ſet bounds to it, by giving to the Children who ſhould pretend to be unjuſtly diſinherited, whether by their Fathers, or Mothers, or other Aſcendants, the Right of complaining of thoſe Diſpoſitions which were called undutiful, becauſe they were contrary to the Duty of Parents, which ties them to leave their Goods to their Children, who have done nothing to deſerve the being deprived of them. And at laſt *Juſtinian* regulated by an expreſs Law the Cauſes which might deſerve diſinheriting.

They called the Action, which the Law gave to Children againſt the Teſtaments in which they were diſinherited, the *Querele*, that is, the Complaint of Undutifulneſs; and it was permitted likewiſe to make ſuch a Complaint againſt exceſſive Donations and Marriage-Portions given to ſome of the Children or to other Perſons, if the ſaid Diſpoſitions were undutiful, that is, if they did not leave to all the Children their Legitime or Child's Part.

Beſides the diſinheriting, which may be either juſt or unjuſt, there is another manner of depriving Children of the Inheritance, and that is by not naming them, or making no mention of them in the Teſtament, which is called in the *Roman* Law *Preterition*, and is diſtinguiſhed from an expreſs Diſheriſon by this Difference, that whereas a Diſheriſon may be juſt if there are juſt Cauſes for it, Preterition cannot but be unjuſt, there being no Cauſe aſſigned.

To ſoften what a Complaint of Undutifulneſs might contain in it, that might be injurious to the Memory of the Teſtator, they gave to this Complaint in the *Roman* Law the Pretext of a Preſumption that the Teſtator had not the free uſe of his Reaſon, and that it was for want of his right Senſes that he made ſuch a Diſpoſition *c*. But in our Uſage we do not obſerve this Precaution, and we charge the Teſtator very freely with Inhumanity, Injuſtice, and Hardſhip, or with having been influenced by Paſſion, and the Inſtigations of a Mother-in-Law, or of ſome other Perſons.

The ſame Equity which made the Complaint of Children to be received againſt the undutiful Teſtaments of their Parents, made likewiſe the Complaints of Fathers, and Mothers, and other Aſcendants, to be received againſt the Teſtaments of their Children, who deprived them of their Succeſſions without juſt cauſe, whether by expreſly diſinheriting them, or paſſing them by without taking any manner of notice of them in their Teſtaments.

a See the Preface, n. 7.

b Sciendum eſt frequentes eſſe inofficioſi querelas. *l.* 1. *ff. de inoff. teſt.*

c Hoc colore inofficioſo teſtamento agitur quaſi non ſanæ mentis fuerunt ut teſtamentum ordinarent. Et hoc dicitur, non quaſi vere furioſus vel demens teſtatus ſit: ſed recte quidem fecit teſtamentum, ſed non ex officio pietatis. Nam ſi vere furioſus eſſet, vel demens nullum eſt teſtamentum. *l.* 2. *ff. de inoff. teſt.*

[*The Plaint, or Action, in the Caſe of an undutiful Teſtament, which the Civilians call* Teſtamentum inofficioſum, *is not in uſe with us in* England: *For by the Common Law, the Teſtator had always a free Will of diſpoſing of his Goods and Chattels in ſuch manner as he thought beſt; and it was only by the particular Cuſtoms of ſome Places that this Power was reſtrained. So that the Writ which is called* Breve de rationabili parte bonorum, *which the Wife or Children had againſt the Executors for the Recovery of part of the Goods, was not general throughout the whole Kingdom, but peculiar to certain Countries, where the Cuſtom was, that Debts being paid, the Remainder ſhould be divided into three equal Parts; to wit, one part to the Wife, the other to the Children, and the third to be left at the Will of the Teſtator.* Cowel's Inſtit. Book 2. Tit. 18.

This Cuſtom of reſerving a reaſonable Part of the Goods to the Widows and Children of Teſtators, is ſtill in force in the City of London, *as to the Widows and Children of Freemen. But in other Parts of the Kingdom where this Cuſtom did formerly take place, it has been aboliſhed by Act of Parliament; as by* Stat. 4, 5 Gul. & Mar. cap. 6. *The Inhabi-*

tants

tants of the Province of York *are impowered to diſpoſe of their perſonal Eſtates by their Wills, notwithſtanding the Cuſtom of that Province as to the reaſonable Part claimed by the Widows and Children. But this Act excepts the Cities of* York *and* Cheſter. *However the ſame was afterwards extended to the Freemen of the City of* York *by* Stat. 2° & 3° Annæ, cap. 5. *And by Statute* 7° & 8° Gul. 3. cap. 38. *the ſame Cuſtom of the Reaſonable Part was abliſhed in the Principality of* Wales.

By the Law of Scotland, *the Teſtator cannot by his Teſtament deprive his Wife or Children of their Legitime or Reaſonable Part.* Stair's Inſtit. of the Law of *Scotland*, lib. 3. tit. 8. num. 32. Mackenzie's Inſtit. book 3. tit. 9.]

SECT. I.

Of the Perſons who may complain of a Teſtament or other undutiful Diſpoſition.

WE ſhall not inſert in this Section that Law of the *Romans* which allowed Baſtard Children to complain of the Undutifulneſs of the Teſtament of their Mothers *a*. For in *France* Baſtards are incapable of all legal Succeſſions, as has been obſerved in its Place *b*.

It is to be remarked, that we ought not to reckon among the Children who are allowed to complain of their not being inſerted in the Teſtaments of their Fathers and other Aſcendants, Daughters who have renounced their Right to the Succeſſions: For ſeeing they cannot ſucceed to one who dies inteſtate while there are Male Children, or any deſcended of Males, there is no Obligation to call them to the Succeſſion by Teſtament *c*.

a l. 29. §. 1. *ff. de inoff. teſtam.*

b See the eighth Article of the ſecond Section of Heirs and Executors in general.

c See the Remark on the firſt Article of the ſecond Section, in what manner Children ſucceed.

[By the Law of *England* likewiſe, Baſtard Children are incapable of all legal Succeſſions by Proximity of Blood, and cannot ſo much as ſucceed to their own Mothers dying Inteſtate: Becauſe a Baſtard in Judgment of Law is *quaſi nullius filius*, and ſo cannot be Heir to any Perſon. And for the ſame reaſon it is, that where the Statute of 32 *H.* 8. *chap.* 1. of Wills, ſpeaketh of Children, Baſtard Children are not reckoned to be within that Statute; and the Baſtard of a Woman is no Child within that Statute. *Coke* 1. *Inſtit. fol.* 123. *a.*]

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I.

Teſtators who have Children, or other Deſcendants, whom the Law calls to ſucceed to them if they die inteſtate, according to the Rules which have been explain'd in their place *a*, cannot diſinherit them, unleſs they have ſome one of the Cauſes which ſhall be explained in this Title *b*. *1. Children cannot be diſinherited without a juſt Cauſe.*

a See the ſecond Section, in what manner Children ſucceed.

b Primum itaque illud eſt cogitandum, quia teſtantibus aliis quidem neceſſitatem imponit lex diſtribuere quandam partem perſonis quibuſdam, tanquam hoc ſecundum ipſam naturam eis debeatur, quale eſt filiis & nepotibus, & patribus atque matribus. *Nov.* 1. *in præf.* §. 2.

Liberis de inofficioſo licet diſputare. *l.* 1. *ff. de inof. teſtam.*

Sancimus igitur non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, ſuum filium vel filiam, vel cæteros liberos præterire, aut exhæredes in ſuo teſtamento facere, niſi forſan probabuntur ingrati. *Not.* 115. *c.* 3.

See the firſt, ſecond and third Articles of the ſecond Section.

II.

The Teſtators who have no Children, and who are ſurvived by their Fathers, or Mothers, or other Aſcendants, cannot diſinherit them, unleſs for ſome one of *2. Neither Fathers, nor Mothers, nor other Aſcendants.*

of the Cauſes which ſhall be likewiſe explained in this Title *c*.

c Omnibus tam parentibus quam liberis de inofficioſo licet diſputare. *l.* 1. *ff. de inoff. teſtam.* Nam etſi parentibus non debetur filiorum hæreditas, propter votum parentum, & naturalem erga filios caritatem; turbato tamen ordine mortalitatis, non minus parentibus quam liberis pie relinqui debet. *l.* 15. *ff. de inoff. teſtam.*

Sancimus non licere liberis parentes ſuos præterire, aut quolibet modo a rebus propriis, in quibus habent teſtandi licentiam, eos omnino alienare: niſi cauſas quas enumeravimus in ſuis teſtamentis ſpecialiter nominaverint. *Nov.* 115. *c.* 14. See the fourth Article of the ſecond Section.

III.

3. Preterition of Children hath the ſame Effect as Diſheriſon without cauſe.

If a Father, or other Aſcendant, without expreſly diſinheriting one of his Children, makes no mention of him in his Teſtament; this Silence, which is called *Preterition*, is conſidered in the ſame manner as Diſheriſon which has no Cauſe *d*.

d Hujus verbi *de inofficioſo teſtamento* vis illa eſt, docere immerentem ſe, & ideo indigne *præteritum*, vel etiam exhæreditatione ſummotum. *l.* 5. *ff. de inoff. teſtam. l.* 3. *eod. Nov.* 115. *c.* 3. See the Texts quoted on the firſt Article.

IV.

4. And alſo the Preterition of Parents.

The *Preterition* of Parents in the Teſtaments of their Children, to whom they have a Right to ſucceed if they die inteſtate, if there were no Deſcendants to exclude them from the Succeſſion, hath the ſame Effect as the *Preterition* of Children in the Teſtaments of their Fathers. For altho by the Order of Nature, Parents are not called to ſucceed to their Children, and that they ought not to expect this ſorrowful Succeſſion; yet it is juſt, that if contrary to this Order the Parents ſurvive their Children, they ſhould not be deprived of their Inheritance *e*.

e *See the Texts cited upon the firſt Article, as alſo upon the third Article.*

V.

5. Parents cannot diſinherit their Children, altho they leave them their Child's Part by other Diſpoſitions.

Altho a Teſtator who has Children had left them their Legitime or Child's Part by ſome Donation, Legacy, or other Diſpoſition; yet he may not diſinherit them by his Teſtament, or paſs them by without taking any notice of them therein. But he ought to inſtitute them Heirs or Executors in his Teſtament, unleſs he mentions therein ſome juſt Cauſes for diſinheriting them *f*.

f Sancimus non licere penitus patri vel matri, aut avo vel aviæ, proavo vel proaviæ, ſuum filium vel filiam, vel cæteros liberos præterire aut exhæredes in ſuo facere teſtamento: nec ſi per quamlibet donationem, vel legatum, vel fideicommiſſum, vel alium quemcunque modum eis dederit legibus debitam portionem: niſi forſan probabuntur ingrati: & ipſas nominatim ingratitudinis cauſas parentes ſuo inſeruerint teſtamento. *Nov.* 115. *c.* 3.

¶ It may be remarked on this Text, that the Interpreters, even the moſt skilful among them, have been of opinion, that the Meaning thereof is, That to make the Teſtament of a Father valid, it is neceſſary that what he leaves to his Children, ſhould be given them by way of Inſtitution; and that otherwiſe the Teſtament in which their filial Portion, or Child's Part, is left them without the Quality of Heir, would be null. And this Opinion is ſo univerſal, that it paſſes for a Rule; altho it be certain that the Author of thoſe Extracts which are commonly called Authenticks, taken out of the Novels of *Juſtinian*, and which are inſerted in the Places of the Code to which they have relation, ſeems not to have underſtood this Text in that Senſe. For in the Authentick, *non licet C. de lib. præter.* which is taken from thence, he has made no mention of the Neceſſity of leaving the filial Portion to the Children by way of Inſtitution: which he ought not to have failed to do, if it had been his Opinion, ſeeing in the authentick *Noviſſima C. de inoff. teſtam.* taken out of the eighteenth Novel, *chap.* 1. he had been careful to inſert in it what was ordained by the ſaid Novel, that the filial Portion might be left to them not only by way of Inſtitution, but alſo by a bare Legacy, or a fiduciary Bequeſt. *Sive quis illud Inſtitutionis modo, ſive per legati, idem eſt dicere, & ſi per fideicommiſſi relinquat occaſionem.* Theſe are the Terms of that eighteenth Novel, which he has contracted in that authentick *Noviſſima*, in theſe words, *quoquo relicti titulo*; which is directly contrary to what this Opinion will have to have been regulated by the hundred and fifteenth Novel. So that this Author having conceived in theſe Terms the authentick *Noviſſima*, and having in the authentick *Non licet* made no mention of the Neceſſity of this Inſtitution, it ſeems plain enough that he did not believe that this hundred and fifteenth Novel ought to be taken in this Senſe. And if we examine carefully the Terms of this hundred and fifteenth Novel, either in the original *Greek*, or in the *Latin*, we ſhall not find that it is ſaid there that the legitime or filial Portion ought to be left by way of Inſtitution; but only that it is

is there ſaid, that Fathers and Mothers, and other Aſcendants, cannot diſinherit their Children, nor paſs them over in ſilence in their Teſtaments, even altho they had left them their filial Portion ſome by Donation, Legacy, or fiduciary Bequeſt, or in ſome other manner whatſoever, unleſs there were juſt Cauſes for diſinheriting them, and that the ſame were expreſſed in the Teſtament. *Sancimus non licere liberos præterire, aut exhæredes in ſuo facere teſtamento; nec, ſi per quamlibet donationem, vel legatum, vel fideicommiſſum, vel alium quemcunque modum, eis dederit legibus debitam portionem: Niſi forſan probabuntur ingrati, & ipſas nominatim ingratitudinis cauſas parentes ſuo inſeruerint teſtamento.* Which Words ſeem only to imply, that it is not lawful to diſinherit Children, or paſs them over in ſilence in a Teſtament, altho by other Diſpoſitions, of what nature ſoever they may be, the Parent had given them their filial Portion, as by Donations or Codicils; and that if after theſe Diſpoſitions a Father, or other Aſcendant, makes a Teſtament, he is obliged to make mention therein of his Children, and cannot diſinherit them without juſt Cauſe. And to ſhew that this Senſe is altogether natural, we might add, that ſeeing *Juſtinian* ſpeaks in this place only of a Teſtament which ſhould contain a Diſheriſon or Preterition of Children, as appears evidently from the Words which have been juſt now quoted, it ſeems to follow from thence, that when he ſays that diſinheriting was not allowed by a Teſtament, altho the Children had their Child's Part left them by Donations, Legacies, or fiduciary Bequeſts, he meant only other Diſpoſitionss, and not the Teſtament it ſelf, in which he ſuppoſes them to be diſinherited or omitted. For can any one ſay that a Father, who diſinherits his Son, could ever think of leaving him his filial Portion by a Legacy or fiduciary Bequeſt, in the ſame Teſtament by which he diſinherits him? And much leſs can this be ſaid of a Teſtament wherein the Son is paſſed over in ſilence by a *Preterition*. So that we may ſay, that *Juſtinian* having ſaid that one cannot diſinherit, nor paſs over in ſilence, Children in a Teſtament, even altho their filial Portion had been left them by a Donation, a Legacy, or a fiduciary Bequeſt, or in any other manner whatſoever, he did not mean that this other manner of giving the filial Portion ſhould be in the Teſtament it ſelf by which the Child is diſinherited or omitted; but that he meant only to ordain thereby, that a Father, or other Aſcendant, ſhould not only not have power to diſinherit his Children without Cauſe, but even not to paſs them over in ſilence in a Teſtament; and that ſuch a Teſtament ſhould be null, altho the Teſtator had given to his Children by ſome other Title their Child's Part. But even altho that other Title ſhould be a Teſtament, by which the Children had been inſtituted Heirs or Executors, whether for their Child's Part, or otherwiſe, that Inſtitution would not hinder the Nullity of a ſecond Teſtament, in which they ſhould be paſſed over in ſilence, or diſinherited; which is the Subject-Matter of *Juſtinian*'s Rule, explained in the Words above cited, and which regard only the Nullity of a Preterition, or unjuſt Diſheriſon, and which he judges to be ſuch independently of all other Diſpoſitions, by which the legal Portion due to the Children may have been left them.

We may likewiſe add on the ſame Subject, that *Juſtinian* has been careful to obſerve in ſeveral Places, that he had not ſuffered any thing to be put into his Code, which was contrary to other Diſpoſitions therein contained; and that he has renewed the ſame Obſervation on the Matter concerning the Succeſſions of Children in one of his Novels *a*, where he proves that he has not abrogated a Law of the Emperor *Theodoſius*; and that it cannot be pretended to be contrary to one of his, for this reaſon, becauſe that Law of *Theodoſius* is in his Code. From whence one might gather, if this Declaration of *Juſtinian*'s were perfectly ſure, that it was not his Intention in this hundred and fifteenth Novel to make it neceſſary that the Children ſhould be inſtituted Heirs, in order to prevent a Complaint of Undutifulneſs; ſince, beſides the eighteenth Novel, we find in the Code of this Emperor many Laws, and even ſome of his own, which forbid the Complaint of Undutifulneſs, when the Teſtator has left any thing to his Children by what Title ſoever, whether of Legacy or fiduciary Bequeſt *b*; and which in this Caſe give the Children only a Right to demand a Supplement of the Portion due to them by Law.

We have not made this Remark in oppoſition to the ordinary Senſe every

a *Nov.* 158. *c.* 1.

b *l.* 29, 30, 31, 32. *C. de inoff. teſt. v. l.* 8. §. 6. *ff. eod.*

body

body gives to this hundred and fifteenth Novel, nor to condemn the Uſage of this Senſe thereof, which has paſſed into a Rule, ſince it may be ſaid otherwiſe that this Rule is altogether equitable, and that it is juſt, that the Children being called by their Birth to the Inheritance of their Parents, it ſhould be left to them with the Title of Heirs, which Nature and the Laws give them. And this Rule would be particularly juſt in the Caſes where Parents ſhould call to their Succeſſion other Heirs together with their Children. But if a Father, having many Children under Age, had inſtituted for his univerſal Heireſs their Mother his Wife, of whom there was no reaſon to fear that ſhe would have other Children by a ſecond Husband, and that he had failed to make uſe of the Name of Heirs with relation to his Children, fixing only their filial Portion or Child's Part at certain Sums; there would be ſome Inconvenience in annulling a Teſtament of this nature for that Defect: As there would be likewiſe an Inconvenience to annul a Teſtament, wherein a Father had made a Partition of his Goods among his Children, without giving them in the Teſtament the Name of Heirs, if no other Fault were found in it. And ſeeing it happens often in ſome Provinces which are governed by the written Law, that Fathers make ſuch Diſpoſitions for the Good of their Children who are under Age, inſtituting their Widows Heireſſes, and regulating at certain Sums the Portions due to their Children by Law, in order to avoid the Charges and Trouble of Seals, Inventaries, and Partitions, and upon other reaſonable Conſiderations; we have thought it proper to make this Obſervation; and we have been likewiſe induced thereto by the Fidelity that is due to the true Senſe of the Laws.

VI.

6. Undutiful Teſtaments are annulled as to the undutiful Inſtitution.

The Teſtaments which are found to be undutiful, either becauſe Children or Parents are omitted in it, or becauſe they are unjuſtly diſinherited, are annulled as to the undutiful Inſtitution *g*.

g Si ex cauſa de inofficioſi cognoverit judex, & pronuntiaverit contra teſtamentum, nec fuerit provocatum, ipſo jure reſciſſum eſt, & ſuus hæres erit ſecundum quem judicatum eſt. *l.* 8. §. 16. *ff. de inoff. teſtam. V. Nov.* 115. *c.* 3. *in f. & cap.* 4. *in f.*

See hereafter the fifth Article of the fourth Section, and the ſixteenth Article of the fifth Section of Teſtaments.

VII.

7. How the Complaint of Undutifulneſs paſſes to the Heirs of the Perſon diſinherited.

If the Perſon who had a Right to complain of an undutiful Teſtament had Children, and chanced to die before he had exerciſed his Right, and made his Demand; the Children might complain of the ſaid Teſtament in the Right of the Deceaſed, unleſs he had approved the Teſtament before his Death *h*. But if there were other Heirs, they could not exerciſe the Complaint of Undutifulneſs, unleſs the Deceaſed had enter'd the Complaint in his own Life-time *i*.

h Jubemus in tali ſpecie eadem jura nepoti dari quæ filius habebat, et ſi præparatio facta non eſt ad inofficioſi querelam inſtituendam, tamen poſſe nepotem eandem cauſam proponere. *l.* 34. *C. de inoff. teſtam.* Niſi pater, adhuc ſuperſtes, repudiavit querelam. *d. l. in f.*

Si quis inſtituta accuſatione inofficioſi deceſſerit, an ad hæredem ſuum querelam transferat? Papinianus reſpondit, (quod & quibuſdam reſcriptis ſignificatur) ſi poſt agnitam bonorum poſſeſſionem deceſſerit, eſſe ſucceſſionem accuſationis. Et ſi non ſit petita bonorum poſſeſſio, jam tamen cæpta controverſia, vel præparata: vel ſi cum venit ad movendam inofficioſi querelam deceſſit, puto ad hæredem tranſire. *l.* 6. §. *ult. ff. eod.*

i Ad extraneos hæredes tunc tantummodo (*tranſmittet querelam*) quando antiquis libris incertam faciet præparationem. *l.* 36. *in f. C. eod.*

¶ It may be remarked on this Article, that it follows from the firſt of the Texts that are cited on it, that the Children of the Perſon diſinherited are excluded as well as he from the Inheritance, and that therefore when a Father diſinherits his Son who has Children, the Diſheriſon which deprives the Son of the Goods of the Teſtator, cuts off likewiſe his Children, and all that are deſcended of him, from having any ſhare or benefit therein. For if it were the Intention of the Law to exclude from the Succeſſion only the Perſon of the Son diſinherited, and not his Children, and if they might ſucceed in their own Right, in default of their Father who is diſinherited, it would not be neceſſary to give them the Right of complaining of the Undutifulneſs of the Teſtament after the Death of their Father, unleſs it were only to vindicate the Honour of his Memory, which is not the Caſe of this Text; the Sequel of which ſhews, that the Son who is diſinherited tranſmits to his Children the ſame Right which he had to complain of the Teſtament. From whence it follows, that the Law giving this Right to the Children, it ſuppoſes that in their own Perſons they have no ſhare in the Inheri-

tance from which their Father has been excluded, unleſs they juſtify his Memory, and get the Diſheriſon annulled. And altho it be ſaid in another Law, that the Son who is diſinherited is conſidered as being dead, and that his Children ſucceed in his place, *Debent nepotes admitti nam exhæredatus pater eorum pro mortuo habetur. l.* 1. §. 5. *ff. de conjung. cum emanc. lib. ejus*, yet this Text has relation to a ſort of diſinheriting which was frequent in the antient *Roman* Law, and had nothing odious in it, not being founded on the Ingratitude of the Children; but it turned ſometimes to their Advantage. *Multi non notæ cauſa exhæredant filios, nec ut eis obſint, ſed ut eis conſulant (ut puta impuberibus) eiſque fideicommiſſam hæreditatem dant. l.* 18. *ff. de liber. & poſt.* But the Diſheriſon which a Son may have deſerved by his bad Conduct, is a Puniſhment which ought to extend to his Children; for otherwiſe it would be uſeleſs, and would not even affect the Son who is diſinherited, ſince he would have by means of his Children the Uſe of the Goods which he could not have himſelf.

VIII.

8. *An involuntary Preterition.*

If a Father or Mother, who had two or more Children, having diſpoſed of their Goods among them by a Teſtament, happen'd afterwards to have another Child, of which no mention was made in the Teſtament, and died without altering it; this Teſtament would do no prejudice to the Rights of the ſaid Child. For if it was thro Negligence that the ſaid Teſtament was not reformed, it would be an undutiful one: And if it was a pure Effect of a ſudden and unforeſeen Death; as if it was a Mother who died in Child-bed of the ſaid Child, whoſe Birth ſhe perhaps waited for, in order to ſettle her Will; the Preſumption that ſhe could not have for the ſaid Child any other than the tender Sentiments of a Mother, would ſupply the want of a Teſtament, which this unforeſeen Accident had put her out of a Condition to make. So that this Child would ſtill have the ſame Portion of the Inheritance which he ought to have had, if there had been no Teſtament at all *l.* But if the ſaid Father or Mother, having no Children at the Time of making their Teſtament, had inſtituted other Heirs or Executors, it would be annulled by the Birth of this Child, either as being an undutiful Teſtament, or as being vacated by the ſaid Birth *m.*

l Si mater filiis duobus hæredibus inſtitutis, tertio poſt teſtamentum ſuſcepto, cum mutare idem teſtamentum potuiſſet, hoc facere neglexiſſet: merito, utpote non juſtis rationibus neglectus de inofficioſo querelam inſtituere poterit. Sed cum eam in puerperio vita deceſſiſſe proponas, repentini caſus iniquitas per conjecturam maternæ pietatis emendanda eſt. Quare filio tuo cui nihil præter maternum fatum imputari poteſt, perinde virilem portionem tribuendam eſſe cenſemus, ac ſi omnes filios hæredes inſtituiſſet. Sin autem hæredes ſcripti extranei erant, tunc de inofficioſo teſtamento actionem inſtituere non prohibetur. *l.* 3. *C. de inoff. teſt.*

See the ſixth Article of the fifth Section of Teſtaments.

IX.

9. *If of two or more Children, one alone is diſinherited, without being particularly named, the Diſheriſon is null.*

If a Father, who had two or more Children, having a mind to diſinherit one of them, did expreſs himſelf in ſuch a manner as not to diſtinguiſh him from the other Children, ſaying only that he diſinherited his Son, without ſpecifying him by Name, or deſcribing him by ſome other Mark; this Diſheriſon, which would not fall upon one Son more than the others, would be without effect, even as to him whom it might be reaſonable to preſume that the Father intended to deprive of his Succeſſion *n.*

n Nominatim exhæredatus filius & ita videtur, filius meus exhæres eſto, ſi nec nomen ejus expreſſum ſit: ſi modo unicus ſit. Nam ſi plures ſunt filii, benigna interpretatione potius à pleriſque reſpondetur, nullum exhæredatum eſſe. *l.* 2. *ff. de lib. & poſt.*

X.

10. *Proviſion for the Son who is diſinherited, pending the Appeal from the Sentence given in his favour.*

If the Son who is diſinherited having procured the Teſtament to be declared undutiful by a Sentence, he who was inſtituted Heir or Executor therein had appealed from the Sentence, and that pending the Appeal, the Son ſhould demand a Proviſion of Alimony out of the Eſtate; this Proviſion would be decreed him according to the Value of the Eſtate, and his Quality *o.*

o De inofficioſo teſtamento nepos contra patruum ſuum, vel alium ſcriptum hæredem, pro portione egerat & obtinuerat. Sed ſcriptus hæres appellaverat. Placuit, interim, propter inopiam pupilli, alimenta pro modo facultatum, quæ per inofficioſi teſtamenti accuſationem pro parte ei vindicabantur decerni: eaque adverſarium ei ſubminiſtrare neceſſe habere, uſque ad finem litis. *l.* 27. §. 3. *ff. de inoff. teſtam.*

XI.

11. *The Portion of a Child whoſe Diſheriſon*

If of two Children whom a Father had diſinherited, one of them enters no Complaint againſt it, he renouncing the Inheritance for his part; or that having

ſubſiſts, accrues to the other Children.

having entered his Complaint, he has been declared to be duly and juſtly diſinherited, and the other diſinherited Child on his part gets the Teſtament to be annulled, and comes in for his ſhare of the Inheritance with the other Children; every one of them will have in the Partition of the Eſtate his Portion according to their Number, without taking him in who is found to be juſtly diſinherited, or who has renounced. For he having no ſhare in the Inheritance, the Portion which he ought to have had remains in the Maſs of the Eſtate, and accrues to him who was unjuſtly diſinherited in conjunction with the other Children. And if this Child ſhould happen to be the only one remaining, he would have the whole Eſtate *p*.

p Qui repudiantis animo non venit ad accuſationem inofficioſi teſtamenti, partem non facit his qui eandem querelam movere volunt. Unde ſi de inofficioſo teſtamento patris, alter ex liberis exhæredatis ageret, quia reſciſſo teſtamento alter quoque ſucceſſionem ab inteſtato vocatur: & ideo univerſam hæreditatem non recte vindicaſſet, hic ſi obtinuerit, uteretur rei judicatæ auctoritate: quaſi centum viri hunc ſolum filium in rebus humanis eſſe nunc, cum facerent inteſtatum crediderint. *l.* 17. *ff. de inoff. teſt. V. l.* 16. *eod.* Exhæredatus pro mortuo habetur. *l.* 1. §. 5. *ff. de conjung. cum emanc. lib. ej.*

If one of the Sons diſinherited had only delayed to bring his Action, without approving of his being diſinherited, or renouncing the Inheritance, his Portion would not accrue to the other Children by this Silence. But the others might oblige him to explain himſelf; and it would be neceſſary to have the Queſtion about his Diſheriſon judicially diſcuſſed, in caſe he ſhould not acquieſce under it. V. l. 8. §. 8. ff. de inoffic. teſtam.

XII.

12. Children to whom their Parents leave leſs than their Legitime or Child's Part, have the Supplement of it.

If the Children have no other ground of Complaint againſt the Teſtaments of their Parents, but that the Portion left them therein is not ſo large as what they have a Right to by Law, or that the Teſtator hath made his Diſpoſition which relates to them to depend on ſome Condition, or on a Time which ſuſpends the Effect thereof; theſe would not be ſufficient Grounds for having the Will declared void, on account of its being undutiful, but they could only demand the Supplement of the Portion due to them by Law; and the Conditions, or other Cauſes of Delay, would be without effect, ſo as that they might have their whole Right at the time of the Death by which they acquire it *q*.

q Quoniam in prioribus ſanctionibus illud ſtatuimus, ut, ſi quid minus legitima portione his derelictum ſit, qui ex antiquis legibus de inofficioſo teſtamento actionem movere poterant, hoc repleatur, ne occaſione minoris quantitatis teſtamentum reſcindatur: hoc in præſenti addendum eſſe cenſemus, ut, ſi conditionibus quibuſdam vel dilationibus, aut aliqua diſpoſitione moram, vel modum vel aliud gravamen introducente eorum jura, qui ad memoratam actionem vocabantur, immunita eſſe videantur, ipſa conditio, vel dilatio, vel alia diſpoſitio moram vel quodcumque onus introducens, tollatur: & ita res procedat quaſi nihil eorum teſtamento additum eſſet. *l.* 32. *C. de inoff. teſtam. l.* 29, 30, *&* 31. *eod.*

See the fifth Article, and the Remark that is there made on it.

XIII.

13. The Favour of the Perſon who is inſtituted Heir or Executor, will not make the Diſheriſon to ſubſiſt.

Whatever may be urged, either on the ſcore of Piety, Duty, or other Conſideration whatſoever, in favour of the Diſpoſition of a Teſtator who had unjuſtly diſinherited one of his Sons, the Teſtament would nevertheleſs be annulled. For the Inſtitution of Children is the firſt Duty of Parents in their Teſtaments *r*.

r Si Imperator ſit hæres inſtitutus, poſſe inofficioſum dici teſtamentum, ſæpiſſime reſcriptum eſt. *l.* 8. §. 2. *ff. de inoff. teſtam.*

The Caſe of this Text appears to be ſo different from our Uſage, that we did not think it proper to give ſuch an Inſtance. For who with us, to make the Diſheriſon of his Children to ſubſiſt, would ever think of inſtituting the King his Heir? And yet this Caſe muſt needs have been very frequent at Rome, *ſeeing it is ſaid in the Text that it has been often decided, that altho the Prince were inſtituted Heir by an undutiful Teſtament, yet that ſhould be no hindrance why a Complaint againſt it, as being undutiful, ſhould not be received.*

XIV.

14. Brothers and Siſters cannot complain of a Teſtament, as being undutiful, unleſs the Perſon inſtituted Heir or Executor be an infamous Perſon.

Of all the Perſons whom the Law calls to the Succeſſions of Perſons dying inteſtate, it is only thoſe who are in the Line of Aſcendants and Deſcendants from the Teſtator who may complain of the Teſtament as being undutiful. And this Right does not paſs to any of the Collaterals, not even to Brothers and Siſters: And they cannot complain of the Teſtaments of their Brothers or Siſters who inſtitute other Heirs or Executors, unleſs the Inſtitution were ſuch as were contrary to good Manners and Decency, becauſe of the Quality of the Perſon who is inſtituted Heir or Executor, as if it were an infamous Perſon *s*.

s Cognati proprie qui ſunt ultra fratrem, melius facerent ſi ſe ſumptibus inanibus non vexarent; cum obtinere ſpem non haberent. *l.* 1. *ff. de inoff. teſt.*

Nemo eorum qui ex tranſverſa linea veniunt, exceptis fratre & ſorore, ad inofficioſi querelam admittatur. *l.* 21. *C. eod.*

Fratres vel ſorores uterini ab inofficioſi actione contra teſtamentum fratris vel ſororis penitus arceantur. Conſanguinei autem, durante agnatione (vel non) contra teſtamentum fratris ſui vel ſororis de inofficioſo quæſtionem movere poſſunt, ſi ſcripti

hæredes infamiæ, vel turpitudinis, vel levis notæ macula aſpergantur. *l.* 27. *C. eod.*

Juſtinian *having abolished the Difference between the* Agnati *and* Cognati *by his hundred and eighteenth Novel, why ſhould not the Brothers by the Mother's ſide have the ſame Right as Brothers by the Father's ſide? And would it not alſo be equitable, that the other near Relations, beyond the Degree of Brothers, ſhould have a Right to annul an infamous Inſtitution, ſince it would be nevertheleſs contrary to Decency and good Manners, and againſt the Spirit of the Law, altho the Teſtator ſhould have neither Brothers nor Siſters?*

SECT. II.

Of the Cauſes which render a Diſheriſon juſt.

The CONTENTS.

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6. *The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.*

I.

1. *Children cannot be diſinherited without a juſt Cauſe.*

SEEING Nature and the Laws which call Children to the Succeſſion of their Parents, look upon the Goods of the Parents as belonging already to the Children, even in the Life-time of their Parents; they cannot be deprived of them, if they have not deſerved ſuch a Puniſhment, which taking from them the Goods, does at the ſame time ſtain their Honour, and expoſes them to yet greater Evils. Thus the Laws have reſtrained the Liberty of diſinheriting, of which Fathers might be apt to make a bad Uſe *a*, either thro an unjuſt Paſſion, or by the Impreſſions of a Mother-in-Law, or of other Perſons *b*: And they have regulated the Cauſes which may deſerve diſinheriting *c*.

a Inſtitutiones benigne accipiuntur, exhæredationes autem non adjuvandæ. *l.* 19. *in f. ff. de liber. & poſt hæred. inſt. vel exhæred.*

Hujus verbi *de inofficioſo*, vis illa eſt, docere immerentem ſe, & ideo indigne præteritum, vel exhæredatum. *l.* 5. *ff. de inoff. teſt.*

b Inofficioſum teſtamentum dicere, hoc eſt, allegare quare exhæredari vel præteriri debuerit. Quod plerumque accidit, cum falſo parentes inſtimulati, liberos ſuos vel exhæredant, vel prætereunt. *l.* 3. *eod.*

Non eſt enim conſentiendum parentibus qui injuriam adverſus liberos ſuos teſtamento inducunt. Quod plerumque faciunt maligne circa ſanguinem ſuum inferentes judicium, novercalibus delinimentis inſtigationibuſque corrupti. *l.* 4. *eod.*

Cum te pietatis religionem non violaſſe, ſed mariti conjugium quod fueras ſortita diſtrahere noluiſſe, ac propterea offenſum atque iratum patrem ad exhæredationis notam prolapſum eſſe dicas, inofficioſi teſtamenti querelam inferre non vetaberis. *l.* 18. *C. eod.*

c See the Articles which follow.

II.

2. *Two ſorts of Cauſes of diſinheriting.*

The Cauſes of diſinheriting Children may be diſtinguiſhed into two ſorts: One, of thoſe which concern the Perſon of the Parents, as if a Son has attempted any thing againſt the Life of his Father: And the other is of ſuch as, without attempting any thing directly againſt the Perſons of the Parents, may deſerve their Diſpleaſure; as, if a Son engages himſelf in an infamous Profeſſion, as ſhall be mentioned in the following Article. But altho theſe Cauſes be different, according to theſe two Views, yet the Laws give the Name of Cauſes of Ingratitude to all thoſe which may deſerve diſinheriting *d*; qualifying with this Name every thing that is contrary to the Duty which Children owe to their Parents. For this Duty implies the abſtaining from every thing that may juſtly draw upon the Children the Wrath of their Fathers.

d Cauſas autem ingratitudinis has eſſe decernimus. Si quis, &c. *Nov.* 115. *C.* 3.

III.

3. *Divers Cauſes of diſinheriting Children.*

Fathers and Mothers, and other Aſcendants, may diſinherit their Children if they have attempted to take away their Life, either by Poiſon, or by other ways *e*: If they have ſtruck them *f*, or abuſed them, or committed any grievous Offence againſt them *g*: If they have not relieved them out of Priſon, by engaging to preſent them in Judgment, or to pay the Debt for them as far as their own Circumſtances will allow them *h*: If they have ſuffered them to remain in Captivity, while they were able to redeem them *i*: If the Father having been mad, they had neg-

e Si vitæ parentum ſuorum per venenum, aut alio modo inſidiari tentaverit. *Nov.* 115. *c.* 3. §. 3. See on this Article the third Section of Heirs and Executors in general.

f Si quis parentibus ſuis manus intulerit. *d. c.* 3. §. 1.

g Si gravem & inhoneſtam injuriam eis injecerit. *d. c.* §. 2.

h Si quemlibet de prædictis parentibus incluſum eſſe contigerit, &c. *d. c.* §. 8.

i Si unum de prædictis parentibus in captivitate detineri contigerit, &c. *d. c.* §. 13.

lected

lected to perform thoſe Offices towards him which that Condition may have required *l*: If by any Violence, or other unlawful way, they had hindred him from diſpoſing of his Eſtate by Will: And if the Father had died without being able to make his Will, and to diſinherit the Son who had been guilty of this Violence, this Son would nevertheleſs be deprived of the Inheritance *m*: If they have accuſed their Parents of other Crimes beſides Treaſon againſt the King, or the State *n*: If a Son has committed Inceſt with his Mother-in-Law *o*: If he had contracted any Familiarity with Scelerates, and led the ſame kind of Life with them *p*: If he has taken up an infamous Profeſſion which his Father did not follow *q*: If a Daughter prefers an infamous Life to a married State *r*.

l Si quis de prædictis parentibus furioſus fuerit, &c. *d. c.* §. 12.

m Si convictus fuerit aliquis liberorum ex eo quia prohibuerit parentes ſuos condere teſtamentum, &c. *d. c.* §. 9. See the tenth Article of the third Section of Heirs and Executors in general.

n Si eos in criminalibus cauſis accuſaverit, quæ non ſunt adverſus principem, ſive rempublicam. *d. c.* §. 3.

Si delator contra parentes filius extiterit, & per ſuam delationem gravia eos diſpendia fecerit ſuſtinere. *d. c.* §. 7.

o Si novercæ ſuæ filius ſeſe immiſcuerit. *d. c.* §. 6.

p Si cum maleficis hominibus ut maleficus verſatur. *d. c.* §. 4.

It is in the Greek μετὰ φαρμάκων cum veneficis. *But whatever Senſe we give to this Word, it would ſeem that this Cauſe of diſinheriting ought not to be confined to the frequenting of the Company, and imitating the Example of one kind only of wicked Perſons.*

q Si præter voluntatem parentum inter arenarios, vel mimos ſeſe filius ſociaverit; & in hac profeſſione permanſerit: niſi forſitan etiam parentes ejuſdem profeſſionis fuerint. *d. c.* §. 10.

r Si aliqui ex prædictis parentibus volenti ſuæ filiæ, vel nepti maritum dare, & dotem ſecundum vires ſubſtantiæ ſuæ pro ea præſtare, illa non conſenſerit, ſed luxurioſam degere vitam elegerit. *d. c.* §. 11. *v. l.* 19. *C. de inoff. teſt.*

We have not inſerted in this Article the laſt of the Cauſes of diſinheriting, which Juſtinian *has collected in this hundred and fifteenth Novel, which is that of Hereſy. For the Uſage of this Cauſe having ceaſed for a long time in* France, *whilſt the Proteſtants had the free Exerciſe of their Religion, it hath ceaſed in the preſent Situation of Affairs for the contrary Reaſon, in that the late Edict and Declarations have taken away from them that Liberty of Conſcience which they formerly enjoyed.*

Altho Juſtinian *had reſtrained the Cauſes for diſinheriting Children to thoſe which we have juſt now explained, and had rejected all others, yet we have in* France *another Cauſe of diſinheriting brought into uſe by the Ordinances, which have given Permiſſion to Fathers to diſinherit their Children who marry againſt their Conſent, allowing only Sons after they have accompliſhed thirty Years of Age, and Daughters after they are paſt Five and twenty, to marry themſelves,* after they have in a dutiful manner deſired the Counſel and Advice of their Fathers and Mothers *a*. *And might not there be other juſt Cauſes of diſinheriting? As, for inſtance, if a Son had attempted to murder his Mother-in-Law, his Father's Wife: If on any occaſion he had failed in any eſſential Duty towards his Parents, ſuch as to furniſh them with neceſſaries in their Wants.*

a Edict of *Henry* II. in the Year 1556, Ordinance of *Blois*, Art. 41.

IV.

4. *Divers Cauſes of diſinheriting Parents.*

Children cannot diſinherit their Parents, except where they have a juſt Cauſe for it; as, if they have attempted any thing againſt their Life *s*: If they have put them in danger of loſing it by ſome Accuſation, except it be in the Caſe of Treaſon, mentioned in the foregoing Article *t*: If the Father has been guilty of Inceſt with the Wife of his Son *u*: If the Parents have imployed unlawful means to hinder their Children from making their Teſtaments *x*: If they have abandoned them in their Madneſs *y*, or in their Captivity *z*: And if the Father or Mother have attempted to take away the Life or Senſes, the one of the other, by Poiſon, or otherwiſe, their common Child may diſinherit the Author of ſuch a Crime *a*.

s Si venenis, aut maleficiis, aut alio modo parentes filiorum vitæ inſidiati probabuntur. *Nov.* 115. *c.* 4. §. 2.

t Si parentes ad interitum vitæ liberos ſuos tradiderint: citra tamen cauſam quæ ad majeſtatem pertinere cognoſcitur. *d. c.* 4. §. 1.

u Si pater nurui ſuæ ſeſe immiſcuerit. *d. c.* 4. §. 3.

x Si parentes filios ſuos teſtamentum condere prohibuerint, in rebus in quibus habent teſtandi licentiam. *d. c.* §. 4.

y Si liberis vel uno ex his in furore conſtituto, parentes eos curare neglexerint. *d. c.* 4. §. 6.

z His caſibus etiam cladem captivitatis adjungimus, &c. *d. c.* 4. §. 7.

a Si contigerit autem virum uxori ſuæ ad interitum, aut alienationem mentis, dare venenum: aut uxorem marito, vel alio modo alterum vitæ alterius inſidiari: tale quidem, utpote publicum crimen conſtitutum, ſecundum leges examinari, & vindictam legitimam promereri decernimus: liberis autem eſſe licentiam nihil in ſuis teſtamentis de facultatibus ſuis illi perſonæ relinquere quæ tale ſcelus noſcitur commiſiſſe. *d. c.* 4. §. 5.

V.

5. *The Cauſes of diſinheriting ought to be proved.*

It is not enough to juſtify the diſinheriting, that the Parents, or the Children, mention the Cauſes of it in their Teſtaments; but the Perſons who are inſtituted Heirs or Executors ought to prove the Facts upon which the diſinheriting is grounded: And if they prove them not, it will be null *b*.

b By the antient Roman *Law, the Son who was diſinherited, and who had a mind to bring his Complaint againſt it, was obliged to make it appear that*

that he was unjuſtly diſinherited. Hujus verbi *de inofficioſo* vis illa eſt, docere immerentem ſe & ideo indigne præteritum, vel etiam exhæredatione ſummotum. *l.* 5. *ff. de inoff. teſt.* Liberi de inofficioſo querelam contra teſtamentum paternum moventes, probationem debent præſtare, quod obſequium debitum jugiter prout ipſius naturæ religio flagitabat, parentibus adhibuerint: niſi ſcripti hæredes oſtendere maluerint ingratos liberos contra parentes extitiſſe. *l.* 28. *C. de inoff. teſt.* *But* Juſtinian *ordered that the Cauſes of diſinheriting ſhould be proved,* niſi forſan probabuntur ingrati. *Nov.* 115. *c.* 3. *And it is alſo the general Rule, that no Accuſation is regarded unleſs it be proved.*

VI.

6. The Husband is not deprived of his Wife's Dowry, for the Ingratitude of his Wife towards the Parents who gave it.

Altho Parents may deprive their ungrateful Children of their Eſtate, and even revoke Donations which they may have made in their favour, as has been ſaid in its place *c*; yet if a Daughter who was endowed by her Father or Mother, or any other Aſcendant, had fallen into the Crime of Ingratitude, the Marriage Portion that was given or promiſed to the Husband would nevertheleſs be due to him. For as to him, the Charges of the Marriage which he is bound to bear, are a juſt Title for him to keep the ſaid Marriage Portion, or to demand it, without any regard to the Fact of his Wife *d*.

c See *the ſecond Article of the Section of Donations.*

d Patrona dotem pro liberta jure promiſſam, quod extiterit ingrata, non retinebit. *l.* 69. §. 6. *ff. de jure dot. v. l.* 24. *C. eod.*

SECT. III.

Of other Cauſes which make the Complaint againſt a Teſtament, as being undutiful, to ceaſe.

1. *The Complaint againſt a Teſtament, as being undutiful, ceaſes by the Approbation of the Teſtament.*
2. *If the Perſon diſinherited, being a Legatee, receives the Legacy, he approves of the Diſheriſon.*
3. *What a Guardian does for his Minor ought not to hurt himſelf, nor what he does for himſelf to be of any Prejudice to his Minor.*
4. *He who approves of the Teſtament by any Act, is excluded from entring a Complaint againſt it, as being undutiful.*
5. *This Complaint preſcribes in five Years time, if there be no juſt Cauſe of Excuſe for the Delay.*
6. *If the Action of Complaint is let drop for want of Proſecution, it is not afterwards received.*
7. *The Complaint on the ſcore of Undutifulneſs, does not exclude the Action on the Head of Forgery, nor the Action of Forgery, the Complaint of Undutifulneſs.*
8. *One may plead the Nullities of the Teſtament, or the Undutifulneſs of it, ſucceſſively one after the other.*

I.

1. The Complaint againſt a Teſtament, as being undutiful, ceaſes by the Approbation of the Teſtament.

IF the Perſon who is diſinherited, altho without juſt Cauſe, had once approved of the Teſtament, the Diſheriſon would have its Effect, whether it was by an expreſs Act that the Teſtament had been approved, or by Acts which did imply the ſaid Approbation, as ſhall be explained by the Rules which follow *a*.

a Quid ergo ſi alias voluntatem teſtatoris probaverim? Puta in teſtamento adſcripſerim poſt mortem patris, conſentire me? Repellendus ſum ab accuſatione. *l.* 31. *in f. ff. de inoff. teſt.* See the following Articles.

II.

2. If the Perſon diſinherited, being a Legatee, receives the Legacy, he approves of the Diſheriſon.

If in the ſame Teſtament which contains the Diſheriſon, there were a Legacy left to the Perſon diſinherited, as, if a Father having diſinherited his Son, had left him a Legacy, ſaying, That altho he were unworthy to have any ſhare at all in his Succeſſion, yet he left him out of Commiſeration a certain Sum, or a Penſion for Alimony; and this Son had received the Legacy, he would thereby have approved the Teſtament, and could not any more complain of his being diſinherited. But if this Son who is diſinherited, chanced to diſcover ſome Flaw in the Teſtament that would be ſufficient to annul it, as if it was forged, or null, thro ſome Nullity which had been hid; the Legacy which he had received would not bar him from the Right of impugning ſuch a Teſtament *b*.

b Illud notiſſimum eſt eum qui legatum percepe-rit, non recte de inofficioſo teſtamento dicturum. *l.* 10. §. 1. *ff. de inoff. teſt.*

Poſt legatum acceptum non tantum licebit falſum arguere teſtamentum, ſed & non jure factum contendere: inofficioſum autem dicere non permittitur. *l.* 5. *ff. de his quæ ut indig. auſer.* See the ſeventh and eighth Articles.

III.

3. What a Guardian does for his Minor, ought not to hurt himſelf; nor what he does for

If it ſhould happen that the Perſon who is diſinherited is Guardian to one to whom the Teſtator has left a Legacy by the ſame Teſtament which contains the Diſheriſon, and that by virtue of his Office of Guardian he had received the Legacy left to his Minor; this would not

himſelf to be of any prejudice to his Minor.

not be an Approbation of the Teſtament with reſpect to himſelf; and what the Intereſt of his Minor had obliged him to do, would be no Hindrance to his bringing his Complaint in his own Name againſt the ſaid Teſtament, as being undutiful. And if on the contrary, a Father having diſinherited his Son who is a Minor, had by the ſame Teſtament left a Legacy to one who happens afterwards to be appointed Guardian to the ſaid Son that is diſinherited; the Complaint which the Function of this Guardian would oblige him to enter againſt the ſaid Teſtament, as being undutiful, would not render him unworthy of this Legacy. And likewiſe the Demand of the Legacy would not exclude him from bringing a Complaint againſt the Teſtament, as being undutiful, on the behalf of his Minor, if it be well grounded *c*. And it would be the ſame thing if a Guardian were bound, as ſuch, to impeach the Teſtament of the Father of his Minor, as being forged, if in the ſaid Teſtament, which by the Event was declared to be genuine, there were a Legacy left to the ſaid Guardian *d*. For in all theſe Caſes the Guardian exerciſes the Rights of two Perſons who are diſtinguiſhed in him, that of the Guardian and that of his own; ſo that he does himſelf no prejudice by any thing which his Duty of Guardian requires of him.

c Si tutor nomine pupilli, cujus tutelam gerebat, ex teſtamento patris ſui legatum acceperat, cum nihil erat ipſi tutori relictum à patre ſuo: nihilominus poterit nomine ſuo de inofficioſo patris teſtamento agere. §. 4. *inſt. de inoff. teſtam.*

Sed ſi è contrario pupilli nomine, cui nihil relictum fuerat de inofficioſo egerit, & ſuperatus eſt, ipſe (tutor) quod ſibi in teſtamento eodem legatum relictum eſt non amittit. §. 5. *eod.*

Tutorem qui pupilli ſui nomine, falſum vel inofficioſum teſtamentum dixit, non perdere ſua legata, ſi non obtinuerit optima ratione defenditur. *l.* 22. *ff. de his quæ ut ind.* Quia officii neceſſitas, & tutoris fides excuſata eſſe debet. *d. l.*

d Tutoribus pupilli nomine, ſine periculo ejus quod teſtamento datum eſt agere (poſſe) de inofficioſo, vel falſo teſtamento, divi Severus & Antoninus reſcripſerunt. *l.* 30. §. 1. *eod.* See the fifth Article of the ſecond Section of Legacies, and the ſeventh and eighth Articles of this Section. *The ſaid Tutors would be very ill adviſed, if they ſhould omit to make the Proteſtations which are uſually made in the like Caſes.*

IV.

4. He who approves of the Teſtament by any Act, is excluded from entring a Complaint againſt it as being undutiful.

If he who would complain of a Diſheriſon, or of ſome other undutiful Diſpoſition, had treated with the Perſon inſtituted Heir or Executor, either for the whole Inheritance, or a Part of it; if he had bought any of the Effects thereof from him, knowing him to be Heir or Executor; if he had hired of him ſome Houſe belonging to the Succeſſion; if he had paid him a Sum of Money which he was indebted to the Teſtator, or had received Payment of a Sum which the ſaid Executor, or a Legatee, had been charged by the Teſtator to pay to him: Theſe kinds of Acts, and others of the like nature, would be Approbations of the Teſtament, which would bar him from bringing a Complaint againſt the ſame, as being undutiful *e*.

e Si hæreditatem ab hæredibus inſtitutis exhæredati emerunt, vel res ſingulas ſcientes eos hæredes (eſſe) aut conduxeruut prædia, aliudve quid ſimile fecerunt: vel ſolverunt hæredi quod teſtatori debebant: judicium defuncti agnoſcere videntur, & à querela excluduntur. *l.* 23. §. 1. *ff. de inoff. teſt.*

Si conditioni parere teſtator hæredem juſſit in perſona filii, vel alterius qui eandem querelam movere poteſt: & ſciens is accepit videndum ne ab inofficioſi querela excludatur: adgnovit enim judicium. Idem eſt, & ſi legatarius ei, vel ſtatu liber dedit: & poteſt dici excludi eum, maxime ſi hæredem ei juſſerat dare. *l.* 8. §. 10. *eod.*

Qui autem agnovit judicium defuncti, eo quod debitum paternum pro hæreditaria parte perſolvit, vel alio legitimo modo ſatisfecit: etiam ſi minus quam ei debebatur, relictum eſt: ſi is major viginti quinque annis eſt, accuſare ut inofficioſam voluntatem patris, quam probavit, non poteſt. *l.* 8. §. 1. *C. eod.*

V.

5. This Complaint preſcribes in five Years time, if there be no juſt Cauſe for the Delay.

If the Son that is diſinherited being of full Age, had let five Years paſs without entring his Complaint, after he knew he was diſinherited, and that being preſent on the Place, he had ſuffered the Perſon who was inſtituted Heir or Executor, whether it was his Brother or any other Perſon, to continue in peaceable Poſſeſſion of the Goods of which the Diſheriſon had ſtript him, without being able to alledge any Excuſe which had hindered him from bringing his Action; this voluntary Silence, being joined to the Preſumption that the Diſpoſition of his Father was juſt, would make it be preſumed, under theſe Circumſtances, that he had approved of it, and therefore his Complaint ought not after that to be received *f*.

f Adoleſcentiæ tempus non imputari in id quinquennium liberis, cujus præſcriptio ſeram inofficioſi quæſtionem moventibus opponi ſolet, manifeſtè ante deſcripſimus. *l.* 2. *C. in quib. cauſ. in integr. teſt. nec n. eſt.*

Niſi pater adhuc ſuperſtes, vel repudiavit querelam, vel quinquennio tacuit. *l.* 14. *in f. C. de inoff. teſt.* Plane ſi poſt quinquennium inofficioſum dici cœptum eſt, ex magna & juſta cauſa, &c. *l.* 8. §. *ult. ff. eod.*

¶ Altho this Preſcription of five Years may ſeem to be too ſhort a time to extinguiſh a Demand of an Inheritance, and that an Heir may bring his Action for an Inheritance at any time within thirty years, yet we ought to make a great Difference between the Silence of a diſinherited Son who forbears to commence his Action under the Circumſtances explained in this Article, and the Silence of an Heir who is not deprived of the Inheritance by an Act of Diſheriſon: for whereas he who is not diſinherited has only the ordinary Preſcription to be afraid of, and that his Right remains intire whilſt the time of that Preſcription is not expired; the Son who is diſinherited is excluded from the Succeſſion by an expreſs Title which deprives him of it, and makes it to paſs to another. So that it is both his Duty and his Intereſt, and for his Honour, to annul the ſaid Title, if it is poſſible for him: and if he lets the five Years run, having no Excuſe to plead, it may be alledged againſt him, either that he has ſuffered this time to paſs, that the Proofs of the Cauſes of the Diſheriſon might periſh, or that his Silence was only the Effect of his Conſciouſneſs that he was juſtly diſinherited. It is becauſe of theſe Conſiderations that we have judged the Rule of the *Roman* Law, which makes the Complaint againſt an undutiful Teſtament to ceaſe after five Years Silence, when there appears no juſt Cauſe for the Delay, to be juſt and equitable, eſpecially under the Circumſtances which we have added, and that thus our Uſage might approve of it.

VI.

6. If the Action of Complaint is let drop for want of Proſecution, it is not afterwards received.

If a Son who is diſinherited having enter'd his Complaint againſt the Teſtament, lets his Action drop for want of proſecuting it within the time limited by Law, this Silence, or Non-proſecution of the Suit, would be inſtead of an Approbation of the Teſtament, againſt which he had brought his Complaint *g*.

g Si quis poſt rem inofficioſi ordinatam, litem dereliquerit, poſtea non audietur. *l.* 8. §. 1. *ff. de inoff. teſt.*

VII.

7. The Complaint on the ſcore of Undutifulneſs does not exclude the Action on the head of Forgery, nor the Action of Forgery, the Complaint of Undutifulneſs.

If he who is diſinherited by a Teſtament which he pretends to be forged, having firſt entred his Action on the ſcore of Forgery, had been caſt in it; that would not bar him from bringing his Complaint againſt the Teſtament, as being undutiful. For altho the Teſtament were not forged, yet the Diſheriſon might be unjuſt. And if on the contrary, having begun with his Complaint againſt his being diſinherited, he had been declared to have been duly diſinherited, he might nevertheleſs impugn the Teſtament, as being forged. For if the Teſtament is forg'd, the Diſheriſon cannot ſubſiſt, even altho it had been ratified in Judgment *h*.

h Eum qui inofficioſi querelam delatam non tenuit, à falſi accuſatione non ſubmoveri placuit. Idem obſervatur, & ſi e contrario falſi crimine inſtituto victus, poſtea de inofficioſo actionem exercere maluerit. *l.* 14. *C. de inoff. teſt.*

VIII.

8. One may plead the Nullities of the Teſtament, or the Undutifulneſs of it, ſucceſſively one after the other.

If he who had right to complain of a Teſtament as being undutiful, ſhould likewiſe pretend that there was ſome Nullity in the Form of the Teſtament, and that for the quicker Diſpatch, and to avoid a Suit about the Undutifulneſs, he ſhould deſire that the Queſtion touching the Nullity might be diſcuſſed in the firſt place; it would be juſt and equitable to begin firſt with that Queſtion; and if he ſhould be caſt in that, to admit him afterwards to his Complaint againſt the Teſtament, as being undutiful. Or if having begun with this Complaint, he had diſcovered afterwards ſome Nullity in the Teſtament, as if ſome of the Witneſſes were under ſome Incapacities which had not been known, and which came afterwards to be diſcovered, it would be juſt to admit that Allegation *i*. But if the Circumſtances do not require that theſe two Cauſes ſhould be divided, it would be proper to join them together in one and the ſame Action *l*.

i Contra majores viginti quinque annis duplicem actionem inferentes, primam quaſi teſtamentum non ſit jure perfectum, alteram quaſi inofficioſum licet jure perfectum, præſcriptio ex prioris judicii mora quinquennalis temporis non naſcitur. Quæ officere non ceſſantibus non poteſt. *l.* 16. *C. de inoff. teſtam.*

l Si quis irritum dicat teſtamentum, vel ruptum & inofficioſum, conditio ei deferri debet utrum prius movere volet. *l.* 8. §. 12. *ff. eod.*

We have added theſe laſt Words to the Article, becauſe it is our Uſage not to divide Actions that may be joined in one.

SECT.

SECT. IV.

Of the Effects of the Complaint againſt a Teſtament, as being undutiful.

The CONTENTS.

1. *If the Teſtator has left leſs than the Legitime or Portion due by Law, it ought to be made up.*
2. *The Teſtament being declared undutiful, all the Children ſucceed as if there had been no Teſtament at all.*
3. *A Caſe where the Complaint of Undutifulneſs augments the Portion of the Son who is inſtituted.*
4. *Extravagant Donations and Dowries are diminiſhed, to make up the Legitime or Portions due by Law to Children or Parents.*
5. *The Legacies of an undutiful Teſtament ſubſiſt.*

I.

1. If the Teſtator has left leſs than the Legitime or Portion due by Law, it ought to be made up.

IF the Complaint of Undutifulneſs were againſt a Teſtament in which no other Wrong were done to the Perſon who complains of it, except that he was thereby reduced to a Portion leſs than what was due to him by Law, without branding him with any Accuſation, the Effect of the Complaint would only be to procure him a Supplement of his Legitime, or Portion due by Law, ſuch as it ought to be, according to the Rules which ſhall be explained in the following Title *a*.

a Si quid minus legitima portione his derelictum ſit, qui ex antiquis legibus de inofficioſo teſtamento actionem movere poterant, hoc repleatur. Ne occaſione minoris quantitatis teſtamentum reſcindatur. *l.* 32. *C. de inoff. teſt. l.* 30. *eod.* See the fifth Article of the firſt Section, and the Remark upon it.

II.

2. The Teſtament being declared undutiful, all the Children ſucceed as if there had been no Teſtament at all.

If the Teſtament is declared to be undutiful, the Inſtitution of the Heirs or Executors whom the Teſtator had put into the Place of the Complainant, will be vacated, if the ſaid Heirs or Executors were others than the Children of the Teſtator. And if they were his Children, who ought to ſhare the Inheritance with him who was unjuſtly diſinherited, their Portions would be diminiſhed, by taking from them not barely the Legitime or Portion due by Law to the Perſon diſinherited, but the intire Portion which he would have had in the Inheritance, if there had been no Teſtament at all *b*.

b Quantum ad inſtitutionem hæredum pertinet, teſtamento evacuato, ad parentum hæreditatem liberos tamquam ab inteſtato ex æqua parte pervenire. *Nov.* 115. *c.* 3. *in f.*

It would ſeem as if this Text related only to the Nullity of the Inſtitution of Heirs that were Strangers, in the room of the Children diſinherited; and that as the undutiful Teſtament is annulled only as to what concerns the diſinheriting, and that the Legacies bequeathed therein do ſubſiſt, as ſhall be ſhewn in the fifth Article, if the Teſtator having diſinherited only one of his Children, had inſtituted his other Children in unequal Portions, it would ſeem not to be agreeable either to Equity or to our Uſage, that the Nullity of the Diſheriſon ſhould render the Condition of the Children equal, which the Father had diſtinguiſhed by his Will. For which reaſon ſome have been of opinion, that this Rule ought only to comprehend the bare Nullity of the Diſheriſon. See the following Article, and the Remark made on it.

III.

3. A Caſe where the Complaint of Undutifulneſs augments the Portion of the Son who is inſtituted.

If a Teſtator having two Sons, had inſtituted one of them his Heir or Executor for a leſs Portion than that which would have come to his ſhare if his Father had died inteſtate; and making no mention of the other Son, or diſinheriting him, had inſtituted a Stranger his Heir or Executor for the Surplus of his Eſtate; the ſaid Inſtitution being made void becauſe of the Preterition or Diſheriſon, the Complaint of Undutifulneſs would have this Effect, that the Inheritance would be divided between the two Sons, as if there had been no Teſtament made. By which means it would happen that the Son who was inſtituted, profiting by the Complaint of the other Son who was excluded, and thereby getting a Moiety of the Eſtate, would have more to his ſhare than was left him by the Teſtament *c*.

c Mater decedens extraneum ex dodrante hæredem inſtituit, filiam unam ex quadrante, alteram præteriit: hæc de inofficioſo egit & obtinuit. Quæro, ſcriptæ filiæ quomodo ſuccurrendum ſit? Reſpondi, filia præterita id vindicare debet quod inteſtata matre habitura eſſet. *l.* 19. *ff. de inoff. teſtam.*

There is this Difference between the Caſe of this Article, and that of the Remark which has been made on the foregoing Article, That in this it is becauſe of the Excluſion of the Stranger Heir, that the Portion of the Son who was not diſinherited happens to be augmented.

IV.

4. Extravagant Donations and Dowries are diminiſhed, to

If a Father, or other Aſcendant, had made Donations either to ſome of his Children, or to other Perſons, or ſettled Dowries or Marriage Portions, ſo as to

make up the Legitime, or Portions due by Law to Children or Parents.

to diminiſh his Eſtate in ſuch a manner as that there would not remain Effects enough to ſatisfy the Legitime, or Portions due by Law to the other Children, reckoning into the Eſtate the Value of the things given away; theſe extravagant Donations and Dowries would be liable to be complained of, as being contrary to the Duty of Parents towards their Children, were there a Teſtament or not; and ſo much would be cut off from the ſaid Donations and Dowries, as would be neceſſary to make up the legal Portions of the Children, even altho the Donces, and the Daughters who had been endowed, ſhould be willing to abſtain from the Inheritance. And if the Donor having no Children, his Succeſſion were to go to his Father or other Aſcendants, they might demand in the ſame manner their Legitime or Legal Portion of the Inheritance out of the ſaid exceſſive Donations *d*.

d V. Toto Titulo Cod. de inoff. don. l. un. Cod. de inoff. dot. & Nov. 92. *To avoid the Length of many Citations, we refer the Reader to thoſe Titles, the Subſtance of which is comprehended in this Article.* See the third Article of the third Section of the following Title.

V.

5. The Legacies of an undutiful Teſtament ſubſiſt.

The Teſtament which is undutiful becauſe of an unjuſt Diſheriſon, or a Preterition, is made void only in ſo far as concerns the Inſtitution of another Heir or Executor in the place of him who is diſinherited. Thus when he who is inſtituted Heir or Executor is ſome other Perſon, and not one of the Children, the Inſtitution remains without any Effect at all: and if they be Children who are inſtituted by the undutiful Teſtament, their Inſtitution is reduced in ſuch a manner, that he who was unjuſtly diſinherited has as much as he would have had if there had been no Teſtament at all, as has been ſaid in the ſecond Article. But the Legacies, the Fiduciary Bequeſts, and all the other Diſpoſitions of the undutiful Teſtament ſubſiſt, and have their Effect, whether the Perſon diſinherited were a Deſcendant or an Aſcendant *e*, as has been remarked in another Place *f*.

e Si vero contigerit in quibuſdam talibus teſtamentis quædam legata, vel fideicommiſſa, aut libertates, aut tutorum dationes relinqui, vel quælibetalia capitula conceſſa legibus nominari, ea omnia jubemus adimpleri, & dari illis quibus fuerint derelicta, & tanquam in hoc non reſciſſum obtineat teſtamentum. *Nov.* 115. *cap.* 3. *in fine.*

This Text relates to the Teſtaments of Children, and the ſame thing is ordained at the end of the following Chapter with reſpect to the Teſtaments of Parents.

Si quid autem pro legatis, ſive fideicommiſſis, & libertatibus, & tutorum dationibus, aut quibuſlibet aliis capitulis, in aliis legibus inventum fuerit huic conſtitutioni contrarium, hoc nullo modo volumus obtinere. *d. Nov. cap.* 4. *in fine.*

f See the ſixteenth Article of the fifth Section of Teſtaments.

¶ By the antient *Roman* Law the Legacies of a Teſtament which was declared to be undutiful, whether becauſe of a Diſheriſon or Preterition, were annulled as well as the Inſtitution, and that for this reaſon, becauſe the Teſtament was conſidered as having been made by a Man out of his Senſes. *Filio præterito, qui fuit in patria poteſtate, neque libertates competunt, neque legata præſtantur.* l. 17. ff. de injuſt. rup. irr. fact. teſt. *Cum inofficioſum teſtamentum arguitur, nihil ex eo teſtamento valet.* l. 28. ff. de inoff. teſtam. And if the Legacies had been paid, the Legatees were bound to reſtore them. *Nec legata debentur, ſed ſoluta repetuntur.* l. 8. §. pen. eod. This Rule had its Juſtice, ſuppoſing a Diſheriſon or Preterition to be altogether unjuſt. But ſeeing it is very rare, and hard to be imagined, that Parents will be moved to diſinherit their Children, or Children their Parents, without great Cauſe; it has been thought equitable on this Conſideration, to ratify and confirm the Legacies and other Diſpoſitions of Teſtaments which contain Diſheriſons that are annulled. And altho it does happen from hence, that the Condition of the Legatees proves to be more favourable than that of the Perſon who is inſtituted Heir or Executor, whom the Teſtator nevertheleſs valued more than the Legatees, as it may fall out on other occaſions, as has been already remarked in another Place *; yet this Event in ſuch a Caſe would cauſe no Inconvenience. For the Condition of an Heir or Executor, who poſſeſſed unjuſtly the Place of the Perſon diſinherited, and who perhaps contributed to the getting him diſinherited, ought not to be ſo favourable as that of the Legatees, ſeeing the Diſpoſitions in which they are concerned, do not the ſame Injury to the Perſon diſinherited.

* *See the fifth Article of the ſeventh Section of Teſtaments, and the Remark made there upon it.*

TITLE III.

Of the Legitime or Legal Portion due to Children or Parents.

WE have seen in the foregoing Title, that Parents ought to leave to their Children, and Children to their Parents, a certain Portion of their Eſtate. It is this Portion that is called the *Legitime*, or *Legal Portion*, which ſhall be the ſubject Matter of this Title.

The Legal Portion of Children was by the antient *Roman* Law only a fourth part of the Portion which they would have had if the Parent had died inteſtate *a*. Thus an only Son had for his legal Portion the fourth part of the whole Eſtate; and if there were two Sons, they had each of them the fourth part of one half of the Eſtate, that is to ſay, an eighth part of the whole; and ſo in proportion according to their Number.

This legal Portion was fixed to this ſmall Proportion of the Eſtate, at a time when they began to ſet ſome bounds to the Liberty that every one had to diſpoſe of his Goods as he thought beſt *b*, and even to deprive their Children of them. And whereas it ſeems natural that the Children ſhould have either the whole Eſtate, or the greateſt part of it, and that the Liberty of bequeathing ſhould be limited to ſome ſmall Portion of the Eſtate, as it is regulated by our Cuſtoms; the *Romans* left the greateſt Share of the Eſtate to the free diſpoſal of the Teſtators, and reſtrained the Right of the Children to a ſmall Portion. So that what is ſaid of Legacies in a Law, which calls them a ſmall Diminution of the Inheritance, which ought to belong wholly to the Heir or Executor *c*, would be more applicable to this legal Portion of the Children, which is in effect only a ſmall Retrenchment of the Inheritance, the whole of which may be left to one ſole Legatee, of whom one would be very much in the wrong to ſay that his Legacy were only a ſmall Diminution of the Inheritance.

Juſtinian was ſenſible that this Portion allotted to the Children by Law was not ſufficient; and he augmented it, but with Moderation, diſtinguiſhing the legal Portion according to the number of the Children, and giving to them all, if they were four in number, or under, a third part of the whole Eſtate, and the half of the Eſtate if the Children were five or more in number: So that this third, or this half, is equally divided among the Children, and the two thirds, or the other half, remain for the Legacies. Thus, what number ſoever there be of Children, the legal Portions of them all together, when they are reduced to it, are at moſt but equal to the Share of the Legatees; and if the Children be fewer in number than five, the Legatees have double the Portion which is reſerved by Law for the Children.

Our Cuſtoms in *France* have almoſt all of them diſtinguiſhed between the ſeveral ſorts of Eſtates and Goods, between Eſtates of Inheritance and Eſtates of Purchaſe, between Goods Moveable and Immoveable; and according to theſe different ſorts of Eſtates and Goods, they have regulated differently the Liberty of Teſtators, not only with reſpect to the Children, but even in favour of the Heirs of Blood the moſt remote, whom they can only deprive of a certain Portion of Eſtates of Inheritance. And ſome Cuſtoms have made no manner of Diſtinction of Goods, but have reſtrained the Liberty of diſpoſing by Teſtament to a ſmall Portion, ſuch as one fourth part of all the Goods in general; and reſerved three fourth Parts of the whole to the Heirs of Blood, whether they be Children or others. Thus theſe Cuſtoms give a great deal more to the moſt diſtant Relations, than they allow to be given to Legataries; and the Portion of the Eſtate which they appropriate to the Heirs of Blood, and which they cannot be deprived of by a Teſtament, is much greater than the Legitime, or Legal Portion, of the Children, in the Provinces which are governed by the written Law.

It is not our buſineſs to examine here, which of theſe two Laws is moſt juſt and

a Quarta debitæ portionis. *l.* 8. §. 8. *ff. de inoff. teſt.*

b Uti quiſque legaſſit de re ſua ita jus eſto. *Inſt. de lege Falc. ex l.* 12. *tabb. Nov.* 22. *cap.* 2.

c Legatum eſt delibatio hæreditatis, qua teſtator ex eo, quod univerſum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

and equitable, whether the *Roman* Law, or the Law of our Cuſtoms *d*: Both the one and the other may be uſeful in their different ways. For if on one hand it be juſt that Eſtates ſhould be appropriated to the Families, and that the great Liberty that is taken in making Diſpoſitions very often unjuſt, ſhould not ſtrip the Children and the other Heirs of Blood; ſo on the other hand it may be of ſervice, if the ſaid Heirs, and eſpecially the Children who are incapable of being wrought upon by better Motives, be kept to their Duty out of fear of ſeeing themſelves reduced to a very ſmall Portion reſerved to them by the Law.

All the Rules relating to this Matter of the Legitime, or legal Portion, reſpect either the Perſons to whom a Portion is due by Law, or the Quantity of the ſaid Portion, or the Goods out of which it is taken, and the Manner in which it is regulated; which ſhall be the ſubject Matter of three Sections.

d See what has been ſaid on this Subject in the Preface to this ſecond Part, num. 7.

[What the Civilians call the Legitime, is the ſame with the Reaſonable Part that was formerly due to Widows and Children by the particular Cuſtoms of ſome Parts in *England*, as particularly in the Province of *York*, and Principality of *Wales*. Which Cuſtom remains ſtill in force in the City of *London*, as to the Widows and Children of Freemen; but has been aboliſhed in other Parts of *England* by ſeveral late Acts of Parliament. *Stat.* 4° & 5° *Gul. & Mar. cap.* 6. *Stat.* 7° & 8° *Gul.* 3. *cap.* 38. *Stat.* 2° & 3° *Annæ, cap.* 5. But there is this Difference between the Legitime of the Civil Law, and the Reaſonable Part due by ſome Cuſtoms in *England*, that the Legitime was due to Parents as well as Children, but not to Widows; whereas the reaſonable Part reſerved by the Cuſtoms in *England*, was due to Widows and Children, but not to Parents. *See the Remark on the Preamble of the foregoing Title.*]

SECT. I.

Of the Nature of the Legitime or Legal Portion, and to whom it is due.

IT is neceſſary to make the ſame Remark here, as has been made in the foregoing Title, that we are to except out of the number of Children to whom a Legitime, or Legal Portion, is due, Daughters who by their Contract of Marriage have renounced their Right and Pretenſions to their Parents Inheritance, in conſideration of a Marriage-Portion. For altho this Marriage-Portion may prove to be leſs than the Legitime which would accrue to them by Law out of the Goods of their Fathers who have endowed them; yet the Uncertainty of the Events which may diminiſh the ſaid Goods, is one of the Motives which juſtify the Renunciation of a future and uncertain Profit, for a certain and preſent Portion *a*.

We muſt likewiſe take notice in relation to this Matter of the Legitime, of the Regulation that was made for the Legitime of Mothers out of the Succeſſions of their Children, by that Ordinance which is called the Edict of Mothers, of which mention has been made in the Preamble of the firſt Section, in what manner Fathers and Mothers ſucceed.

a See concerning theſe Renunciations, what has been ſaid in the Preamble to the 2*d Section of Heirs and Executors in general.*

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5. *And that of Children of remoter Degrees is regulated by their Stocks of whom they are deſcended.*
6. *Among Aſcendants the Legitime is due only to the neareſt.*
7. *If the Aſcendants are many in the ſame degree, one half of the Legitime goes to thoſe of the Father's ſide, and the other half to thoſe of the Mother's ſide.*
8. *Brothers have no Legitime.*

I.

The Legitime, or Legal Portion, is a certain Share of the Inheritance which the Laws appropriate to thoſe Perſons who cannot be deprived of the Quality of Heir, and to whom they give a Right to complain of undutiful Wills. And this has occaſioned the Liberty of deviſing by Will to their prejudice to be reſtrained, ſo as that there may remain for them a ſhare of the Inheritance, of which they cannot be deprived by any Diſpoſition *a*. 1. *Definition of the Legitime.*

a Debita portio. *l.* 8. §. 11. *ff. de inoff. teſt.* Debitum bonorum ſubſidium. *l.* 5. *C. de inoff. don.* Quod ad ſubmovendam inofficioſi teſtamenti querelam, non ingratis liberis relinqui neceſſe eſt. *d. l.* 5.

Hoc

Hoc obſervandum in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt. *Nov.* 18. *cap.* 1. *in f.* See the following Article.

II.

2. The Legitime is due to Deſcendants and Aſcendants.

There are two Orders of Perſons to whom the Laws give a Legitime; to Children out of the Eſtates of their Parents, and to Parents out of the Eſtates of their Children. But if in the ſame Succeſſion there are both Children of the Deceaſed and alſo Parents, there will be only a Legitime for the Children: For they exclude the Parents from Succeſſions *b*.

b See the Articles which follow, and the firſt Title of the ſecond Book.

III.

3. All Children who are capable of inheriting, have a right to a Legitime.

All the Children of both Sexes have without diſtinction the Right to demand a Legitime, or Legal Portion, whether they be in the firſt degree of Sons or Daughters, or whether they be deſcended one or more Degrees lower, provided only that they be called to the Inheritance, whether it be in their ow Name, or by Repreſentation, as has been explained in its proper place *c*.

c Children are called to the Legitime in the ſame order as to the Succeſſion of one who dies inteſtate, according to their Rank explained in the 2d Book, Title 1. Section 2.

IV.

4. The Legitime of the Children of the firſt degree is regulated according to their number.

When there are only Children of the firſt Degree, they have each of them their Legitime by equal Shares. And if there are at the ſame time Children of the firſt degree alive, and Grand-Children deſcended from others deceaſed, the Succeſſion is divided according to the number of the Children of the firſt degree who are ſtill alive, and of thoſe who being dead have left Children who repreſent them; and theſe Grand Children have only among them the legal Portion which the Perſon whom they repreſent would have had: For it is that legal Portion which falls to their Share *d*.

d This is a Conſequence of the foregoing Article, and of the Order of the Succeſſion of Children.

V.

5. And that of Children of remoter Degrees is regulated by their Stocks of whom they are deſcended.

If there were no Child of the firſt Degree alive, but ſeveral Grand-Children of the ſecond Degree, or other Degree more remote; they would have all of them their legal Portions, not according to their number, but the Deſcendants of each Son would have among them the Legitime which their Father would have had. And every one of theſe Deſcendants would have their Share in the ſaid Legitime, greater or leſſer, according as they are more or fewer in number *e*.

e This is a Conſequence of the ſame Order.

VI.

6. Among Aſcendants the Legitime is due only to the neareſt.

The ſecond Order of Perſons to whom a Legitime or Legal Portion is due, is that of Parents, that is, of Fathers, and Mothers, and other Aſcendants *f*. But there is this Difference between them and Children as to what concerns the Legitime, that ſeeing the neareſt Aſcendants exclude the remoteſt from the Succeſſions of Deſcendants, and that in the Order of Aſcendants there is no Right of Repreſentation, as there is in the Order of Deſcendants, it is only the neareſt Aſcendants to whom a Legitime is due *g*.

f Primum itaque illud eſt cogitandum, quia teſtantibus aliis quidem, neceſſitatem imponit lex diſtribuere quandam partem perſonis quibuſdam, tanquam hoc ſecundum ipſam naturam eis debeatur. Quale eſt filiis, & nepotibus, & patribus atque matribus. *Nov.* 1. *in Præf.* §. 2.

g See the 2d Book, Title 2d, Section 1ſt, Article 5th.

We muſt take this Article in the ſame Senſe as what has been ſaid of the Succeſſion of Aſcendants, ſo as that they may preſerve the Right of Reverſion of Eſtates that are ſubject to it. See the 3d Section of the ſame 2d Title.

VII.

7. If the Aſcendants are many in the ſame degree, one half of the Legitime goes to thoſe of the Father's Side, and the other half to thoſe of the Mother's Side.

If the neareſt Aſcendants happen to be many in the ſame degree, ſome paternal and ſome maternal, the Total of their Legitime will be divided, not by the Head according to their number, but in two Parts, one for the Aſcendants of the Father's ſide, and the other for the Aſcendants of the Mother's ſide; altho the Number of thoſe of one ſide be greater than the number of thoſe of the other. And if there be Aſcendants only of one ſide in the ſame degree, their Legitime is divided by Heads *h*.

h See the 2d Book, Title 2. Sect. 1. Art. 6.

VIII.

8. Brothers have no Legitime.

Altho Brothers may complain of an undutiful Teſtament of their Brother, in the Caſe of the laſt Article of the firſt Section of the foregoing Title, yet they have not for all that a right to a Legitime. For in that caſe it is the whole

whole Inheritance that the Law gives them, and in all other Caſes they may be deprived by Teſtament of all Share in the Inheritance *i*.

i See the laſt Article of the firſt Section of the preceding Title.

SECT. II.

What is the Quota *or Quantity of the Legitime or legal Portion.*

The CONTENTS.

1. *Different* Quota's *of the Legitime.*
2. *The Legitime of Children differs according to their Number.*
3. *If there be four Children, or under that Number, they have a third Part of the Eſtate.*
4. *If there be five or more Children, they have a Moiety of the Eſtate.*
5. *Thoſe who come by Repreſentation, have only one Share among them.*
6. *The Legitime of the Aſcendants, is the third Part of the Eſtate.*

I.

1. Different Quota's of the Legitime.

THE *Quota* of the Legitime is the Portion of the whole Goods of the Inheritance, which is appropriated to him to whom a Legitime is due. And the ſaid Portion is differently regulated, as ſhall be explained by the following Articles *a*.

a Subſtantiæ pars. *Nov.* 18. *cap.* 1. Definita menſura. *d. c.*

II.

2. The Legitime of Children differs according to their Number.

With reſpect to Children, the Law hath differently regulated their Legitime according to their Number *b*, by the Rules which follow.

b See the following Articles.

III.

3. If there be four Children, or under that Number, they have a third Part of the Eſtate.

If there are four Children, or a leſſer Number, they have all of them together for their Legitime a third Part of the Eſtate; ſo that this Third remains entire to one only Child, if there be no more than one, or is divided among them all, according to their Number, each of them having for his Legitime his Share of this third Part *c*.

c Si quidem unius eſt filii pater aut mater, aut duorum, vel trium, vel quatuor, non triuncium eis relinqui ſolum, ſed etiam tertiam propriæ ſubſtantiæ partem: hoc eſt uncias quatuor. *Nov.* 18. *cap.* 1. Singulis ex æquo quadriuncium dividendo. *d. c.*

IV.

4. If there be five, or more Children, they have a Moiety of the Eſtate.

If there are five Children, or a greater Number, they have all of them among them for their Legitime the half of the Eſtate; ſo as that the ſaid half be divided among them all according to their Number, each of them having for his Legitime his Share of the ſaid Moiety; and that it remain entire to one only Child, if there is but one *d*.

d Si vero ultra quatuor habuerint filios, mediam eis totius ſubſtantiæ relinqui partem, ut ſexuncium ſit omnino quod debetur ſingulis ex æquo quadriuncium vel ſexuncium dividendo, *Nov.* 18. *c.* 1.

V.

5. Thoſe who come by Repreſentation have only one Share among them.

We muſt underſtand the two preceding Articles in the Senſe explained in the third, fourth, and fifth Articles of the firſt Section; ſo as that the Children who come by Repreſentation, of what Number ſoever they conſiſt, may have among them only the Share of the Perſon whom they have right to repreſent *e*.

e See the ſaid Articles, and the ſecond Book, Tit. 1. *Sect.* 2.

VI.

6. The Legitime of the Aſcendants, is the third Part of the Eſtate.

Seeing the Legitime or legal Portion of the Aſcendants is not more favourable than that of the Children, and that there is for the Legitime of an only Child, and even of four Children, but a third Part of the Eſtate, there is likewiſe only a third Part for the Aſcendants, to be divided among them if they are more in Number than one *f*.

f Hoc obſervando in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt. *Nov.* 18. *cap.* 1. *in fine.*

¶ It is certain that a Legitime is due to Aſcendants, ſeeing the Law gives them a Right to complain of the Undutifulneſs of their Childrens Teſtaments, which it would not give them, if it did not appropriate to them a part of the Inheritance, which cannot be taken away from them. But when *Juſtinian* regulated the legal Portions by his eighteenth Novel, the Texts whereof have been cited on the preceding Articles, he confined himſelf to the Legitime of Children, and did not expreſly regulate that of Parents. So that it has been doubted whether the Legitime of Parents ought to be the ſame with that which has been ſettled for the Children. And ſeeing by this Regulation of *Juſtinian*'s, the Legitime of the Children has been di-

diverſified according to their Number, having been fixed to a third Part of the Inheritance when there are only four Children, or a leſſer Number, and to the Moiety when there are five Children, or upwards, as has been ſaid in the third and fourth Articles; there was ground to doubt whether after this Regulation, the Aſcendants ought to have either a Third, or a Moiety, or only the antient Legitime, which was the fourth Part of what would have fallen to them, had the Party died inteſtate, as has been ſaid in the Preamble of this Title. This Queſtion has been decided by Uſage, and by the Opinions of Interpreters, who have judged that the Legitime of Parents ought to be a third Part of the Inheritance. And this Opinion may be grounded on the laſt Words of that eighteenth Novel of *Juſtinian*; for after having there regulated the Legitime of Children, he ſays that the ſame thing ſhall be obſerved with reſpect to all Perſons to whom the antient Law gave the Right to complain of a Teſtament as undutiful, and a fourth Part of the Inheritance for their Legitime. *Hoc obſervando in omnibus perſonis in quibus ab initio antiquæ quartæ ratio de inofficioſo lege decreta eſt.* Theſe Words, which are the ſame that have been quoted on this Article, ſeem to comprehend clearly enough the Aſcendants, and can be underſtood only of one Legitime, without diſtinction of their Number, ſince we ought not to ſuppoſe that there are more than four Aſcendants concurring together to the Succeſſion. Thus it would ſeem reaſonable on that account, that their Legitime ſhould be regulated to a third Part at leaſt. To which we may add, that *Juſtinian*, ſpeaking of the Legitime due to Parents in the eighty ninth Novel, Chap. 12. §. 3. ſays there, That he has already fixed the ſaid Legitime. *Si vero habuerint hi quos prædiximus aliquos Aſcendentium, legitimam eis relinquant partem quam lex & nos conſtituimus.* Which can be applied to nothing elſe but to the Regulation in his eighteenth Novel.

This firſt Queſtion concerning the Legitime of Aſcendants, has been followed by another, which has divided the ſame Interpreters into two Parties. It is in the Caſe of a Teſtator, who having no Children, leaves behind him one Aſcendant and Brothers of the whole Blood, and inſtitutes either his Brothers, or Strangers, his Heirs or Executors, leaving to the Aſcendant only a ſmall Portion of the Inheritance, ſuch as does not ſatisfy him; whether, in this Caſe, the Aſcendant's Legitime be the third Part of the whole Eſtate, or only a third of the Portion which the ſaid Aſcendant would have had if there had been no Teſtament, the Brothers concurring with him.

Of theſe two Parties, one pretends that the Legitime of Parents is always the ſame, *viz.* a third Part of the Eſtate: and the others will have the Legitime in this Caſe to be only a Third of the Share that the Aſcendant would have had, if there had been no Teſtament. So that if, for example, there were two Brothers, as the Aſcendant's Portion, if there were no Teſtament, would be a Third, as has been ſhewn in its place *; his Legitime ought to be a Third of that Third: And this is their Reaſon, which has given riſe to this Queſtion. They eſtabliſh for a Principle and general Rule in the Matter of the Legitime or legal Portion, That every Legitime is nothing elſe but a Portion of that Share of the Inheritance which would have accrued to him who demands his Legitime, in caſe there had been no Teſtament. From whence they infer, that when the Deceaſed leaves behind him Brothers by the ſame Father and Mother, the Legitime of the Aſcendant is diminiſhed according to their Number; ſince when there is no Teſtament, the hundred and eighteenth Novel, Chap. 2. calls to the Succeſſion the Brothers of the whole Blood, together with the Aſcendants, by equal Portions. From whence it follows, according to their Principle, that the Legitime of an Aſcendant, when the Deceaſed leaves behind him Brothers, is only a third Part of the Share which he would have had in conjunction with the Brothers, if the Deceaſed had died inteſtate. So that if there were, for inſtance, ſeven Brothers, the Legitime of the Aſcendant, who would have had, if there had been no Teſtament, only an eighth Part of the Inheritance, would be only a four and twentieth Part. And to this Reaſon they add, that if the Legitime of the Aſcendants were always a third Part of the whole Eſtate, it would fall out that their Legitime might be much greater than the Portion which would have fallen to their Share, if there had been no Teſtament; ſince in this very Caſe of the ſeven Brothers, the Portion that would fall to them in caſe there were no Teſtament

* *See the ſeventh Article of the firſt Section of the ſecond Title of the ſecond Book.*

tament

tament would be only an eighth Part, and yet nevertheleſs their Legitime would be a third; which they ſay would be a great Inconvenience.

The others, on the contrary, have been of opinion, that the Legitime of Aſcendants, in all Caſes where it ought to take place, is always a Third of the Inheritance to be divided among all the Aſcendants, as that of the Children is always either a Third, or a Half, according to their Number, to be ſhared among them. Which is founded on the Remarks that have been juſt now made, and on this, That the Rule of the antient *Roman* Law, which fixed the Legitime at a fourth Part of the Portion that would be due if there were no Teſtament, has been altered by *Juſtinian*, who has regulated the Legitime, not at a Portion of the Share that would fall to them if there were no Teſtament, but at a certain Portion of the Total of the Inheritance, to wit, a Third, or a Moiety. Thus the Legitime is independent of the Portion, greater or leſs, which one might have in caſe there were no Teſtament. To which they add, that the Brothers having no Legitime reſerved to them by Law, they cannot come in for any Share of the Legitime of the Aſcendants to diminiſh it.

One ſees that theſe Difficulties are a Conſequence of the Law of *Juſtinian*, which has called the Brothers of the whole Blood to the Succeſſion with the Aſcendants, when there is no Teſtament. For if the Brothers of the whole Blood did not concur in the Succeſſion with the Aſcendants, no more than the Brothers by the Mother's ſide only, there would never have been any doubt concerning the manner of regulating this Legitime of the Aſcendants. From whence it ſeems reaſonable to conclude, that ſeeing the whole Difficulty proceeds barely from the Novelty of that Law which diminiſhes the Portion of Aſcendants ſucceeding to one who dies inteſtate, when there are Brothers, and that there is no Proof that *Juſtinian* intended by that Law to leſſen the Legitime of Aſcendants, nor to render it uncertain, according as the Brothers ſhould be in a greater or leſſer Number; thoſe of the ſecond Party may agree, without any prejudice to their Cauſe, that the Legitime ought to be a Portion of that Share which one would have if the Deceaſed had died inteſtate; adding to it what ſeems to be agreeable to Reaſon and Juſtice, to wit, that this Rule ought to be underſtood of the Portion which he who demands the Legitime would have, in caſe he ſucceeded alone to the Perſon dying inteſtate, or that no body concurred in the Succeſſion with him, except Perſons to whom a Legitime would be likewiſe due. For in this Senſe it will always hold true, according to the antient Law, that the Legitime will be a Portion of what one would have if the deceaſed had died inteſtate, as may be ſeen in the Legitime of Children regulated by *Juſtinian*; ſince it is certain that the Third or Half of the Eſtate which he gives to the Children, makes a Third or Half of the Succeſſion, which they would have entire, if there were no Diſpoſition that curtailed them of it.

The only Difficulty then that remains, is to know whether *Juſtinian*, when he granted the Favour to Brothers of the whole Blood to call them to the Succeſſion with the Aſcendants, intended thereby to make ſuch a Confuſion as to overturn the Order and the Principles of the Legitime or legal Portions, and to make a Rule which, without being any ways explained, ſhould have this Effect, that a Teſtator leaving behind him a Father and eleven Brothers, might give to his Father only a ſix and thirtieth Part of his Eſtate, and nothing at all to his Brothers, leaving the five and thirty Portions to a Stranger. Nothing obliges us to judge that *Juſtinian*'s Law, which calls the Brothers together with the Aſcendants to the Inheritance of their Brothers, ought to make ſuch a Change in the Legitime of the Aſcendants; but this Law is limited to the Succeſſions of thoſe who die inteſtate. And altho it may happen by this Law, that the Legitime of an Aſcendant may be much greater than the Portion he would have had in the Inheritance, if the Deceaſed had died inteſtate, yet this is no greater Inconvenience than that which happens with reſpect to the Legitime of Children, that when they are only four in Number, their Legitime, which ought to be greater than if they were five in Number, is nevertheleſs ſmaller. For in this Caſe every one of the four Children has only a fourth Part of a Third, which is only a twelfth Part; whereas among five Children, each of them has a fifth Part of a Moiety, which makes a tenth Part of the whole. Theſe kinds of Conſequences are natural to arbitrary Laws, as has been obſerved in other Places, and are not ſuch Inconve-

niences

nieces as ought to make any Change in them.

It ſeems reaſonable to conclude from all theſe Reflexions, and from the Words of the eighteenth Novel quoted upon this Article, that *Juſtinian* has fixed the ſame Legitime for Aſcendants as for Children, when they have a Third; and that this Legitime of the Aſcendants is always the ſame, whether there be Brothers, who concur with them in the Succeſſion, or whether there be none. And this Rule can be attended with no Inconvenience, whatever Caſe may happen. For if we ſuppoſe that a Son inſtitutes his Father, or his Mother, and his Brothers of the whole Blood, his Heirs or Executors by equal Portions, the Father and Mother could not complain of a Teſtament which gives them all they would have had by Law, had there been no Teſtament. But if this Son had inſtituted a Stranger his Heir or Executor together with his Father, leaving his Father not ſo much as what the Law allots him, it would be for the Intereſt of the Brothers that the Father ſhould have a third Part, ſeeing this Third would come to them after the Father's Death. And in fine, if the Brothers were inſtituted with the Father or Mother, but by unequal Portions, ſo as that the Father or Mother ſhould have leſs than ſome of the Brothers, it would not be juſt, nay it would be a Hardſhip in the Brothers, to reduce their Father or Mother to a third Part of the Portion, which each of them would have if there were no Teſtament.

SECT. III.

Out of what Goods the Legitime is taken, and how it is regulated.

The CONTENTS.

1. *The Legitime is regulated according to the Value of the Goods.*
2. *The Demand of the Legitime is a Demand of a Partition.*
3. *Goods given away in the Teſtator's Life-time, are ſubject to the Legitime.*
4. *The Children who are Donees, may abſtain from the Inheritance; but their Donations are ſubject to the Legitime.*
5. *Dowries and Gifts are reckoned as a part of the Legitime.*
6. *The Fruits of the Legitime are due from the Time that the Succeſſion is open.*
7. *The Legitime cannot be ſubject to any Charge, Delay, or Condition.*
8. *The Legitime of Children of different Marriages is not diſtinguiſhed.*

I.

SEeing the Legitime is a Portion of the Inheritance, it is out of all the Goods in groſs that it ought to be taken *a*, not by dividing each Land or Tenement, each Right, or other Goods, ſeparately by themſelves, in order to give a part of every one thereof to him to whom a Legitime is due; but by eſtimating the whole Effects belonging to the Inheritance, and ſo to give him his Share of the ſaid Effects to the Value of his Portion.

1. The Legitime is regulated according to the Value of the Goods.

a Tertia propriæ ſubſtantiæ pars. *Nov.* 18. *c.* 1.

II.

If he to whom a Legitime is due inſiſts on having his Share of the Inheritance not in Value, but in hereditary Effects, the Heir or Executor cannot refuſe it. And if they do not agree among themſelves, it is neceſſary to make a Partition, and to give for the Legitime Goods of the Inheritance which may make it up. For the Legitime being a part of the Inheritance, the Demand of a Legitime is in effect a Demand of a Partition *b*; which ought to be made according to the Rules explained in their place *c*.

2. The Demand of the Legitime, is a Demand of a Partition.

b Sancimus repetitionem ex rebus ſubſtantiæ patris fieri. *l.* 36. *C. de inoff. teſt.*

c See the Title of Partitions.

III.

Seeing the ſecuring of a Legitime to the Perſons to whom it is due, is to hinder any Diſpoſitions that might diminiſh their Share in the Eſtate of him who ought to leave this Legitime; it muſt be taken not only out of the Goods which he has left behind him, but alſo out of the Goods which he may have diſpoſed of by Donations made in his Life-time to his Children, or to other Perſons, or by Marriage Portions to Daughters; for otherwiſe theſe kinds of Diſpoſitions might quite deſtroy a Legitime. Thus it is taken out of the Goods alienated in this manner, as well as out of thoſe which remain in the Inheritance *d*.

3. Goods given away in the Teſtator's Life-time, are ſubject to the Legitime.

d Si (ut allegatis) mater veſtra ad eludendam inofficioſi querelam, pene univerſas facultates ſuas, dum ageret in rebus humanis, factis donationibus, ſive in quoſdam liberos, ſive in extraneos exhauſit: ac poſtea vos ex duabus unciis fecit hæredes: eaſque legatis & fideicommiſſis exinanire geſtivit, non inju-

ria juxta formam de inofficioso teſtamento conſtitutam, ſubveniri vobis, utpote quartam partem non habentibus, deſideratis. *l.* 1. *C. de inoff. donat. v. tot. h. tit. & l. un. C. de inoff. dot. Nov.* 92. See the fourth Article of the fourth Section of the foregoing Title.

IV.

4. The Children who are Donees may abſtain from the Inheritance, but their Donations are ſubject to the Legitime.

If the Children to whom the Parents had made Donations, or given Marriage-Portions, to the prejudice of the other Children, ſhould pretend to content themſelves with what had been already given them, and offer to renounce their Share in the Inheritance; they might very well abſtain from taking upon them the Quality of Heirs, and by that means free themſelves from the Charges of the Succeſſion; but their Donations would be liable to be diminiſhed in order to make up the Legitime of the other Children *e*.

e Non valentibus filiis qui donationibus honorati ſunt, dicere, contentos ſe quidem eſſe immenſis his donationibus, videri autem abſtinere paterna hæreditate: ſed neque cogendis quidem, ſi contenti ſunt donationibus ſuſcipere hæreditatem: neceſſitatem autem habentibus omnibus modis complere fratribus quod hæc defert ſecundum quam ſcripſimus menſuram. *Nov.* 92.

V.

5. Dowries and Gifts are reckoned as a part of the Legitime.

All the kinds of Goods which may be liable to be brought into Hotch-pot in caſe of a Partition, ſuch as the Donations mentioned in the foregoing Article, and thoſe which may have been made to the ſame Perſons who demand a Legitime, enter into the Maſs of the Goods from whence the Legitime is to be taken, and contribute towards it. Thus when the Legitime is due to him who ought to bring in Goods to the Maſs of the Inheritance in caſe of a Partition, he ought to reckon what he has received as a part of his Legitime; and what may be wanting to make it up, is either taken from the others, or out of the Bulk of the Inheritance. And if he who demands the Legitime has received nothing, he takes it out of the whole Inheritance: and the Donees who have received too much, ought to contribute to it in proportion *f*.

f In quartam partem, ad excludendam inofficioſi querelam, tam dotem datam, quam ante nuptias donationem præfato modo volumus imputari: ſi ex ſubſtantia ejus profecta ſit, de cujus hæreditate agitur. *l.* 29. *in f. C. de inoff. teſt.* See the Title of the Contribution of Goods.

VI.

6. The Fruits of the Legitime are due from the time the Succeſſion is open.

Seeing the Legitime is due at the moment that the Succeſſion is open, the Fruits and other Revenues of it are likewiſe due from the ſaid moment: And the Teſtator cannot hinder it by any Diſpoſition *g*.

g Modis omnibus ei hujus legitimæ partis quam nunc deputavimus, & uſumfructum, inſuper & proprietatem relinquat. *Nov.* 18. *c.* 3.

VII.

7. The Legitime cannot be ſubject to any Charge, Delay, or Condition.

If the Teſtator had made ſome Diſpoſition which he intended ſhould be in lieu of the Legitime of one of his Children, and having ſettled it either at a certain Sum, or in ſome particular Goods, or even at a certain Portion of the Inheritance, he had added thereto ſome Condition, or ſome Delay for the Delivery or Payment of what he had left, or ſome other Charge; theſe Conditions, theſe Delays, theſe Charges would be without effect, if what he had given did not exceed the Value of the Legitime. For as it is nothing elſe but a certain Portion of the Inheritance which cannot be diminiſhed by the Teſtator, he can neither charge it with any burden, nor retard the Payment or Delivery of a thing which ought to go to his Children at the time of his Death, and that without any diminution *h*.

h Si conditionibus quibuſdam, vel dilationibus, aut aliqua diſpoſitione moram, vel modum, vel aliud gravamen introducente, eorum jura qui ad memoratam actionem vocabantur, imminuta eſſe videantur: ipſa conditio, vel dilatio, vel alia diſpoſitio, moram vel quodcunque onus introducens, tollatur: & ita res procedat, quaſi nihil eorum in teſtamento additum eſſet. *l.* 32. *C. de inof. teſt.*

VIII.

8. The Legitime of Children of different Marriages is not diſtinguiſhed.

If there are two or more Children of the ſame Father or Mother by different Marriages, their Legitimes will not be diſtinguiſhed by the Difference of thoſe Marriages; but all he Children of the ſame Father, or of the ſame Mother, altho by different Marriages, will have each of them their Legitime, according as the number of them all together ſhall demand *i*.

i Uſque ad quatuor quidem filios, (ex priore & ſecundo matrimonio) quatuor uncias omnino definienets: ſi autem ultra quatuor ſint, uſque ad mediam ſubſtantiæ partem. *Nov.* 22. *c. ult.*

TITLE IV.

Of the Diſpoſitions of thoſe who have married a ſecond time.

EVERY body is ſenſible of two Truths in relation to ſecond Marriages, and both the one and the other are equally agreeable to Religion and to Nature. One is, that ſecond Marriages are not unlawful; and even the Church condemns thoſe who eſteem them ſuch *a*. And the other is, that the Liberty of marrying a ſecond time, howſoever lawful it may be even for ſuch as have Children by a former Marriage, is nevertheleſs attended with ſome Mark of Diſtinction, by which the Laws of the Church and of the State diſtinguiſh the Condition of thoſe who marry again, from that of Perſons who have not taken the ſame liberty. As to the Church, the Canon Law forbids the receiving into holy Orders thoſe who have been twice married *b*. And it makes likewiſe ſome other Diſtinctions of ſecond Marriages which are ſufficiently known, and which it is not our buſineſs to ſpeak of here. As to the Laws of the State, they have ſet bounds to the Diſpoſitions which Perſons, who having Children do marry a ſecond time, may make of their Eſtates.

The Motives of theſe Laws of the Church and of the State, in relation to ſecond Marriages, are different according to their different Views. For the Church conſiders in them a kind of Incontinency, which it tolerates, but which makes the Perſons appear in her Eyes leſs pure, and by that means leſs fit to exerciſe thoſe ſacred Functions of which the holieſt Perſons ought to account themſelves unworthy. And the Laws of the State conſider in ſecond Marriages the Inconvenience of the Wrong which Perſons who marry again do to their Children. And to prevent the Diſpoſitions which Parents, whoſe Affection for their Children may be alienated by a ſecond Marriage, might make to their prejudice, the Laws have appropriated to the Children the Goods which came from their Fathers or Mothers to the Survivor of the two who marries again. They have likewiſe reſtrained the Diſpoſitions which the Survivor who marries again might make of their own proper Goods in favour of the ſecond Husband, if it is the Mother, or of the ſecond Wife, if it is the Father who has married again. And they have given the Name of Puniſhment of ſecond Marriages to that which they have ordained on this Subject in favour of the Children of thoſe Perſons who marry again *c*.

It is theſe Rules, which reſtrain in favour of the Children the Diſpoſitions of Fathers and Mothers who marry again, that we are to treat of under this Title, and which our Uſage has taken from the *Roman* Law. For even that Ordinance which is called the Edict of ſecond Marriages, made by *Francis* II. in the Year 1560, hath been taken from thence, as we ſhall obſerve on the Articles of this Title which have relation to thoſe of the ſaid Ordinance.

By ſecond Marriages, whether it be that of the Husband or of the Wife, is underſtood every Marriage which is not the firſt; and whatever number of Marriages there may have been, they are all comprehended under this Name of ſecond Marriages with reſpect to that Party of the married Couple who had been married before: For as to the other Party who had never been married before, it cannot be ſaid to be a ſecond Marriage.

It may be remarked here, that beſides the Puniſhments of ſecond Marriages which relate to the Diſpoſitions of Goods, there were others in the *Roman* Law againſt the Intemperance of Women. Thus thoſe who married again within the Year of mourning were noted with Infamy *d*. And there were ſeveral other Puniſhments ordained againſt them *e*. Thus ſhe who abandoned her ſelf to a Slave, became Slave to the Maſter of him to whom ſhe proſtituted herſelf, if ſhe perſevered in that Amour, after a Denunciation made by the Maſter of the ſaid Slave; which was aboliſhed by *Juſtinian f*. Thus *Conſtantine* declared the Crime of thoſe Women who proſtituted themſelves to their own Slaves, even in private, to be capital *g*.

a 31. *q.* 1. *c.* 11, 12, 13.
b 1 *Tim.* 3. 2. *Diſt.* 26. *& tit. de bigam. non ordin. V. Nov.* 6. *c.* 5.

c Pœna contra binubos. *Nov.* 2. *c.* 2. §. 1. Communis mulieris & viri mulcta. *Nov.* 22. *c.* 23.
d l. 1. *C. de ſec. Nup.*
e d. l. 1. *l.* 2. *eod. l.* 22. *C. de admin. tut.*
f l. un. C. de Senat. Claud. toll.
g l. un. C. de mulier. quæ ſe propr. ſerv. junx.

Of theſe ſeveral ſorts of Puniſhments there is only that which relates to the ſecond Marriage of a Widow within her Year of Mourning that has been received into uſe with us; but even this Puniſhment has been aboliſhed, and we obſerve the Canon-Law which has rejected it *h*. For altho the Incontinency of a Woman who marries again within her Year of Mourning gives her juſtly a bad Reputation, and that great Inconveniencies may follow from it, becauſe of the Doubt that may ariſe, which of the two Husbands ſhould be reckoned Father of a Child who ſhould be born, for example, ſeven or eight Months after the Marriage of a Widow, which ſhe had contracted within two months after the Death of her firſt Husband; yet the Church tolerating theſe ſorts of Marriages to avoid a greater Evil, it abſolves from the legal Infamy the Widows who marry again before the ſaid Term. And as for the other Puniſhments which do not ſuit with our Policy, which does not admit of Slaves; thoſe Laws have ſerved as a Pattern with us for the Regulation which was made by one of the Articles of the States of *Blois*, by which it was ordained, that Widows who *married again fooliſhly to Perſons that were unworthy*, ſhould not have power to make any Diſpoſitions in favour of ſuch Husbands, and that they ſhould be even *interdicted the free Adminiſtration of their Eſtates i*.

As to the ſubject Matter of this Title, it is neceſſary to diſtinguiſh two ſorts of Rules which have been made concerning ſecond Marriages, in order to preſerve the Rights of the Children whoſe Father or Mother contract a ſecond Marriage. One is of thoſe Rules which ſecure to the Children the Goods which their Father or Mother who marries again, inherited from the Father or Mother of theſe Children who died firſt. And the other is of ſuch Rules as relate in general to all the other Goods of the Perſon who has contracted a ſecond Marriage. And theſe two ſorts of Rules ſhall be the ſubject Matter of two Sections, which ſhall be preceded by a firſt Section, wherein it is neceſſary to diſtinguiſh the ſeveral ſorts of Goods which a Perſon who marries again may be poſſeſſed of.

h c. penult. & ult. de ſec. nup.
i Ordinance of Blois, *Article* 182.

SECT. I.

Of the ſeveral ſorts of Goods which Perſons contracting a ſecond Marriage may be poſſeſſed of.

The CONTENTS.

1. *Three ſorts of Goods belonging to the Perſons who marry a ſecond time.*
2. *Two ſorts of Goods which the Husband or Wife may have from one another.*
3. *Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Marriage.*
4. *Goods which come to the Father or to the Mother, from their Children.*
5. *Goods of the Father or Mother coming by other Titles.*
6. *Theſe ſeveral ſorts of Goods have their different Rules.*

I.

1. *Three ſorts of Goods belonging to the Perſons who marry a ſecond time.*

WE muſt diſtinguiſh three ſorts of Goods which a Perſon who contracts a ſecond Marriage, having Children by a former, may be poſſeſſed of. Thoſe which came to her from her firſt Husband, if it is the Wife, or from the firſt Wife, if it is the Husband; thoſe which come to the Husband or Wife from ſome one of their common Children; and thoſe which they may have acquired ſome other way *a*.

a There can be no Goods which are not comprehended in this Diviſion.

II.

2. *Two ſorts of Goods which the Husband or Wife may have from one another.*

A Wife may have from her firſt Husband, or a Man from his firſt Wife, Goods of two ſorts; that which any one of them may have acquired by their Contract of Marriage, and that which the Party who dies firſt may have left to the Survivor by a Teſtament, or other Diſpoſition *b*.

b Theſe two kinds comprehend all. See the firſt, ſecond, and following Articles of the ſecond Section.

The ſecond part of this Article is to be underſtood of Diſpoſitions which are allowed between Husband and Wife. For there are Cuſtoms which prohibit differently theſe Diſpoſitions, as has been obſerved in the Preamble of the ſecond Section of Heirs and Executors in general.

III.

3. *Goods which the Husband acquires from the Wife, or*

We muſt reckon among the Goods which the Husband acquires from the Wife, or the Wife from the Husband, by their Contract of Marriage, all and every thing that is ſtipulated by the Con-

the Wife from the Husband, by their Marriage.

tract it ſelf, or given by the Law or by Cuſtom, without Stipulation, in favour of one Party, out of the Goods of the other, whether the ſaid Goods, ſtipulated or not, have any peculiar Name, ſuch as that of Nuptial Gains, Dower, Augmentation of Dowry, or any other ſuch like Name, or that it be ſome other Right which has no particular Name *c*.

c See the firſt and following Articles of the ſecond Section, and the Texts cited on thoſe Articles.

IV.

4. Goods which came to the Father or to the Mother from their Children.

The Goods which may come to the Father or to the Mother from ſome of their common Children, conſiſt either in the Uſufruct they may have of the Goods of their Children, or in the Property of what may fall to them of their Succeſſion, whether by Teſtament, or when they die inteſtate *d*.

d See the firſt and ſecond Sections, in what manner Fathers ſucceed, &c.

V.

5. Goods of the Father or Mother coming by other Titles.

All the other Goods which Fathers and Mothers who marry a ſecond time may have, are thoſe which they have had either of their own Patrimony, or have acquired by their Induſtry, or by other Titles beſides thoſe which have been juſt now ſpecified *e*.

e See touching theſe ſorts of Goods the third Section.

VI.

6. Theſe ſeveral ſorts of Goods have their different Rules.

It has been neceſſary to diſtinguiſh theſe different kinds of Goods. For there is none of them but what is the ſubject Matter of ſome one of the Rules which follow *f*.

f We muſt compare the Articles of this Section with thoſe of the two following Sections, according as they have relation to one another.

SECT. II.

The Rights which Children have to the Goods which their Father or Mother who marries a ſecond time had acquired from the Party who died firſt.

The CONTENTS.

1. *The Children have a right to the Goods which came from their Father or Mother to the Perſon who marries again.*
2. *The Children acquire the Property of the ſaid Goods by the ſecond Marriage of their Father or Mother.*
3. *And the Goods belong to them by equal Portions.*
4. *We do not diſtinguiſh the Origin of the Goods, in which the Husband or Wife have their Gains.*
5. *Theſe Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.*
6. *When the Children die inteſtate, the Father or Mother who marries a ſecond time, has no ſhare in the Goods which the ſaid Children inherited from their deceaſed Father or Mother.*

I.

1. The Children have a Right to the Goods which came from their Father or Mother to the Perſon who marries again.

WHEN a Man who ſurvives his Wife, or a Wife who ſurvives her Husband, contracts a ſecond Marriage, having Children by the former, all the Goods which came to them from the Party deceaſed, whether on the ſcore of Gains acquired by their Contract of Marriage, or by Diſpoſitions, whether the ſame are to have their effect in the Life-time of the Giver, or after his Death, or in any other manner whatſoever, are appropriated to the common Children from the moment of the ſecond Marriage *a*, as ſhall be explained by the Rules which follow.

a See the following Articles, and the Texts cited on them.

II.

2. The Children acquire the Property of the ſaid Goods by the ſecond Marriage of their Father or Mother.

Of all the ſorts of Goods mention'd in the preceding Article, the Property thereof accrues to the Children from the Moment of the ſecond Marriage of the Father or Mother: and the Perſon who marries a ſecond time, has only the uſufruct of theſe ſorts of Goods during Life; and cannot make any Alienation, Engagement, Donation, or other Diſpoſition of them *b*.

b Fœminæ quæ ſuſceptis ex priore matrimonio filiis, ad ſecundas (poſt tempus luctui ſtatutum) tranſierint nuptias: quidquid ex facultatibus priorum maritorum ſponſalium jure, quidquid etiam nuptiarum ſolennitate perceperint, aut quidquid mortis cauſa donationibus factis, aut teſtamento jure directo, aut fideicommiſſi, vel legati titulo, vel cujuſlibet munificæ liberalitatis præmio ex bonis (ut dictum eſt) priorum maritorum fuerint adſecutæ: id totum, ita ut perceperint, integrum ad filios, quos ex præcedente conjugio habuerint, tranſmittant. *l.* 3. *C. de ſec. nupt.* Habeant poteſtatem poſſidendi tantùm atque fruendi in diem vitæ, non etiam alienandi facultate conceſſa. *d. l.* 3. *Nov.* 2. *c.* 2. *Nov.* 22. *c.* 23 *&* 24. *l. ult. C. de bon. mat.*

Generaliter cenſemus, quocunque caſu conſtitutiones ante hanc legem mulierem liberis communibus, morte mariti matrimonio diſſoluto, quæ de bonis mariti ad eam devoluta ſunt, ſervare ſanxerunt: iiſdem caſibus maritum quoque quæ de bonis mulieris

lieris ad eum devoluta ſunt morte mulieris matrimonio diſſoluto, communibus liberis ſervare. *l.* 5. *C. de ſec. nupt.*

It is from theſe Laws that the ſecond Head of the Edict of July 1560 *has been taken, which prohibits Widows, who marry a ſecond time, from giving to their new Husbands any ſhare of the Goods which they had by the Gift and Liberality of their deceaſed Husbands; and directs that the ſaid Goods may be preſerved to their common Children; and ordains the ſame thing with reſpect to Husbands, as to the Goods which came to them by their Wives.*

III.

3. And the Goods belong to them by equal Portions.

This Property accrues to the ſaid Children by equal Portions. And the Father or Mother who marries again has not the liberty to chuſe among their Children, in order to prefer or benefit ſome of them before the others, neither in the total of theſe ſorts of Goods, nor in a part of them. For the ſecond Marriage is equally prejudicial to them all, and they are all of them equally concerned and intereſted therein *c*.

c Venient autem talia lucra ad filios omnes ex prioribus nuptiis. Non enim permittimus parentibus non recte introductam electionem in eos: neque alii quidem filiorum dare, alium vero exhonorare. Omnes enim ſecundis ſimiliter exhonorati ſunt nuptiis. *Nov.* 22. *c.* 25.

IV.

4. We do not diſtinguiſh the Origin of the Goods in which the Huſband or Wife have their Gains.

Whether the Wife's Marriage-Portion was of her own proper Goods, or whether it came from ſome other hand, and that in conſideration of her Marriage, her Father, or ſome other Perſons, had given it her; all the Gains and Advantages which may accrue to the Husband out of theſe ſorts of Goods, are conſider'd as come from the Goods of the Wife, and are ſubject to the Rules which have been juſt now explained. And likewiſe the Gains and Advantages which the Wife may have out of the Goods of the Husband, whatever way he came by them, are conſidered as Goods come from the Husband, and are ſubject to the ſame Rules *d*.

d Non diſcernimus de dote, & ante nuptias donatione utrum ipſi hanc dederint per ſe contrahentes, an aliqui alii pro eis hoc egerint: ſive ex genere, ſive etiam extrinſecus. *Nov.* 22. *c.* 23. *in f.*

V.

5. Theſe Gains accrue to the Children, altho they be not Heirs either to the Father or Mother.

Seeing the Right of the Children to theſe ſorts of Goods which have been juſt now mentioned in the preceding Articles, accrues to them by the bare Effect of the ſecond Marriage of the Father or Mother, as has been ſaid in the ſecond Article; theſe Goods do belong to them, altho they be not Heirs either to their Father or their Mother. And the Children who are their Heirs, will not exclude thoſe who ſhall have renounced the Inheritance. But if any one of the ſaid Children, whether he be Heir or not, either to the Father or to the Mother, having once acquired his Right, happens to die, leaving Children behind him; he may diſpoſe of theſe Gains among them unequally, in the ſame manner as he may of his other Goods *e*.

e Et ſuper his quoque lucris, quæcunque ad ſecunda venientibus vota parentibus, percipiunt, non perſcrutamur, utrum hæredes exiſtant aut præmorientis parentis, aut ſecundi morientis, nec ſi alii quidem hæredes exiſtant, alii vero non. Sed ſicut ſuperius diximus, præmium eis damus hoc, ſive hæredes fiant, ſive etiam non: & hoc ex æquo percipiant ipſi quidem ſuperſtites: cum eis autem & defuncti filii, genitoris accipientes partem. *Nov.* 22. *c.* 26. §. 1. *l.* 7. *C. de ſec. nupt.* Eligendi quos voluerint ex liberis ſuperſtitibus, non adempta licentia. *d. l.* 7. *in f.*

VI.

6. When the Children die inteſtate, the Father or Mother who marries a ſecond time, has no ſhare in the Goods which the ſaid Children inherited from their deceaſed Father or Mother.

If one of the Children whoſe Mother had married a ſecond time, ſhould happen to die, leaving behind him his ſaid Mother and Brothers; he would have the liberty to diſpoſe in favour of his Mother of all his ſeveral ſorts of Goods, and even of thoſe Goods of his Father's which had come to him by the effect of the Rules which have been juſt now explained; and his Brothers would have no right to claim either the Uſufruct or Property of the things left to their Mother by ſuch Diſpoſition *f*. But if the Son had died without diſpoſing of his Part of the Goods which he had from his Father, the Mother would have no Right of Property in them, the ſame remaining to the other Children, whether it be that ſhe married again the ſecond time before the Death of her Son, or only after *g*. For ſeeing the Goods which are appropriated to the Children by the ſecond Marriage of their Mother, do belong to them all equally by the Title which is common

f Matri relinquens ſive ex inſtitutione, ſive legatum recte derelinquat & dominium & uſum, ſive ex rebus quæ extrinſecus advenerunt, fuerit facultas, ſive ex paternis: nihil ex hoc fratribus contradicere valentibus. *Nov.* 22. *c.* 46. §. 1. *in f.* Habeat quod dimiſſum eſt aut datum, & ſecundum proprietatem & ſecundum uſum. *d.* §. 1.

g Si autem inteſtatus filius moriatur jam ad ſecundas matre veniente nuptias, aut poſtea veniente, vocetur quidem & ipſa cum filii aut filiæ fratribus ſecundum noſtram conſtitutionem ab inteſtato ad ejus ſucceſſionem. Sed quanta quidem ex paterna ſubſtantia ad filium pervenerunt, eorum ſolummodo habeat uſum ad ſecundas omnino, ſive prius, ſive poſtea veniens nuptias. *d. c.* 46. §. 2.

to them, they have among them the Right of Accretion therein. But as for the Uſufruct of that ſhare of the Father's Goods which belonged to the deceaſed Son, and for all the other Goods which he may have had any other way than by his Father, or that he might have acquired by his own Induſtry, or by Succeſſion, or otherwiſe, the Mother would ſucceed to them, either as to the Property or Uſufruct thereof, according to the Rules which have been explained in their Place *h*.

h See the Remark on the Succeſſion of Mothers at the end of the Preamble to the Title, in what manner Fathers ſucceed, and the fourth Article of the firſt Section of the ſame Title.

¶ We have reſtrained the Rule explained in this Article to the Mother only, without extending it to the Father, becauſe the Novel of *Juſtinian*, from whence the Rule has been taken, is limited to the Mother; but it would ſeem that their Condition ought to be equal. And ſeeing the Rules explained in the preceding Articles, which by the former Laws related only to Mothers, have been extended to Fathers by ſubſequent Laws, as appears by the laſt Text cited on the ſecond Article, and that *Juſtinian* has in other Places made this general Remark, that all the Puniſhments of ſecond Marriages are common to the Husband and the Wife; it ſeems that we may juſtly conclude from this Principle, that this Rule, as well as the others, ought to regard the Men as much as the Women. *Contra binubos pœnæ communes & viri ſunt & mulieris. Nov. 2. cap. 2. in fin. Communis mulieris & viri multa. Nov. 22. cap. 23.* To which we may add the Example of another Law of the ſame Emperor, who having enacted much ſeverer Puniſhments againſt the Women when they ſeparated from their Husbands without juſt Cauſe, than againſt the Men for the ſame caſe, did afterwards make thoſe Puniſhments equal, and that for this reaſon, that in a like Offence their Puniſhment ought to be the ſame: *In delicto enim æquali, ſimiles eis imminere pœnas juſtum eſſe putamus. Nov. 127. cap. 4.* Thus the Spirit of all theſe Rules ſeems to require that there ſhould be an Equality between the Man and the Wife for all the Conſequences of ſecond Marriages.

SECT. III.

Of the Diſpoſitions which Perſons who have married twice may make of their own proper Goods.

The CONTENTS.

1. *The Perſon who marries twice, cannot give more to the ſecond Husband or Wife, than they leave to ſuch of their Children as has the leaſt Share of their Eſtate.*
2. *Neither directly nor indirectly by the Interpoſition of other Perſons.*
3. *The Computation of the Goods is made according as they are found at the time of the Death.*
4. *What is cut off from the Gift, belongs in common to the Children of the firſt Marriage.*
5. *The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are deſcended.*
6. *The Uſufruct left to the Survivor, is not loſt by the ſecond Marriage, unleſs it was left on that Condition.*

I.

ALTHO the Father or Mother who has married a ſecond time retain the Property of all their Goods, excepting what is appropriated to their Children of the firſt Marriage, purſuant to the Rules explained in the preceding Section; and that nothing hinders them from alienating the ſaid Goods, and even giving them to other Perſons, provided they do not thereby encroach on the Legitime, or Portion reſerved by Law to their Children; yet this Liberty is bounded by one of the Puniſhments of ſecond Marriages. For it is not allowed to the Wife who, having Children by a former Marriage, has married a ſecond time, to diſpoſe of any ſort of her Goods in favour of the ſecond Husband, nor to the Husband to diſpoſe in favour of the ſecond Wife, whether it be by their ſecond Contract of Marriage under the Title of Nuptial Gains, Dower, or other Diſpoſition whatſoever, whether the ſame be to take effect in the Lifetime of the Giver, or after their Death; unleſs they reſerve to every one of the Children as much as is given away; and the Gift will be limited to the Portion which the Perſon who has married the ſecond

1. *The Perſon who marries twice, cannot give more to the ſecond Husband or Wife, than they leave to ſuch of their Children as has the leaſt ſhare of their Eſtate.*

ſecond time ſhall have left of their Eſtate to the Child to whom they have left the leaſt Share *a*.

a Non liceat plus novercæ vel vitrico teſtamento relinquere vel donare, ſeu dotis vel ante nuptias donationis titulo conferre, quam filius vel filia habet, cui minor portio ultima voluntate derelicta vel data fuerit. *l.* 6. *C. de ſec. nupt.*

It is from this Law that the firſt Head of the Edict of July 1560 *is taken, which prohibits Women who have married twice from giving any part of their Goods or Moveables of the Eſtates which they themſelves have purchaſed, or which have come to them by deſcent from their Anceſtors, to their new Husbands, to the Father, Mother, or Children of their ſaid Husbands, or other Perſon, who may be preſumed to be in truſt for them, more than what they have given to ſuch of their Children to whom they have given the leaſt ſhare of their Eſtates.*

II.

2. *Neither directly nor indirectly by the Interpoſition of other Perſons.*

If to elude the Rule explained in the foregoing Article, the Perſon who has married a ſecond time, had made ſome Diſpoſition in favour of Perſons interpoſed, in order to tranſmit by them to the ſecond Husband, or to the ſecond Wife, more than what had been left to any Child of the firſt Marriage who had the leaſt ſhare; the ſaid Diſpoſition would be reduced in the ſame manner as if it had been made in expreſs Terms to the ſecond Husband, or to the ſecond Wife *b*.

b Omni circumſcriptione, ſi qua per interpoſitam perſonam, vel alio quocunque modo fuerit excogitata, ceſſante. *l.* 6. *C. de ſec. nupt. Nov.* 22. *c.* 27.

This is ſo regulated by the Edict of July 1560 *concerning ſecond Marriages, as has been remarked on the foregoing Article.*

III.

3. *The Computation of the Goods is made according as they are found at the time of the Death.*

We muſt underſtand what is ſaid in the firſt Article, concerning the Reduction of what is left to the ſecond Husband or Wife to the Portion of the Child of the firſt Marriage who has the leaſt, not of the Portion of the Goods which the Father or Mother who makes the Diſpoſition, may have at the time of making the ſaid Diſpoſition that is liable to be reduced, but of the Portion of the Goods which they ſhall be found to have at the time of their Death. For the Goods may be either augmented by Acquiſitions, or diminiſhed by Alienations and Loſſes. And it is only at the time of the Death of the Father or Mother, that it can be known what Portions the Children will have in their Goods, that the Gift to the ſecond Husband or Wife may be compared with the Portion of the Child who ſhall have the leaſt, and be made equal to it *c*.

c Optimum nobis viſum eſt eſſe, mortis binubi parentis obſervari tempus. *Nov.* 22. *cap.* 28. Evenientes fortunæ contrarios eventus ſapius operantur. *d. c.* Aufferre quod tranſcendit oportet, & filiis applicare. *d. c.*

IV.

4. *What is cut off from the Gift, belongs in common to the Children of the firſt Marriage.*

This Diminution of the Gift made to the ſecond Husband or Wife, does not accrue to that Child who has the leaſt Share in the Parent's Eſtate; but it goes to all the Children together by equal Portions. For it is in favour of them all that the Diminution is ordain'd *d*.

d Quod plus eſt in eo quod relictum aut datum eſt omnino aut novercæ aut vitrico, ac ſi neque ſcriptum, neque relictum aut datum vel donatum, competit filiis: & inter eos ſolos ex æquo dividitur ut oportet. *Nov.* 22. *cap.* 27.

V.

5. *The Children of divers Marriages take each of them the Goods which their Parent had by the Marriage of which they are deſcended.*

When there are Children of divers Marriages who come to ſhare the Goods of their Father or Mother, thoſe of each Marriage take out of the Maſs of the Inheritance that which came by the Marriage of which they are deſcended to their Father or Mother whoſe Succeſſion they divide. And altho the ſecond Marriage have not been followed by a third, yet the Children of this ſecond Marriage have the ſame Right, and the ſame Appropriation of what ought to come to them, as thoſe of the firſt Marriage have in the Goods that belong to them *e*. But the other Goods, which are the proper Goods of the Father or Mother who leave behind them Children of different Marriages, are divided among them all by equal Portions; unleſs there be ſome Diſpoſition that diſtinguiſhes them, which cannot be ſet aſide as being undutiful, and which does not encroach on the Right of their Legitimes or Legal Portions *f*.

e Ex ſolido quidem prioris matrimonii filii, illius lucrantur donationem: ex ſolido quoque ex ſecundis nati feminibus, ab illo facta fruentur magnificentia: licet non ad tertium illa mulier matrimonium venerit. *Nov.* 22. *c.* 29. Nos enim hac lege id præcipue cuſtodiendum eſſe decernimus, ut ex quocunque conjugio ſuſcepti filii, patrum ſuorum ſponſalitias retineant facultates. *l.* 4. *in f. C. de ſec. nupt.*

f Matris inteſtatæ defunctæ hæreditatem ad omnes ejus liberos pertinere, etiamſi ex diverſis matrimoniis fuerint, juris eſt. *l.* 4. *ff. ad Senat. Tertull. & Orphit. d. l.* 4. *C. de ſec. nupt.*

VI.

VI.

6. The Uſufruct left to the Survivor is not loſt by the ſecond Marriage, unleſs it was left on that Condition.

If the ſurviving Father or Mother had an Uſufruct which the deceaſed Husband or Wife had left them by any Diſpoſition whatſoever, they would keep it altho they married a ſecond time, unleſs it had been left them on condition that their Right to it ſhould ceaſe upon their marrying again *g*. And the Father who marries again retains with much more Reaſon the Uſufruct which he had of the Goods of his Children, and even of thoſe Goods which the ſaid Children had of their Mother *h*.

g Volumus vel ſi uſufructus detur per largitatem, aut mortis cauſa donationem factam inter vivos, in quibus licet etiam donari, ſi relinquatur, & accipiens ad ſecundas veniat nuptias, manere ſic quoque uſum, donec ſuperſit qui hunc habet uſumfructum : niſi expreſſim ille qui donationem (ſicut dictum eſt) fecit, aut hunc reliquit, ſive maſculus, ſive fœmina, dixerit velle, ad ſecundas veniente nuptias eo qui uſumfructum accepit, ſolvi eum, & ad ſuam reverti proprietatem. *Nov.* 22. *c.* 32.

h Patres uſumfructum maternarum rerum, etiam ſi ad ſecundas migraverint nuptias, ſine dubio habere debebunt. *l. ult. C. de bon. mat.*

THE CIVIL LAW, IN ITS NATURAL ORDER.

BOOK IV.

Of Legacies, and other Diſpoſitions made in View of Death.

LEGACIES and the other Diſpoſitions made in view of Death, which are to be treated of in this Book, are diſtinguiſhed from Teſtaments, which have been diſcourſed of in the preceding Book, in this, that it is eſſential to a Teſtament that it contain an Inſtitution of an Heir or Executor, which is a general Diſpoſition of all the Teſtator's Goods, altho there were nothing elſe in the Teſtament beſides this bare Inſtitution, ſeeing the Heir or Executor is univerſal Succeſſor; whereas theſe other Diſpoſitions are only particular Diſpoſitions of certain things. And it is for this reaſon, that altho one may make theſe ſorts of Diſpoſitions in a Teſtament, as one may make a Teſtament without any other Diſpoſition beſides the bare Inſtitution of an Heir or Executor, and that one may give Legacies, and make other Diſpoſitions in view of Death by other Acts than a Teſtament, it has been neceſſary to diſtinguiſh theſe two Matters, and to give to every one its ſeparate Rank.

TITLE I.

Of Codicils, and of Donations in proſpect of Death.

CODICILS are Diſpoſitions made in view of Death, which are diſtinguiſhed from Teſtaments by two Characters. One is that of their Formalities, which are fewer than thoſe of Teſtaments; and the other is that of their Uſe, which is limited

ted to Legacies and fiduciary Bequeſts, whereas a Teſtament ought neceſſarily to contain an Inſtitution of an Heir or Executor. Thus all Diſpoſitions made in view of Death, in which there is no Heir or Executor named, will only have the Nature of Codicils, or Donations in proſpect of Death, and not of a Teſtament, even altho they ſhould have all the Formalities required to a Teſtament; which muſt not be underſtood in the ſenſe of the *Roman* Law, and of the Provinces where the ſame is obſerved. For in the Cuſtoms, as they admit of no teſtamentary Heir, the Diſtinction between Teſtaments and Codicils is there altogether uſeleſs; and they give there the Name of Teſtaments to all Diſpoſitions made in proſpect of Death.

We ſhall not repeat here touching the Difference between the uſe of Teſtaments and that of Codicils, what has been ſaid thereof in the fourth Section of Teſtaments, where the matter of the Codicillary Clauſe, which is often inſerted in Teſtaments, hath been handled. The Reader will be pleaſed in reading this Title to conſult that Section of the Codicillary Clauſe, where we have been obliged, in order to explain the Effect of the ſaid Clauſe in Teſtaments, to explain ſome Rules which relate to the uſe of Codicils; and he will find there at the ſame time the Rules of the *Roman* Law concerning this Matter, which he might expect to meet with here.

We ſay nothing here of Donations made in proſpect of Death, which ſhall be the ſubject Matter of the third Section.

SECT. I.

Of the Nature and Uſe of Codicils, and of their Form.

The CONTENTS.

1. *Definition of a Codicil.*
2. *To make a Codicil, one muſt have power to make a Teſtament.*
3. *One may make a Codicil, either with a Teſtament or without a Teſtament.*
4. *One may make ſeveral Codicils, which may ſubſiſt all together.*
5. *The Codicil makes a part of the Teſtament, when there is one.*
6. *The next of Kin is charged with the Execution of the Codicils, when there is no Teſtament.*
7. *Difference between the two ſorts of Codicils.*
8. *The Codicil hath its effect, altho it be not expreſly confirmed by the Teſtament.*
9. *One cannot impoſe by a Codicil a Condition on which the Inſtitution of the Heir or Executor ſhall depend.*
10. *Five Witneſſes are required to a Codicil.*
11. *Rules of Teſtaments which agree to Codicils.*

I.

A Codicil is an Act which contains Diſpoſitions in proſpect of Death, without the Inſtitution of an Heir or Executor *a*. 1. *Definition of a Codicil.*

a Codicillis hæreditas neque dari neque adimi poteſt, ne confundatur jus teſtamentorum & codicillorum. §. 2. *inſt. de codic. l.* 2. *C. eod.*

II.

Altho the Codicil do not contain the Inſtitution of an Executor as a Teſtament, yet no body can make a Codicil if he has not a Right to make a Teſtament. For the liberty of diſpoſing of a part of one's Goods, ſuppoſes the ſame Qualities as thoſe that are neceſſary for diſpoſing of the whole *b*. Thus they who are incapable of making a Teſtament, cannot make a Codicil *c*. 2. *To make a Codicil, one muſt have power to make a Teſtament.*

b Codicillos is demum facere poteſt qui & teſtamentum facere poteſt. *l.* 6. §. 3. *ff. de jure cod.*

c See, touching the Cauſes which make this Incapacity, the ſecond Section of Teſtaments.

III.

As it is free for every one who has power to make a Teſtament, either to make a Teſtament or a Codicil, one may equally make either the one without the other, or both together *d*, whether in this laſt Caſe the Teſtament precede or follow the Codicil, or that both the one and the other be made at the ſame time; and whether alſo the Teſtament confirm the Codicil that is already made or to be made *e*, or that it make no mention of it at all, provided only that the Teſtament which is made after the Codicil do not annul it *f*. And the Liberty of all theſe different Manners of diſpoſing is the effect of that which every one has, who has a Right to make a Will, to diſpoſe either of all his Effects 3. *One may make a Codicil, either with a Teſtament or without a Teſtament.*

d Non tantum autem teſtamento facto poteſt quis codicillos facere, ſed & inteſtatus quis decedens fideicommittere codicillis poteſt. §. 1. *inſt. de Cod.*

e Codicilli aut in futurum confirmantur, aut in præteritum. *l.* 8. *ff. de jure Cod.* Aut teſtamento facto, aut ſine teſtamento. *d. l.*

f See the 8*th Article.*

by a Teſtament, naming an Heir or Executor, or only of a part of them by Legacies, and other particular Diſpoſitions in a Codicil, if he intends to have no other Heirs beſides thoſe of his Blood. And one may likewiſe make ſeveral Codicils, either at the ſame Time, or at different Times *g*.

g Codicillos autem etiam plures quis facere poteſt. §. *ult. inſt. de codic.*

IV.

4. One may make ſeveral Codicils which may ſubſiſt all together.

Beſides the Difference between a Teſtament and Codicil, which reſults from the Rules explained in the firſt Article, it is neceſſary to remark a ſecond Difference which is a Conſequence of the former, that ſeeing the Teſtament contains an univerſal Diſpoſition of the Totality of the Teſtator's Goods, there cannot be ſeveral Teſtaments of which all the Diſpoſitions ſubſiſt together, and the laſt Teſtament annuls the Diſpoſitions of the former, if it does not expreſly confirm them *h*. But Codicils containing only particular Diſpoſitions of a part of the Goods, one may make ſeveral Codicils, as has been ſaid in the preceding Article, and they ſubſiſt all of them *i*, except the Changes which a Teſtament or the laſt Codicils may have made *l*.

h Teſtamentum rumpitur alio teſtamento. *l.* 1. *de injuſt. rupt.* Poſteriore teſtamento quod jure perfectum eſt ſuperius rumpitur. §. 2. *inſt. quib. mod. teſt. infirm.* See the firſt Article of the fifth Section of Teſtaments.

i Codicillos & plures quis facere poteſt. *l.* 6. *ff. de jure codic.*

l See the eighth Article.

V.

5. The Codicil makes a part of the Teſtament, when there is one.

When there is together both a Teſtament and a Codicil, whether they be made at one and the ſame Time, or at different Times, and whether the Teſtament or Codicil make mention of one another, or make no mention, the Codicil is conſidered as making a part of the Teſtament *m*. For the Diſpoſitions both of the one and the other are equally the laſt Will of the Teſtator, and the particular Diſpoſitions of the Codicil ought to be conſidered as contained in the general Diſpoſition which is eſſential to the Teſtament. Thus the Diſpoſitions of the Teſtament, and thoſe of the Codicil, are interpreted the one by the other, and are reconciled with one another in ſuch Things as may ſubſiſt both of the one and the other. But if one of them makes any Alteration in the other, the laſt Diſpoſition, even in the Codicil, will have its effect in that which may be regulated by a Codicil *n*.

m Codicilli pars intelliguntur teſtamenti. *l. penult. ff. teſtam. quamad. aper.*

Ad teſtamentum quod quoquo tempore feciſſet pertinent codicilli. *l.* 16. *ff. de jure codic.*

n We have added theſe laſt Words, becauſe, as ſhall be ſaid in the ninth Article, one cannot diſpoſe of the Inheritance in a Codicil.

VI.

6. The next of kin is charged with the Execution of the Codicils, when there is no Teſtament.

As when there is a Teſtament, he who is inſtituted Heir or Executor is bound to execute the Diſpoſitions of the Codicils, ſo when there is no Teſtament, it is the Heir at Law, or next of Kin, who is charged with the Execution of them *o*, in the ſame manner as if he were inſtituted Heir or Executor by a Teſtament. For he might have been deprived of the Inheritance; and it was out of free Good-will that the Deceaſed has left it to him *p*. Thus the Diſpoſitions of a Codicil have, with regard to him, the ſame effect as if they were ordained by a Teſtament, in which he were made Heir or Executor *q*.

o Quicumque ab inteſtato ſucceſſerit, locum habent codicilli. *l.* 16. *ff. de jure codic.*

p Ideo fideicommiſſa dari poſſunt ab inteſtato ſuccedentibus, quoniam creditur paterfamilias ſponte ſua his relinquere legitimam hæreditatem. *l.* 8. §. 1. *ff. de jure codic.*

q Codicillorum jus ſingulare eſt, ut quæcumque in his ſcribuntur, perinde habeantur ac ſi in teſtamento ſcripta eſſent. *l.* 2. §. 2. *eod.*

VII.

7. Difference between the two ſorts of Codicils.

It follows from the two foregoing Articles, that there is a Difference between the two ſorts of Codicils, that is, thoſe which happen to be accompanied with a Teſtament, whether the ſame follow or precede the Codicils, and thoſe of Perſons who die without a Teſtament; that theſe laſt are in lieu of a Teſtament, containing all the Diſpoſitions of the Deceaſed, in the ſame manner as if he had made a Teſtament, and named therein his Heir at Law for his Executor, charging him with what ſhould be contained in the Codicil: Whereas the Codicil of him who has likewiſe made a Teſtament, has relation to that Teſtament *r*, and makes a part of it, as has been ſaid in the fifth Article.

r Inteſtato patrefamilias mortuo, nihil deſiderant codicilli: ſed vicem teſtamenti exhibent. Teſtamento autem facto, jus ſequuntur ejus. *l.* 16. *in f. ff. de jure codic.*

We may give to this Text the Meaning explained in this Article, altho it has another which ſhall be mentioned in the Remark on the fourth Article of the following Section.

VIII.

VIII.

8. *The Codicil hath its effect, altho it be not expreſly confirmed by the Teſtament.*

If he who had made a Codicil, makes afterwards a Teſtament, in which he makes no mention of the Codicil, the Codicil will nevertheleſs have its effect. For altho it be not expreſly confirmed by the Teſtament, yet it is confirmed, in ſo far that it has not been revoked. And it is preſumed that the Teſtator has perſevered in the ſame Mind, ſince he has ordered nothing to the contrary *s*. But if the Teſtament contained any Diſpoſitions contrary to thoſe made in the Codicil, or if it made any Alteration in them, the laſt Will would be the Rule *t*.

s Divi Severus & Antoninus reſcripſerunt, ex iis codicillis qui teſtamentum præcedunt, poſſe fideicommiſſum peti, ſi appareat eum qui teſtamentum fecit, à voluntate quam in codicillis expreſſerat, non receſſiſſe. §. 1. *in f. inſt. de codic.* Teſtamento facto, etiamſi Codicilli in eo confirmati non eſſent, vires tamen ex eo capient. *l.* 3. §. 2. *ff. de jure codic.*

t Sed non ſervabuntur ea de quibus aliter defunctus noviſſime judicavit. *l.* 5. *in f. ff. de jure codic.*

IX.

9. *One cannot impoſe by a Codicil a Condition on which the Inſtitution of the Heir or Executor ſhall depend.*

As one cannot by a Codicil make an Heir or Executor, ſo likewiſe one cannot take away the Inheritance by a Codicil, nor conſequently impoſe on the Heir or Executor a Condition on which it ſhould depend whether he ſhould be Heir or not; nor can he take away a Condition of this Nature impoſed by the Teſtament. For theſe ſorts of Diſpoſitions would have the Effect to take away and give the Inheritance; which cannot be done but by a Teſtament, to which more Formalities are required than to a Codicil *u*.

u Divi Severus & Antoninus reſcripſerunt, nihil egiſſe matrem quæ cum pure liberos ſuos hæredes inſtituerit, conditionem emancipationis codicillis adjecit. Quia neque conditionem hæredi inſtituto codicillis adjicere, neque ſubſtituere directe poteſt. *l.* 6. *ff. de jure codic.* §. 2. *inſt. de codic.* Hæredi quem teſtamento pure inſtituit, codicillis ſcripſit conditionem. Quæro an ei parere neceſſe habeat? Modeſtinus reſpondit hæreditas codicillis neque adimi poteſt. Porro in defectu conditionis de ademptione hæreditatis cogitaſſe intelligitur. *l.* 27. §. 1. *ff. de condit. inſt.*

X.

10. *Five Witneſſes are required to a Codicil.*

For the Validity of a Codicil, it is neceſſary that it ſhould be atteſted by five Witneſſes of the ſame Quality with thoſe who are allowed to be Witneſſes to a Teſtament *x*.

x In omni ultima voluntate, excepto teſtamento, quinque teſtes vel rogati, vel qui fortuitu venerint in uno eodemque tempore, debent adhiberi. *l. ult.* §. *ult. C. de codic.*

The Formalities of Codicils, as well as thoſe of Teſtaments, depend on the Uſage of the Places, as has been ſaid concerning the Formalities of Teſtaments. See the firſt Article of the third Section of Teſtaments.

[In *England* we make no Diſtinction between the Number of Witneſſes required to a Codicil, and thoſe required to a Teſtament. Two are ſufficient in written Teſtaments which contain Diſpoſitions of Perſonal Eſtate, and the ſame Number is required in Codicils. But if the Codicils contain any Deviſes of Lands and Tenements, then three Witneſſes are neceſſary, as has been already obſerved. *Swinb. of Wills, part* 1. §. 9. *Stat.* 29. *Car.* 2. *cap.* 3. §. 22. See the Remark on the firſt Article of the third Section of Teſtaments.]

XI.

11. *Rules of Teſtaments which agree to Codicils.*

We may add, as a laſt Rule of the Nature and Uſe of Codicils, that we muſt apply to them, and obſerve in them all the Rules of Teſtaments which may have relation to and agree with Codicils. Thus we may apply to Codicils the Rules which relate to the Capacity or Incapacity of Perſons, whether to make Diſpoſitions in proſpect of Death, or to receive any Liberality by ſuch Diſpoſitions, the Rules touching the Interpretation of the ſaid Diſpoſitions, thoſe of Conditions, and in general all the other Rules of Teſtaments which may be applied to Codicils *y*.

y One may be able to judge of the Truth and Uſe of this Rule, by the relation which the Rules concerning Teſtaments, which have been already explained, have to Codicils.

SECT. II.

Of the Cauſes which annul Codicils.

The CONTENTS.

1. *The Codicil is null for want of the neceſſary Formalities.*
2. *Or if it is revoked by a ſecond.*
3. *Or by a Teſtament.*
4. *The Birth of a Child annuls the Teſtament, and Codicil.*
5. *Other Cauſes which annul Codicils.*

I.

1. *The Codicil is null for want of the neceſſary Formalities.*

THE Codicil is null, if it wants the Number of five Witneſſes, who have the Qualifications neceſſary for giving Teſtimony, or if it wants any one of the other Formalities explained in the third Section of Teſtaments *a*.

a See the Text cited on the tenth Article of the firſt Section, and the Remark on the ſame Article, and the third Section of Teſtaments.

It is neceſſary to obſerve, as to the Formalities explained in that third Section of Teſtaments, that ther

there are ſome Rules of that Section which do not agree to Codicils; as, for example, thoſe of the ninth and tenth Articles, which ſay, that the Heir or Executor, his Children, his Father, and his Brothers, cannot be Witneſſes to the Teſtament; for in a Codicil there is no Heir or Executor.

II.

2. Or if it is revoked by a ſecond.

A firſt Codicil is annulled by a ſecond which revokes it *b*. But if the ſecond makes only ſome Changes in the firſt, both the one and the other will ſubſiſt in what the ſecond ſhall not have changed. And if the ſecond makes no Alteration at all in the firſt, both of them will have their Effect *c*.

b Cum proponatis pupillorum matrem veſtrorum diverſis temporibus, ac diſſonis voluntatibus duos codicillos ordinaſſe: in dubium non venit, id quod priori codicillo inſcripſerat, per eum, in quem poſtea ſecreta voluntatis ſuæ contulerat, ſi à prioris tenore diſcrepat, & contrariam voluntatem continet, revocatum eſſe. *l.* 3. *C. de codic.*

c This is a Conſequence of the Power which one has to make ſeveral Codicils. See the fourth Article of the firſt Section.

III.

3. Or by a Teſtament.

A Teſtament ſubſequent to a Codicil may either confirm it, or revoke it, or make ſome Alteration in it, with much more Reaſon than a ſecond Codicil may: Which depends on the manner in which the Teſtator ſhall have explained himſelf in the ſaid Teſtament *d*.

d See the fourth, fifth, and eighth Articles of the firſt Section.

IV.

4. The Birth of a Child annuls the Teſtament and Codicil.

If he, who having no Children had made a Codicil and a Teſtament, happens afterwards to have Children, the Teſtament and the Codicil will be void *e*.

e Rupto teſtamento poſthumi agnatione, codicillos quoque ad teſtamentum pertinentes non valere, in dubium non venit. *l.* 1. *C. de codic.*

¶ This Text relates only to the Caſe where there is both a Codicil and a Teſtament: And it is ſaid in another Text, that when there is only a Codicil without a Teſtament, the Birth of a Child does not annul it. *Agnatione ſui hæredis nemo dixerit Codicillos evanuiſſe. l. pen. ff. de jure Cod. l.* 16. *eod.* This Difference, which the *Roman* Law makes between a Codicil without a Teſtament, and the Codicil of him who had alſo made a Teſtament, is founded upon this, That he who makes a Codicil, and dies without making any Teſtament, dies with an Intention to leave his Succeſſion to his Heir at Law, and that therefore his Intention is that his Heir at Law ſhould execute the Codicil; whereas, when there is both a Teſtament and a Codicil, it is a Rule in the *Roman* Law that the Codicil ſhall follow the Condition of the Teſtament, and that it ſhall ſubſiſt if the Teſtament ought to ſubſiſt, or that it be void if the Teſtament is annulled. *Inteſtato patrefamilias mortuo nihil deſiderant Codicilli, ſed vicem teſtamenti exhibent: teſtamento autem facto, jus ſequuntur ejus. l.* 16. *in fine ff. de jure Cod.*

This Law, which makes all the Codicils of thoſe who have made no Teſtament to ſubſiſt without diſtinction, might in certain Caſes treſpaſs againſt Equity. For if we ſuppoſe that a Man who was not married, and had no hopes of having any Children, had made a Codicil, in which he had diſpoſed of the greateſt Part of his Eſtate, thinking to leave the Remainder, which would be the leaſt Part of it, to his Heir at Law, a collateral Relation, and one who did not ſtand in need of it; and that afterwards he ſhould happen to marry, and to have Children, and to die without revoking this Codicil, either thro Forgetfulneſs, or becauſe he had been ſurprized by Death; it would ſeem very hard to make ſuch a Codicil to ſubſiſt, in a Caſe where even a Teſtament would be annulled, not only as to the Inſtitution of an Heir or Executor, but as to all the other Diſpoſitions thereof, even the moſt favourable *. And if Equity requires that the Birth of a Child ſhould annul in its favour all the Diſpoſitions of a Teſtament, the ſame Equity would ſeem likewiſe to require that the Birth of a Child ſhould annul alſo the Diſpoſitions of a Codicil, altho it be not accompanied with a Teſtament; ſeeing this Circumſtance is wholly indifferent to the Right of the Child, who is as much or more injured by the Diſpoſitions of ſuch a Codicil, as he can be by a Teſtament. So that ſeeing the Motive which has induced us to receive into our Uſage the Diſpoſitions of the *Roman* Law, is only the Equity thereof which renders thoſe Diſpoſitions of the *Roman* Law, which we obſerve, juſt in all Places, and at all Times, and that we reject ſuch Diſpoſitions thereof as ſeem to deviate from that Equity, and which ſavour too much of thoſe Niceties which we ſee ſo frequent there; we did not think it proper to ſet it down as a Rule, That the Birth of a Child does not annul a Codicil, when

* *See the fifteenth Article of the fifth Section of Teſtaments.*

there is no Teſtament. Neither have we put down the contrary in this Article; but we have contented our ſelves with making this Remark here concerning this Difficulty, in which we ſhould be afraid to treſpaſs againſt Equity, if we ſhould lay it down as a general Rule, either that all Codicils are valid when there is no Teſtament, or that they are null when there is a Teſtament which is found to be null. For this firſt Rule would be attended with the Inconvenience that has been juſt now taken notice of, if the Birth of a Child ſhould not annul a Codicil that is not accompanied with a Teſtament. And it may be ſaid of the other Rule of the *Roman* Law, which annuls indifferently all Codicils, when there is a Teſtament which proves to be null, whether the Teſtament be made after or before the Codicil, or be made at the ſame time, that it may alſo have its Inconveniences, except in the Caſes where the Codicils and Teſtaments have ſuch a Connexion with one another, that the Diſpoſitions which they contain ought all of them either to ſubſiſt or periſh together; as for example, if a Teſtator who, having no mind to explain his particular Diſpoſitions by a Teſtament, had only named his Heirs or Executors in the Teſtament, requiring them to execute the Diſpoſitions which he ſhould afterwards make by a Codicil, and accordingly made a Codicil which contained Legacies with which he burdened his Heirs or Executors differently and apart, one with ſome, and the others with others, and that it happened that this Teſtament proved to be null, either by reaſon of the Incapacity of the Heirs or Executors, or for want of ſome Formalities; one might without tranſgreſſing againſt Juſtice or Equity annul this Codicil ſo linked and united to this Teſtament. But if a Teſtator, who, without any Deſign of making a Teſtament, had firſt made a Codicil, containing ſome Diſpoſitions in favour of poor Relations or Servants, or for ſome charitable Uſes, ſhould afterwards chance to make a Teſtament, and inſtitute for his Heir or Executor either his Heir at Law, or even ſome other Perſon; would it be neceſſary, in order to do Juſtice, that if this Teſtament ſhould prove null, the Codicil ſhould likewiſe be annulled, becauſe it is the Rule in the *Roman* Law, that when there is a Teſtament, all Codicils are to follow the Fate thereof?

All that has been ſaid here touching the Difference of Codicils in the Caſes where there is no Teſtament, and in the Caſes where there is, concerns only the Provinces which are governed by the written Law. For as to the Cuſtoms, the Reader has already been ſufficiently informed, that as all the Diſpoſitions which are made there are only Codicils, ſeeing they cannot there make an Heir by a Teſtament, this Difference is of no manner of uſe in them. And as for the Provinces which are governed by the written Law, we have ſeen there, and there is ſtill to be ſeen at this Day, ſeveral Law Suits which are occaſioned by the Difficulties which ariſe from certain Caſes which are pretended to be excepted from the Rule of the *Roman* Law, which annuls all Codicils when there is a Teſtament which is found to be null. It is eaſy to imagine that the Liberty of excepting certain Caſes is a Source of many Law Suits. Which makes it to be wiſhed that there were on this Subject ſome Regulation, which ſhould make the Validity of Codicils either to depend abſolutely on that of Teſtaments, when there are any, or to be wholly independent on them, or which ſhould give ſome Temperament thereto, if any that is juſt and neceſſary can be found.

V.

5. Other Cauſes which annul Codicils.

We may add, for a laſt Rule concerning the Cauſes which may annul a Codicil, that we muſt join to thoſe Cauſes which proceed from the want of Formalities, and to the others that have been juſt now explained, ſome others of the Number of thoſe which annul alſo Teſtaments; ſuch as, if the Perſon who had made a Codicil, dies under an Incapacity incurred by a Sentence of Condemnation; if the Codicil has been made by Force; if he who made it, did afterwards cancel it *f*.

f See the fifth Section of Teſtaments.

SECT. III.

Of Donations made in proſpect of Death.

IT is neceſſary to diſtinguiſh in this Word of Donation in proſpect of Death, two different Ideas of two Things, which it ſignifies in its common Acceptation with us. For we may underſtand by this Word the Deed or Writing which contains the Diſpoſition of the Donor, as we underſtand by

by the Word Codicil the Writing which contains the Legacies; and we may likewiſe underſtand by this Word of Donation in proſpect of Death, the very Diſpoſition it ſelf, that is, the Beneficence contained in the Writing, as the Legacy is contained in the Codicil. Thus, whereas with reſpect to Legacies we make uſe of two diſtinct Words, to wit, that of Codicil, which ſignifies the Writing in which the Legacies are contained, and the Word Legacy, which ſignifies the Diſpoſitions made in the Codicil; in the Caſe of Donations made in proſpect of Death, we have only this one Word which has both Senſes, and which ſignifies equally the Diſpoſition of the Perſon who gives, and the Writing which contains the ſaid Diſpoſition; which may proceed from hence, that uſually the Word Donation in proſpect of Death, is only made uſe of when there is one only Donation made by a particular Act or Writing; whereas Codicils may contain one or more Legacies, and likewiſe other Diſpoſitions.

It was neceſſary to obſerve the Diſtinction of theſe two Meanings which the Word Donation in proſpect of Death, may have, in order to prevent the Reader's forming to himſelf a wrong Idea of what is the Subject-matter of this Section. For he might imagine that this Section ſhould contain all the Rules which may relate to Donations made in proſpect of Death, either as to the Formalities of the Acts, or Writings which contain theſe ſorts of Diſpoſitions, or as to their Nature. And he might likewiſe fancy, that as in the preceding Sections we have explained only what concerns Codicils, without ſaying any thing of Legacies, which ſhall be the Subject-matter of the ſubſequent Title; ſo we ſhould make the like diſtinction in Donations becauſe of Death. But ſince we are to explain the Detail of the Rules relating to Legacies only in the following Title, and that the ſaid Rules are applicable to Donations made in proſpect of Death, they being of the nature of Legacies, we ſhall explain in this Section only ſuch Rules concerning Donations made in proſpect of Death as ought to be ſeparated from thoſe of Legacies, whether it be that the ſaid Rules relate to the Donation it ſelf, that is, to the Liberality of the Donor, or to the Writing which contains it; and it will be eaſy to diſtinguiſh in every Article what it relates to.

Before we proceed to the Explanation of the few Rules of which this Section conſiſts, it is proper to obſerve, that ſeeing the bare Word Donation comprehends the Donations that are to take effect in the Life-time of the Donor, as alſo the Donations that are to have their effect only after the Donor's Death, it is neceſſary to diſtinguiſh aright the Nature of theſe two ſorts of Donations, and for that end to conſult what has been ſaid of this Matter in the Preamble to the Title of Donations which are to have their effect in the Donor's Life-time, and likewiſe what is there ſaid of the Maxim, *To give, and to retain, is good for nothing*; which has been explained in the ſame Place.

The CONTENTS.

1. *Definition of a Donation made in proſpect of Death.*
2. *Wherein Donations made in proſpect of Death, and Codicils do agree, and wherein they differ.*
3. *Formalities of Donations made on account of Death.*
4. *Who may make Donations in proſpect of Death.*
5. *The Rule of Codicils agree to Donations made in proſpect of Death.*
6. *And alſo the Rules of the Legacies.*

I.

A Donation made in proſpect of Death, is a Diſpoſition made by him, who not being willing to ſtrip himſelf in his Life-time of the thing which he intends to give away, deſires that after his Death it may go to the Perſon whom he has a mind to favour with it, and that he ſhould have it rather than his Heirs *a*. *1. Definition of a Donation made in proſpect of Death.*

a Mortis cauſa donatio eſt, cum quis habere ſe vult quam eum cui donat: magiſque eum cui donat, quam hæredem ſuum. *l.* 1. *ff. de mort. cauſ. donat.* §. 1. *in f. inſt. de donat.*

¶ In the *Roman* Law they diſtinguiſhed three ſorts of Donations becauſe of Death. The firſt is of thoſe, where, without any preſent danger of Death, one gives out of a View that he muſt ſome time or other die. The ſecond is of thoſe, where the Donor, finding himſelf in ſome danger of Death, gives in ſuch a manner, that he ſtrips himſelf of the thing which he gives away, and conveys it to the Donee, whom he makes Maſter of it. And the third is of thoſe Donations, where, in the ſame Caſe of a danger of Death, one gives in ſuch a manner that the Thing given

ſhall

ſhall not belong to the Donee till after the Donor's Death. *Julianus libro ſeptimo decimo Digeſtorum tres eſſe ſpecies mortis cauſa donationum ait. Unam cum quis nullo præſentis periculi metu conterritus, ſed ſola cogitatione mortalitatis donat. Aliam eſſe ſpeciem mortis cauſa donationum ait, cum quis imminente periculo commotus, ita donat, ut ſtatim fiat accipientis. Tertium eſſe genus donationum ait, ſi quis periculo motus non ſic det ut ſtatim faciat accipientis, ſed tunc demum cum mors fuerit ſecuta.* L. 2. ff. de mort. cauſ. donat. §. 1. Inſtit. de donat.

We ſhall not ſet down here as Rules, theſe three ways of giving in proſpect of Death. This Diſtinction does not agree with our Uſage; for it is to be obſerved that the ſecond of theſe three ſorts of Donations in proſpect of Death, has a Character quite oppoſite to the eſſential Character we give to Donations made in view of Death, which is that they are revokable, and that they do not put the Donees in poſſeſſion till after the Death of the Donor. Whence it follows, that this ſecond ſort of Donation would be a Donation that takes effect in the Donor's Life-time, ſince it would put the Donee immediately into poſſeſſion. And it is to be obſerved alſo that by our Uſage thoſe who are in imminent danger of Death, thro Sickneſs or otherwiſe, cannot make Donations that are to have their effect in the Donor's Lifetime. As to the two other ſorts of Donations in proſpect of Death, according to our Uſage it is indifferent whether the Perſon who makes the Donation becauſe of Death be in immediate danger of it, or be not. And they muſt all of them be in Writing, and made in due Form.

What has been juſt now ſaid, that by our Uſage thoſe who are in imminent danger of Death cannot make Donations that are to have effect in the Life-time of the Donor, is to be underſtood of Donations of immoveable Goods, or of Sums of Money, or of other things that are not actually delivered to the Donee; for what is actually deliver'd, the Donation thereof is good and valid, unleſs it be done in fraud of the Law, or of Cuſtom, beyond the bounds of what one may give away in proſpect of Death.

It may likewiſe be remarked concerning that Uſage of the *Roman* Law as to Donations in proſpect of Death, that they reckoned in the number of ſuch Donations the other ways by which it may happen that one has ſomething becauſe of the Death of another, which they called *mortis cauſa capio*; as if a Father gave ſomething becauſe of the Death of his Son. It would be needleſs to inſtance in more Examples of this kind, there being nothing in this matter that deſerves our Obſervation. *V. l.* 8. 12. 18. *&* 21. *ff. de mort. cauſa donat. & capion.*

II.

2. *Where-in Donations made in proſpect of Death, and Codicils do agree, and wherein they differ.*

There is this Difference between a Codicil and a Donation in proſpect of Death, that the Name of Codicil is given indifferently to all Acts which contain the ſeveral Diſpoſitions which one may make in the proſpect of Death beſides that of the Inſtitution of an Executor, whatever number there be of the ſaid Diſpoſitions, and of what nature ſoever they may be; but by a Donation in proſpect of Death is properly underſtood, only one ſingle particular Diſpoſition. Thus he who beſides making a Teſtament and Codicils, if he had a mind to make any, or without making either Teſtament or Codicil, had a mind to diſpoſe of a Sum of Money, or other thing, in favour of ſome Perſon, might give to the Act or Writing that ſhould contain the ſaid Diſpoſition, the Name of Donation becauſe of Death, which one does not give to the other Acts which contain ſeveral Diſpoſitions: But he might likewiſe give to this Diſpoſition the Name of Codicil. Thus, it is the ſame thing for a Donation in proſpect of Death, whether it be expreſſed under this Name in a Writing made expreſsly for that purpoſe, or whether it be contained in a Codicil, either under the Name of Legacy, or under that of Donation *b*.

b See the ſixth Article of this Section, and the third Article of the firſt Section of Legacies, and the Texts cited on them. As to this whole Article, the Reader may conſult the Preamble of this Section.

III.

3. *Formalities of Donations made on account of Death.*

Donations made in proſpect of Death being of the ſame Nature with Codicils, the ſame Formalities ought to be obſerved in them: And as five Witneſſes are required to a Codicil, the ſame number is likewiſe neceſſary to a Donain proſpect of Death *c*.

c See the Text cited on the 10th Article of the firſt Section of Codicils, and the Remark there made upon it.

Quinque teſtibus præſentibus. *l. ult. C. de donat. cauſ. mort.*

IV.

4. *Who may make Donations*

The ſame Perſons who may or may not make Teſtaments or Codicils, may alſo

Donations in proſpect of Death.

alſo, or may not make Donations becauſe of Death. For the ſame Capacity is required for this ſort of Diſpoſitions as for the two others *d*.]

d See the ſecond Section of Teſtaments.

V.

5. The Rules of Codicils agree to Donations made in proſpect of Death.

We ought to apply to the Acts or Writings which contain Donations made in proſpect of Death, the other Rules which relate to Codicils, as they may agree with them. And it will be eaſy to diſcern thoſe Rules, without repeating them in this Place *e*.

e See the two preceding Sections.

VI.

6. And alſo the Rules of Legacies.

As to what concerns the Nature of Donations made in proſpect of Death, it being the ſame with that of Legacies *f*, they have alſo the ſame Rules, which ſhall be explained in the following Title.

f Mortis cauſa donationes ad exemplum legatorum redactæ ſunt per omnia. §. 1. *inſt. de donat. V. l. ult. C. de donat. cauſ. mort.*

TITLE II.

Of LEGACIES.

LEgacies are particular Diſpoſitions on account of Death, which diſtinguiſh the Legatees from the Heir or Executor, in that the Legatees ſucceed only to that which is taken off from the Inheritance to be given to them, and that they are as it were particular Succeſſors; whereas the Heir or Executor is univerſal Succeſſor to the whole Maſs of the Goods.

There is likewiſe this Difference between Legatees and Executors, that an Executor cannot be made but by a Teſtament, whereas Legatees may be made not only by a Teſtament, but alſo by a Codicil. And it is the ſame thing for the Legacies, whether they be contained in one or other of theſe two ſorts of Diſpoſitions, which are diſtinguiſh'd with regard to Legacies only in this, that the Legacies left by a Teſtament are due from the Executor, and thoſe left in a Codicil, without a Teſtament, are due from the Heir at Law, or next of kin.

It is neceſſary alſo to remark here, as we have done in other Places, that in the Cuſtoms of *France* if a Teſtator inſtitutes any other Perſon for his Heir or Executor beſides him who has a right to ſucceed by Law, if there were no Teſtament, they do not give him the Name of Heir, but only that of univerſal Legatee. For altho he ſucceeds to all the Goods, and to all the Rights which the Teſtator has power to diſpoſe of; yet the Cuſtoms give the Name of Heir only to the Heir of Blood, to whom they appropriate the Goods which they do not allow the Teſtator to diſpoſe of: And this Legatee is diſtinguiſhed from particular Legatees by this Quality of univerſal Legatee. Thus the Diſpoſition made in his favour is not called the Inheritance, even altho it ſhould comprehend all the Effects of the Teſtator, if he had none but what he had power to diſpoſe of; but it is only called an univerſal Legacy.

Seeing there are ſome Matters which are common both to Legacies, and to the Inſtitution of an Heir or Executor, and that it was neceſſary to explain them under the Title of Teſtaments, we ſhall not repeat here what has been already explained of theſe Matters, as that which concerns the Rules of the Interpretation of the Diſpoſitions of the Teſtator, thoſe relating to Conditions, Deſcriptions, and other Manners which may diverſify the ſaid Diſpoſitions, the Rules concerning the Right of Accretion, of Tranſmiſſion, and others which have been explained under the Title of Teſtaments. Neither ſhall we ſay any thing here of the Formalities neceſſary to Legacies, this Matter having been explained in the ſame Title of Teſtaments, and in that of Codicils, which are the Diſpoſitions by which Legacies are given. And in general the Reader ought to apply to Legacies all the Rules explained in thoſe other Titles, according as they are capable of being applied thereto. And under this Title we ſhall treat of the Rules which are peculiar to the Matter of Legacies.

It is further to be remarked, that under the Name of Legacy, it is neceſſary to comprehend that kind of Diſpoſitions on account of Death which are called particular Fiduciary Bequeſts, diſtinguiſhed from Legacies in the antient *Roman* Law both by their Name and their Nature, but confounded with one another by the latter Laws, which have given to the ſaid Fiduciary Bequeſts the Nature of Legacies, and have made theſe two ſorts of Diſpoſitions equal in every thing *a*. But becauſe there is in

a Per omnia exæquata ſunt legata fideicommiſſis. *l. 1. ff. de legat. 1.*

reality

reality ſome Difference between Legacies and particular Fiduciary Bequeſts, and that we ſhall be obliged to make uſe of this Word of Fiduciary Bequeſt, and to quote Laws in which it is mentioned; it is neceſſary not only to inform the Reader thereof, but to explain here on this Subject that which ought to precede the Rules, in order to make them rightly underſtood.

A Fiduciary Bequeſt is a Diſpoſition by which the Teſtator prays his Heir or Executor to deliver to ſome Perſon either the whole Succeſſion, or a part thereof, or ſomething in particular. The firſt Uſe of Fiduciary Bequeſts was ſuch, that it depended wholly on the Heir or Executor, either to comply with this Requeſt of the Teſtator's, or not to comply with it, as he thought fit: and it was from thence that the *Latin* Word *Fideicommiſſum* came, becauſe it was committed or remitted to the Faith and Integrity of the Heir or Executor; but afterwards the Heirs or Executors were compelled by Law to execute theſe ſorts of Diſpoſitions *b*.

The Fiduciary Bequeſts of the whole Inheritance, or of a part of it, are a Matter which ſhall be explained under the third Title of the fifth Book. And as for particular Fiduciary Bequeſts, altho, as has been juſt now remarked, they have been made like unto Legacies, yet it is neceſſary to diſtinguiſh in theſe Fiduciary Bequeſts two ſorts of Rules: Thoſe which are common to them and to Legacies, which ſhall be explained under this Title: And ſome others that are peculiar to them, which ſhall be explain'd in the ſecond Section of the third Title of the fifth Book.

It is neceſſary finally to remark on the ſubject Matter of this Title, that Donations made in proſpect of Death being diſtinguiſhed from Legacies only by Name, as has been remarked in the third Section of the preceding Title; we muſt apply to thoſe Donations the Rules which ſhall be explain'd under this Title. Thus the Reader muſt remember that what ſhall be here ſaid only of Legacies, ought likewiſe to be underſtood of Fiduciary Bequeſts, and of Donations becauſe of Death, unleſs there be ſome Difference which it will be eaſy to diſcern.

It is not needful to explain here the different kinds of Legacies which had been in uſe in the *Roman* Law. For altho this Knowledge might be of uſe for the right underſtanding of the Texts of ſome Laws, *Juſtinian* having confounded all theſe ſorts of Legacies together, giving to them all the ſame Nature and the ſame Effect *c*, yet the Explanation of this Diſtinction would be uſeleſs. However we may take notice of one way of bequeathing, which had been rejected by the antient Law, and which *Juſtinian* has allowed, and which with us might either be approved or rejected, according to the Circumſtances. It was that Manner of bequeathing which they called by the way of Puniſhment *Pœnæ nomine d*, when the Teſtator ordained or forbad ſomething to his Heir or Executor, or impoſed ſome Condition on him, adding thereto a Penalty either of doing or giving ſomething, in caſe he ſhould fail to execute the Will of the Teſtator. Thus by our Uſage a Teſtator might legally order the Payment of a Legacy at ſuch a time, and impoſe the Payment of Intereſt, as a Puniſhment for his delay to make Payment. Thus a Teſtator might require his Heir or Executor to take into Partnerſhip with him in his Commerce a Perſon to whom he had a mind to procure that Advantage; adding, that in caſe his ſaid Heir or Executor would not receive ſuch a one for his Partner, he ſhould give him a certain Sum of Money. But our Uſage would not approve of a Teſtator's enjoining his Heir or Executor to marry, or not to marry his Daughter to ſuch a one, or if he ſhould contravene his Order to give to ſuch a one the Sum of ſo much. And altho ſuch a Legacy ſeems to be approved by *Juſtinian*, contrary to the antient Law which condemned it *e*, yet it would ſeem to be an Encroachment on the Liberty of Marriage, and by that means be contrary to Decency and Good Manners.

c §. 2. *inſt. de legat. l.* 1. *C. comm. de legat.*

d §. *ult. inſt. de leg. l. un. C. de his quæ pœn. non.*

e V. de §. *ult.*

b V. tit. inſt. de fideicom. hared. & tit. de ſing. reb. per fideicom. relict.

SECT. I.

Of the Nature of Legacies, and of particular Fiduciary Bequeſts.

THE Remark which has been made in the Preamble of this Title on Fiduciary Bequeſts, explains the Reaſon why we add to the Title of this Section particular Fiduciary Bequeſts.

The CONTENTS.

1. *Definition of a Legacy.*
2. *Definition of a particular Fiduciary Bequeſt.*
3. *Legacies, particular Fiduciary Bequeſts, and Donations becauſe of Death, are all of the ſame Nature.*
4. *Wherein conſiſts the Validity of theſe Diſpoſitions.*
5. *Their Nature, and the Formalities to be obſerved in them.*
6. *Eſſential Characters of theſe Diſpoſitions.*
7. *A Teſtator may burden the Legatees with Legacies to other Perſons.*
8. *A thing left to ſeveral Perſons is divided equally among them.*
9. *A Legatee of ſeveral Legacies cannot reſtrain himſelf to thoſe that are without Burden.*
10. *Legacies are only due after all the Debts are paid.*

I.

1. *Definition of a Legacy.*

A Legacy is a particular Diſpoſition becauſe of Death in favour of ſome Perſon, either by a Teſtament or Codicil *a*.

a Legatum eſt donatio teſtamento relicta. *l.* 36. *ff. de legat.* 2.

Legatum eſt donatio quædam à defuncto relicta, ab hærede præſtanda. §. 1. *inſtit. de legat.*

Legatum eſt delibatio hæreditatis, qua teſtator ex eo quod univerſum hæredis foret, alicui quid collatum velit. *l.* 116. *ff. de legat.* 1.

II.

2. *Definition of a particular Fiduciary Bequeſt.*

A particular Fiduciary Bequeſt is a Diſpoſition by which the Executor or a Legatee is intreated to reſtore, or to give to a third Perſon a certain thing *b*.

b Poteſt quis etiam ſingulas res per fideicommiſſum relinquere: veluti fundum, argentum, hominem, veſtem, & pecuniam numeratam. Et vel ipſum hæredem rogare ut alicui reſtituat, vel legatarium. *inſt. de ſing. reb. per fideicom. relict.*

III.

3. *Legacies, particular Fiduciary Bequeſts, and Donations becauſe of Death, are all of the ſame Nature.*

It is the ſame thing for the Validity of the Diſpoſitions of a Teſtator, whether he expreſs himſelf in relation thereto in the Words of a Legacy, or of a Fiduciary Bequeſt, or Donation becauſe of Death; for all theſe ſorts of Diſpoſitions have the ſame Nature and the ſame Uſe *c*: And whether the Teſtator expreſs himſelf in Terms of Intreaty to his Executor, or that he commands him, or that without addreſſing himſelf to the Executor, he explains his Will, the Executor will be bound to execute it *d*. And it is the ſame thing if it is a Legatee whom the Teſtator requires or intreats to give or remit a Sum of Money, or any other thing to a third Perſon *e*.

c Per omnia exæquata ſunt legata fideicommiſſis. *l.* 1. *ff. de legat.* 1.

Et fideicommiſſum, & mortis cauſa donatio appellatione legati continetur. *l.* 87. *ff. de legat.* 3.

Mortis cauſa donationes ad exemplum legatorum redactæ ſunt per omnia. §. 1. *inſtit. de donat.*

d Omne verbum ſignificans teſtatoris legitimum ſenſum legare vel fideicommittere volentis, utile atque validum eſt ſive directis verbis, quale eſt, *jubeo*, forte, ſive precariis utatur teſtator, quale eſt *rogo*, *volo*, *mando*, fideicommitto. *l.* 2. *C. com. de legat.*

e Et hæc diſpoſuimus non tantum ſi ab hærede fuerit legatum derelictum vel fideicommiſſum, ſed & ſi à legatario, vel fideicommiſſario, vel alia perſona quam gravare fideicommiſſo poſſumus, fideicommiſſum cuidam relinquatur. *l.* 1. *C. comm. de leg.* See the ſeventh Article.

IV.

4. *Wherein conſiſts the Validity of theſe Diſpoſitions.*

The Validity of Legacies, of Fiduciary Bequeſts, and of Donations on account of Death, implies two things, the Quality of the Diſpoſition, which is that wherein their Nature does conſiſt, and the Formalities of the Acts which contain them, whether they be Teſtaments, Codicils, or Donations *f*.

f See the following Article.

V.

5. *Their Nature, and the Formalities to be obſerved in them.*

The Quality of theſe Diſpoſitions which conſtitutes their Nature, conſiſts in the eſſential Characters which the Laws preſcribe, and on which it depends whether they have their Effect, or whether they be null. And the Formalities reſpect the Acts or Writings which contain theſe Diſpoſitions, and which are the Proof of their Verity; which is held to be well eſtabliſhed when the ſaid Acts are according to the Form regulated by Law. Theſe Formalities have been explained in their proper Places *g*. And as for the Nature and Characters of theſe Diſpoſitions, we muſt join to what has been ſaid of that Matter in the three firſt Articles, all the Rules of this Title, and of the preceding Titles, in ſo far as we can judge they have any relation to them.

g See the third Section of Teſtaments, the firſt Section of Codicils, and the third Article of the third Section of the ſame Title.

VI.

6. *Eſſential Characters of theſe Diſpoſitions.*

It is eſſential to the Validity of theſe three ſorts of Diſpoſitions, that the Perſons who make them have the power to do it; that thoſe in favour of whom they are made be not incapable of them; and that the things which are diſpoſed of be ſuch as may be diſpoſed of. Theſe three

three Characters ſhall be the ſubject Matter of the two following Sections, where we muſt uuderſtand what ſhall be ſaid only of Legacies; as if it had been alſo expreſſed of Fiduciary Bequeſts, and of Donations becauſe of Death *h*.

h See the two following Sections.

VII.

7. A Teſtator may burden the Legatees with Legacies to other Perſons.

A Teſtator may burden with a Legacy, or a Fiduciary Bequeſt, not only his Executor, but likewiſe a Legatee, as has been ſaid in the third Article. And if he had made a Teſtament, or a Codicil, or a Donation becauſe of Death, he might burden by new Diſpoſitions thoſe to whom he had given ſomething by former ones, which having been made only in proſpect of Death, may ſuffer this Diminution *i*.

i Eorum, quibus mortis cauſâ donatum eſt, fideicommitti quoquo tempore poteſt. *L.* 77. §. 1. *ff. de legat.* 2. See the laſt of the Texts cited on the third Article.

We have added in the Article, that the Teſtator may charge with Legacies thoſe to whom he has given ſomething by preceding Diſpoſitions made in proſpect of Death; for he could not impoſe new Burdens on thoſe to whom he had made ſimple Donations, that were to have their Effect in his Life-time.

VIII.

8. A thing left to ſeveral Perſons is divided equally among them.

If one and the ſame thing is bequeathed to two or more Perſons, without diſtinction of Portions, it will be equally divided among them, ſhare and ſhare alike *l*.

l In legato pluribus relicto, ſi partes adjectæ non ſunt, æquæ ſervantur. *l.* 19. §. *ult. ff. de leg.* 1.

IX.

9. A Legatee of ſeveral Legacies cannot reſtrain himſelf to thoſe that are without Burden.

As one may bequeath one and the ſame thing to ſeveral Perſons, ſo one may leave to one Perſon different Legacies, either without a Charge or with a Charge: And the Legatee may accept thoſe which he ſhall think fit, and reject the others; unleſs it be that thoſe which he refuſes would oblige him to ſome Charge. For in this Caſe he could not divide the Legacies, and by accepting one, he would be liable to the Charges of the others *m*.

m Duobus legatis relictis, unum quidem repudiare, alterum vero amplecti poſſe, reſpondetur. Sed ſi unum ex legatis onus habet & hoc repellatur, non idem dicendum eſt. *l.* 5. *d. l.* §. 1. *ff. de leg.* 2.

X.

10. Legacies are only due after all the Debts are paid.

We may add as a laſt Rule of the Nature of Legacies, and of other Diſpoſitions on account of Death, that ſince Teſtators can diſpoſe only of their Goods, the Debts owing by the Teſtator, even thoſe that are the leaſt favourable, are preferred before all his Diſpoſitions of what kind ſoever they be *n*.

n Sicuti legata non debentur, niſi deducto ære alieno aliquid ſuperſit, nec mortis cauſa donationes debebuntur, ſed infirmantur per æs alienum. Quare ſi immodicum æs alienum interveniat, ex re mortis cauſa ſibi donata nihil aliquis conſequitur. *l.* 66. §. 1. *ff. de leg. Falc.*

SECT. II.

Who may give Legacies, and who may receive them.

WE muſt underſtand what ſhall be ſaid of Legacies hereafter, in the Senſe which comprehends particular Fiduciary Bequeſts, and Donations becauſe of Death, as has been already ſufficiently remarked; and it is for Brevity's ſake we inſert here only the Word Legacy.

The CONTENTS.

1. *Who may give Legacies.*
2. *At what time are we to conſider the Capacity or Incapacity of the Perſon who leaves the Legacy.*
3. *Who may receive Legacies.*
4. *Perſons unworthy of Legacies.*
5. *The ſame.*
6. *Particular Rules concerning Perſons who may receive Legacies.*
7. *One may bequeath Alimony to a Perſon incapable of other Legacies.*
8. *The Teſtator may leave a Legacy to his Executors.*
9. *A Legacy left to two Executors how to be divided.*
10. *The Teſtamentary Heir, who is alſo a Legatee, may keep to his Legacy, and renounce the Inheritance.*
11. *One may leave a Legacy to unknown Perſons, and in what Senſe.*
12. *A Legacy to one of many Perſons.*
13. *A Legacy to a Town, or other Corporation.*

I.

1. Who may give Legacies.

The ſame Perſons who may make a Teſtament, may give Legacies. Thus, to know if a Perſon may give a Legacy, we muſt examine if he is not under ſome of the Incapacities which hinder a Man from making a Teſtament, and which have been explained in their proper Place *a*.

a See the 2d Section of Teſtaments.

II.

II.

2. At what time are we to consider the Capacity or Incapacity of the Person who leaves the Legacy.

Seeing the Rules touching the Incapacity of bequeathing are the same with those of the Incapacity of making a Will, the Rules concerning the time when we are to consider the Incapacity of the Person who disposes, are the same with respect to Legacies, as with respect to the Institution of an Executor, and they are explained in the same Place *b*.

b See the 14th Article, and those that follow, of the 2d Section of Testaments.

III.

3. Who may receive Legacies.

All Persons who are capable of being named Executors of a Will, are also capable of receiving Legacies; and it is only such as are capable of being Executors that are capable of being Legatees. Thus, in order to know who those Persons are, we need only to consult the Rules which are set down in their proper Place *c*.

c See the same 2d Section of Testaments.

IV.

4. Persons unworthy of Legacies.

We must not rank in the number of Persons incapable of Legacies those who render themselves unworthy of them. Thus, for example, a Legatee who by collusion with the next of kin, or out of some other Motive, should conceal the Testament in which he had a Legacy left him, would render himself unworthy of it *d*. And every Legatee in whom should be found any one of the Causes which render the Heir or Executor unworthy of the Inheritance, and which have been explained in their Place, would be also unworthy of the Legacy *e*.

d Si legatarius vel fideicommissarius, celaverit testamentum, & postea hoc in lucem emerserit, an posset legatum sibi relictum is qui celaverit ex eo testamento vindicare dubitabatur, quod omnino inhibendum esse censemus, ut non accipiat fructum suæ calliditatis, qui voluit hæredem hæreditate sua defraudare. Sed hujusmodi legatum illi quidem auferatur. Maneat autem quasi pro non scripto apud hæredem: ut qui alii nocendum esse existimavit, ipse suam sentiat jacturam. *l.* 25. *C. de legat.*

e See the 3d Section of Heirs and Executors in general.

V.

5. The same.

We must not reckon among the Persons unworthy of Legacies, him who being next of kin, had impugned as null the Testament which contained a Legacy in his favour. For altho the Testament were confirmed against his Pretension, yet seeing it did not any ways injure the Honour of the Deceased, and that he only exercised a Right which he ought not to be deprived of by this Legacy, nothing could be imputed to him that should render him unworthy of the Legacy. But if this Legatee, after having received his Legacy, should impeach the Will as being forged, pretending that the Executor had made it, and the Will should be confirmed by Sentence, he would lose the Legacy because of the Injury he had done to this Executor. But if the Legatee who is next of kin, having received the Legacy left him, should afterwards attempt to annul the Testament because of some Flaw therein, which ought to have this effect, such as the Incapacity of the Person instituted Heir or Executor, his Action would be received, and it would be no bar to him that he had approved the Testament by receiving his Legacy. And in general when the Question is, whether a Legatee who receives his Legacy loses the Right which he may have to the Inheritance; it is by the Circumstances of his Person, of his Condition, of his Age, and others, that it ought to be decided *f*.

f Ille qui non jure factum (testamentum) contendit, nec obtinuit, non repellitur ab eo quod meruit. Ergo qui legatum secutus, postea falsum dixit amittere debebit quod consecutus est. De eo vero qui legatum accepit, si neget jure factum esse testamentum, Divus Pius ita rescripsit: *Cognati Sophronis licet ab hærede instituto acceperant legata, tamen si is ejus conditionis fuerit visus, ut obtinere hæreditatem non possit, & jure intestati ad eos cognatos pertinet, petere hæreditatem ipso jure poterunt.* Prohibendi autem sint an non, ex cujusque persona, conditione, ætate, cognita causa a judice constituendum erit. *l.* 7. §. 1. *ff. de his quæ ut ind. auf.* See the second and following Articles of the third Section of an undutiful Testament.

VI.

6. Particular Rules concerning Persons who may receive Legacies.

Altho for understanding who the Persons are to whom Legacies may be left, it be sufficient to know, that whoever is not incapable of being Heir or Executor may be a Legatee; yet there are in relation to this Subject some particular Rules, which it is necessary to distinguish from this general Rule, either because they are Exceptions to it, or for other Considerations, which one will be able to judge of by the Rules which follow *g*.

g See the following Articles.

VII.

7. One may bequeath Alimony to a Person

The Incapacity of inheriting or receiving a Benefit by some Disposition made in prospect of Death, does not comprehend Legacies of Alimony. For the

incapable of other Legacies.

the ſame being of an abſolute Neceſſity to whoſoever lives, it is but equitable that all Perſons whatſoever ſhould be capable of receiving it. Thus one may bequeath Alimony even to thoſe who are under Sentence of Death, or condemned to other Puniſhments which imply Civil Death: And whilſt they continue in Life, they may enjoy a Legacy limited to this Uſe *h*.

h Si in metallum damnato quid extra cauſam alimentorum relictum fuerit, pro non ſcripto eſt, nec ad fiſcum pertinet. Nam pœnæ ſervus eſt, non Cæſaris. Et ita Divus Pius reſcripſit. *l.* 3. *ff. de his quæ pro non ſcript.*

The ſame Motives which make a Legacy of Alimony to a Perſon condemned to Death, or to any other Puniſhment which implies Civil Death, to ſubſiſt, ſeem to juſtify the like Legacy in favour of an Alien who ſhould ſtand in need of this Relief: And his Incapacity of inheriting ought not to exclude him from the benefit of a Legacy of this nature.

VIII.

8. *The Teſtator may leave a Legacy to his Executors.*

A Teſtator may leave a Legacy not only to other Perſons beſides his Executors, but even to the Executors themſelves, if they be more in Number than one; for one Executor alone having all the Goods of the Inheritance, he cannot owe himſelf a Legacy. Thus, where there are two or more Executors, the Teſtator may bequeath either to any one of them alone, or to every one of them, what he thinks fit, and diſtinguiſh them by particular Diſpoſitions of certain Things *i*.

i Si uni ex hæredibus fuerit legatum, hoc deberi ei officio judicis familiæ erciſcundæ manifeſtum eſt. *l.* 17. §. 2. *ff. de leg.* 1.

IX.

9. *A Legacy left to two Executors, how to be divided.*

If a Teſtator had left a Legacy in common to two of his Executors or Teſtamentary Heirs, they would ſhare it by equal Portions, altho their Portions in the Inheritance were unequal, unleſs the Teſtator had diſtinguiſhed the Portions of the Legacy, in the ſame manner as thoſe of the Inheritance. But not having done it, their Condition, altho different in reſpect of the Inheritance, is the ſame in the Legacy *l*.

l Si ex pluribus hæredibus ex diſparibus partibus inſtitutis, duobus eadem res legata ſit: hæredes, non pro hæreditaria portione, ſed pro virili id legatum habere debent. *l.* 67. §. 1. *ff. de leg.* 1.

X.

10. *The teſtamentary Heir, who is alſo a Legatee, may keep*

If the Teſtamentary Heir, who is likewiſe a Legatee, renounces the Inheritance, he will not be for that depriv'd of his Legacy. For it was free for him to abſtain from one of the two Favours, and to keep to the other *m*. And if it was a Son that was inſtituted Heir in part, and named a Legatee by the Teſtament of his Father, he might likewiſe keep to the Legacy, without being charged with contravening the Will of the Teſtator his Father; ſince he might very decently excuſe himſelf from medling in the Affairs of the Inheritance, and leave it to thoſe who were called to the Succeſſion with him *n*.

to his Legacy, and renounce the Inheritance.

m Sed & ſi abſtinuerit ſe hæreditate, conſequi eum hoc legatum poſſe conſtat. *l.* 17. §. 2. *ff. de leg.* 1.

n Filio pater quem in poteſtate retinuit, hæredi pro parte inſtituto, legatum quoque relinquit: duriſſima ſententia eſt exiſtimantium denegandam ei legati petitionem, ſi patris abſtinuerit hæreditate, non enim impugnatur judicium ab eo qui juſtis rationibus noluit negotiis hæreditariis implicari. *l.* 87. *eod. l.* 12. *C. de leg.*

XI.

11. *One may leave a Legacy to unknown Perſons, and in what ſenſe.*

A Teſtator may leave a Legacy to a Perſon unknown, and even uncertain, provided that ſome Circumſtances mark his Intention, and the Motive that induced him to it, by which we may come at the knowledge of the Perſon to whom he has left the Legacy. Thus, for example, if a Teſtator had bequeathed a Sum of Money to a Perſon who ſhould do ſuch a Piece of Service either to himſelf, or ſome one of his Children, or of his Friends; he who ſhould happen to be the Perſon who rendered this Service, would be the Legatee, altho the Teſtator had died without knowing who had done him that good Office *o*.

o Quidam relegatus facto teſtamento, poſt hæredis inſtitutionem, & poſt legata quibuſdam data, ita ſubjecit: *Si quis ex hæredibus, cæteriſve amicis, quorum hoc teſtamento mentionem habui, ſive quis alius reſtitutionem mihi impetraverit ab imperatore, & ante deceſſero, quam ei gratias agerem; volo dari ei qui id egerit, a cæteris hæredibus aureos tot.* Unus ex his quos hæredes ſcripſerat impetravit ei reſtitutionem, & antequam id ſciret deceſſit. Cum de fideicommiſſo quæreretur, an deberetur, conſultus Julianus reſpondit deberi. Sed etiam ſi non hæres vel legatarius, ſed alius ex amicis curavit eum reſtitui, & ei fideicommiſſum præſtari. *l.* 5. *ff. de reb. dub.*

XII.

12. *A Legacy to one of many Perſons.*

One may leave a Legacy to one Perſon among many, as to one of the Children of a Son, or of a Relation, or of a Stranger; whether the Teſtator explain the Circumſtances which might diſtinguiſh this Legatee, or that he leaves the Choice of him to his Heir or Executor, or to ſome other Perſon. And in the firſt Caſe, if the Legatee is ſufficiently diſtinguiſhed, he alone will have the Legacy, or if he is not ſufficiently

ciently diſtinguiſhed: all the Children will have their Share in it. But in the ſecond Caſe, he who ſhall have been named by the Heir or Executor, or other Perſon, to whom the Teſtator had given the Power of naming, will be the Legatee. And if he who had the power of naming, dies without having named any one, the Legacy will belong either wholly to one Child alone, if there remains no more than one, or it will belong in common to thoſe who ſhall remain. Thus, altho the Legacy were deſtined only for one Child, yet none of them being diſtinguiſh'd from the others, it would go to them all *p*.

p Si hæres damnatus eſſet, decem uni ex libertis dare, & non conſtituerit cui daret: hæres omnibus eadem decem præſtare cogendus eſt. *l.* 17. §. 1. *ff. de leg.* 2. *v. l.* 24. *eod.*

Si cum forte tres ex familia eſſent ejus qui (*uni ex familia*) fideicommiſſum reliquit eodem vel diſpari gradu: ſatis erit uni reliquiſſe: nam poſtquam paritum eſt voluntati, cæteri conditione deficiunt. *l.* 67. §. 2. *ff. de legat.* 2.

Rogo fundum cum morieris reſtituas, ex libertis cui voles. Quod ad verba attinet, ipſius erit electio. Nec petere quiſquam poterit, quamdiu præferri alius poteſt. Defuncto eo, priuſquam eligat, petent omnes. Itaque eveniet, ut quod uni datum eſt, vivis pluribus unus petere non poſſit, ſed omnes petant quod non omnibus datum eſt. Et ita demum petere poſſit unus, ſi ſolus moriente eo ſuperſuit. *d. l.* 67. §. 7.

XIII.

13. *A Legacy to a Town or other Corporation.*

One may leave a Legacy to a Town, or other Corporation whatſoever, whether Spiritual or Secular, and direct that it be applied to ſome honeſt and lawful uſe, ſuch as for publick Buildings, for maintaining the Poor, or for other charitable Uſes, or for the publick Good of the ſaid Society *q*. And we muſt conſider as a Legacy left to a Town or other Corporation, that which is left to thoſe who compoſe the ſaid Body, as to the Inhabitants of ſuch a Town, or other Place, to the Canons of ſuch a Chapter, to the Monks of ſuch a Monaſtery *r*. But we muſt not reckon in the number of Corporations capable of Legacies, thoſe which are not duly eſtabliſhed and approved. But if the Legacy were left perſonally to the particular Perſons who had a mind to form themſelves into a Society, that they might reap the Benefit of the Legacy, either every one for himſelf in particular, or for the So-Society in general, when it ſhould be eſtabliſhed, the Legacy might ſubſiſt according to the Circumſtances *s*.

q Si quid relictum ſit civitatibus omne valet, ſive in diſtributionem relinquatur, ſive in opus, ſive in alimenta, vel in eruditionem puerorum, ſive quid aliud. *l.* 117. *ff. de leg.* 1.

Quod in alimenta ætatis puta infirmæ (ſenioribus, vel pueris, puelliſque) relictum fuerit, ad honorem civitatis pertinere reſpondetur. *l.* 122. *eod.*

r Civibus civitatis legatum vel fideicommiſſum datum civitati relictum videtur. *l.* 2. *ff. de reb. dub.*

s Cum Senatus temporibus Divi Marci permiſerit collegiis legare: nulla dubitatio eſt, quod ſi corpori cui licet coire legatum ſit, debeatur. Cui autem non licet, ſi legetur, non valebit, niſi ſingulis legetur. Hi enim, non quaſi collegium, ſed quaſi certi homines admittentur ad legatum. *l.* 20. *ff. de reb. dub.*

SECT. III.

What things may be deviſed.

As to things that may be deviſed, it is neceſſary to obſerve a Diſtinction of Legacies of two ſorts. One is of the Legacies of things of which the Property paſſes to the Legatee; and the other is of Legacies which do not convey to the Legatee the Property of any thing, but only an Enjoyment, or the Uſe and Profits of a thing for ſome time, or during his Life, ſuch as an Uſufruct, a Penſion, Alimony, or other Annuity. The Legacies of the firſt of theſe two kinds ſhall be explained in this and the following Section, and thoſe of the ſecond ſort ſhall be the ſubject Matter of the fifth Section.

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I.

1. One may deviſe every thing that is in Commerce.

ONE may deviſe all ſorts of things, Moveables or Immoveables, Rights, Services, and things of any other kind that are in Commerce, and that may paſs from the uſe of one Perſon to that of another *a*.

a Corpora legari omnia & jura, & ſervitutes poſſunt. *l.* 41. *ff. de legat.* 1. See the following Article.

II.

2. One cannot deviſe things that are publick or conſecrated.

Since one can deviſe only what may paſs to the Uſe of the Legatee, the Legacy of a publick thing, or of a conſecrated Place, would be without Effect, and the Legatee would not ſo much as have the Value of theſe ſorts of things, whether the Teſtator was ignorant of the Quality of the things, or knew it. And in this laſt Caſe ſuch a Diſpoſition would be the Act of a Madman *b*.

b Campum martium, aut Forum Romanum, vel Ædem ſacram legari non poſſe conſtat. Sed & ea prædia Cæſaris quæ in formam patrimonii redacta ſub procuratore patrimonii ſunt, ſi legentur, nec æſtimatio eorum debet præſtari. *l.* 39. §. *penult. & ult. ff. de legat.* 1. Furioſi eſt talia legata teſtamento adſcribere. *dict. l.* §. 8. *in f.*

What is ſaid in this Article of a conſecrated Place is to be underſtood of holy, ſacred, or conſecrated Places that are ſet apart for publick uſe, ſuch as a Church or Church-Yard. For the Legacy of a Houſe in which there were a Chapel for the uſe of the ſaid Houſe, would comprehend the Chapel, in the ſame manner as the Legacy by an Eccleſiaſtick of his Silver Chapel, would take in the conſecrated Plate belonging to it.

III.

3. One may bequeath a thing belonging to another Perſon.

Altho one cannot diſpoſe of what belongs to others, yet a Teſtator may bequeath a thing which belongs to another *c*. And ſuch a Legacy may have its effect, or not have it, according to the Rules which follow.

c Non ſolum teſtatoris vel hæredis res, ſed etiam aliena legari poteſt. §. 4. *inſt. de leg.*

¶ Altho it may ſeem ſomewhat ſtrange that one can bequeath a thing which he has no right to diſpoſe of, and eſpecially a thing which he knows to be another's, and that it does not ſeem poſſible that one in his right Senſes ſhould make ſuch a Diſpoſition; however ſeeing a Teſtator may oblige his Heir or Executor to purchaſe an Eſtate for the uſe of a Legatee, this would be in effect to bequeath a thing that is another's. Thus we muſt underſtand what ſhall be ſaid in the following Articles, as meant of Diſpoſitions of this Quality, or ſuch that one may judge that the Teſtator did not intend to make a ridiculous Legacy of a Houſe, for inſtance, belonging to his Neighbour, without having any Circumſtance that may juſtify ſuch a Diſpoſition from the Imputation of Extravagance. For it ought to have ſome Foundation and ſome Motive that may agree with good Senſe, and render it juſt.

It would ſeem that it is only in this Senſe that we are to underſtand the Rules which we find in the *Roman* Law touching this Matter, and that the Authors of thoſe Rules neither could, nor intended thereby to authorize the impertinent Diſpoſitions of things to which neither the Teſtator nor his Heir or Executor had any right, and when there was no Circumſtance that could make ſuch a Diſpoſition appear to be reaſonable; as we ought likewiſe to believe, that by permitting a Teſtator to bequeath what did not belong to him, they did not thereby mean that a Teſtator might in conſcience give away, or a Legatee retain a thing bequeathed, which belonged neither to the Teſtator, nor to his Heir or Executor. We add this laſt Reflexion, becauſe of the Sentiment of ſome Authors, who have been of opinion that the Canon Law condemns as unlawful all Legacies of things belonging to other Perſons; which they found upon the Decretal of the fifth Chapter *de teſtamentis*, altho that Decretal be only in a particular Caſe, where the Legatee being in poſ-

ſeſſion of the Thing bequeathed, refuſed to give it back, pretending to found his Right to the Thing on the Rule of the Civil Law, which had permitted the Teſtator to bequeath it to him. No Perſon could ever imagine, that in ſuch a Caſe the Legacy ought to diveſt the Proprietor of his Right. Theſe are the Words of that Decretal: *Filius noſter F. conqueſtus eſt, quod quondam P. pater ſuus aliqua Eccleſiæ veſtræ, ſepulturæ ſuæ gratia, juris alieni reliquit. Et quidem leges hujus ſæculi hoc habent, ut hæres ad ſolvendum cogatur ſi auctor ejus rem legavit alienam: ſed quia lege Dei, non autem lege hujus ſæculi vivimus, valde mihi videtur injurius, ut res tibi legata, quæ cujuſdam Eccleſiæ eſſe perhibentur, a te teneantur, qui aliena reſtituere debuiſti.* It is true, that the Terms of this Decretal ſeem to condemn in general the Rule of the Civil Law, as being oppoſite to the Divine Law; but ſeeing it is only with reſpect to the Injuſtice of this Legatee, and that a Legacy conformable to the Remark we have juſt now made, or to the Caſe which ſhall be explained in the ſixth Article, would have nothing in it contrary to the Divine Law, it is neceſſary, in order to give to this Decretal its proper and juſt Meaning, to apply it rather to the bad Uſe that one would make of the Rule of the Civil Law, than to the Rule it ſelf.

IV.

4. A Teſtator may bequeath a Thing which he knows is not his own.

If the Teſtator knew that the Thing which he bequeathed was not his own, the Teſtamentary Heir or Executor will be bound either to give the Thing it ſelf to the Legatee, if he can have it of the Owner at a reaſonable Rate *d*; or if he cannot purchaſe it, or will not *e*, he muſt give the Value of it. For the Intention of the Teſtator was, that the Legatee ſhould reap the Benefit of the Legacy. But it will not be preſumed that the Teſtator knew that what he bequeathed was not his own, unleſs this Fact be proved; and it is the Legatee that is to make proof it; for he who is the Demandant is obliged to eſtabliſh his Right *f*.

d Aliena (res) legari poteſt, ita ut hæres cogatur redimere eam, & præſtare: vel ſi eam non poteſt redimere, æſtimationem ejus dare. §. 4. *inſt. de leg.*

Si ædes alienas ut dares damnatus ſis, neque eas ulla conditione emere poſſis, æſtimare judicem oportere Atteius ſcribit, quanti ædes ſint: ut pretio ſoluto, hæres liberetur. *l.* 30. §. *ultimo ff. de leg.* 3.

e Idem juris eſt, & ſi potuiſſes emere, non emeres. *d.* §. *ult. in f.*

f Et verius eſt ipſum qui agit, id eſt legatarium, probare oportere, ſciviſſe alienam rem legare defunctum: non hæredem probare oportere, ignoraſſe alienam: quia ſemper neceſſitas probandi incumbit illi qui agit. §. 4. *in f. inſt. de leg.* See the following Article.

V.

5. The Legacy is null, if the Teſtator thought that the Thing he bequeathed was his own.

If it is not proved that the Teſtator knew that the Thing which he bequeathed was not his own, the Legacy will be null. For it is preſumed, that he gave it away only becauſe he thought it was his own, and that otherwiſe he would not have charged his Teſtamentary Heir or Executor with a Legacy of this Nature *g*.

g Quod autem diximus alienam rem poſſe legari, ita intelligendum eſt, ſi defunctus ſciebat alienam rem eſſe, non ſi ignorabat. Forſitan enim ſi ſciviſſet alienam rem eſſe non legaſſet. Et ita Divus Pius reſcripſit. §. 4. *inſt. de leg.*

Videri potius quod habere ſe crederet, quam quod onerare hæredes vellet, legaſſe. *l.* 36. *in f. ff. de uſu & uſufr. leg.*

VI.

6. Exception to the foregoing Rule.

If the Legacy of a Thing which the Teſtator took to be his own, and which was not ſo, had been given in favour of a near Relation of the Teſtator's, or of a Perſon of that Conſideration that it would make it a Duty in the Teſtator to leave him ſuch a Legacy; it would have the Effect that the Circumſtances might demand. Thus, for example, if a Teſtator had bequeathed to his Widow whom he left without an Eſtate, the Uſufruct of ſome Land or Tenement which was not his own, and which he believed was his own, thinking that the ſaid Land or Tenement was part of a Succeſſion that had fallen to him a little before his Death; the Teſtamentary Heir or Executor of this Teſtator would be obliged to pay to the ſaid Widow an Annuity to the Value of that Uſufruct, or the Uſufruct it ſelf, if he could agree for it with the Proprietor at a reaſonable Price *h*.

h Cum alienam rem quis reliquerit, ſiquidem ſciens: tam ex legato, quam ex fideicommiſſo, ab eo qui legatum ſeu fideicommiſſum meruit, peti poteſt. Quod ſi ſuam eſſe putavit, non aliter valet relictum, niſi proximæ perſonæ vel uxori, vel alii tali perſonæ datum ſit, cui legaturus eſſet, & ſi ſciſſet rem alienam eſſe. *l.* 10. *C. de legat.*

VII.

7. If the Thing belongs to the Teſtamentary Heir or Executor, it is equal

If the Thing bequeathed did belong to the Teſtamentary Heir or Executor, it would be the ſame thing whether the Teſtator knew or were ignorant of that Fact; and the Teſtamentary Heir would be bound to acquit the Legacy. For even

whether the Teſtator know or be ignorant of this Fact.

even altho this Teſtator had believed that the Thing was his own, yet we ought not to preſume in this Caſe, that if he had known that it was not his own, he would not have bequeathed it, and would not have been willing to burden his Teſtamentary Heir with the procuring it ſome other way; ſince he might have very reaſonably judged that it would be as eaſy for his Teſtamentary Heir to give that which was his own, as that which ſhould be a part of the Inheritance. Thus, we ought to preſume on the contrary, that he having a mind to leave this Legacy, would not have been diverted from doing it, altho he had known that the Thing belonged to his Teſtamentary Heir or Executor *i*.

i Si rem tuam quam exiſtimabam meam, te hærede inſtituto, Titio legem: non eſt Neratii Priſci ſententiæ, nec conſtitutioni locus: qua cavetur, non cogendum præſtare legatum hæredem. Nam ſuccurſum eſt hæredibus, ne cogerentur redimere, quod teſtator ſuum exiſtimans reliquit. Sunt enim magis in legandis ſuis rebus, quam in alienis comparandis & onerandis hæredibus faciliores voluntates. Quod in hac ſpecie non evenit, cum dominium rei ſit apud hæredem. *l.* 67. §. 8. *ff. de legat.* 2.

VIII.

8. If the Thing bequeathed belongs already to the Legatee, the Legacy is uſeleſs.

If the Thing bequeathed did belong to the Legatee, the Legacy would be null. For he could not acquire a new Right to what was already entirely his own. And we ought to preſume that if the Teſtator had known it, he would not have made ſuch a Diſpoſition. Thus it would remain always null, altho it ſhould afterwards happen that this Legatee ſhould alienate the Thing that was bequeathed to him: and he could not ſo much as demand the Value of it *l*.

l Sed ſi rem legatarii quis ei legaverit, inutile eſt legatum: quia quod proprium eſt ipſius, amplius ejus fieri non poteſt. Et licet alienaverit eam, non debetur nec ipſa res, nec æſtimatio ejus. §. 10. *inſt. de legat. l.* 13. *C. eod.*

IX.

9. If the Legatee has acquired by a lucrative Title what was bequeathed to him, the Legacy will be null.

If after that a Teſtator had bequeathed a Thing which was not his own, and which he knew was not his own, the Legatee had acquired the Property of it for a valuable Conſideration, as in a Sale, the Legacy would ſubſiſt, and the Value of it would be due to the Legatee; for he ought to reap the Profit of the Legacy. But if he had acquired the Thing by a lucrative Title, as by Gift, or by another Legacy from the Proprietor thereof; the Legacy of the Teſtator, who was not Owner of the Thing bequeathed would remain null, unleſs it ſhould appear that his Intention was that the Legatee ſhould have in this Caſe, beſides the Thing it ſelf, likewiſe its Value. But if this Intention was not very evident, it would be ſufficient for the Legatee to have without any Charges the very Thing which the Teſtator intended to give him, altho he came by it another way, ſince by that the Intention of the Teſtator would be accompliſhed *m*.

m Si res aliena legata fuerit, & ejus rei vivo teſtatore legatarius dominus factus fuerit: ſi quidem ex cauſa emptionis, ex teſtamento actione pretium conſequi poteſt. Si vero ex cauſa lucrativa, veluti ex donatione, vel ex alia ſimili cauſa, agere non poteſt. Nam traditum eſt duas lucrativas cauſas in eundem hominem, & eandem rem concurrere non poſſe. §. 6. *inſt. de legat.*

Fideicommiſſum relictum, & apud eum, cui relictum eſt, ex cauſa lucrativa inventum, extingui placuit: niſi defunctus æſtimationem quoque ejus præſtari voluit. *l.* 21. §. 1. *ff. de legat.* 3.

Quæro cum corpora legata etiam nunc ex lucrativa cauſa poſſideantur, an à ſubſtitutis peti poſſint. Reſpondi, non poſſe. *l.* 88. §. 7. *in f. de leg.* 2.

X.

10. A Legacy of the ſame Thing to the ſame Perſon by two Teſtators.

If it ſhould happen that two Teſtators had bequeathed the ſame Thing to one and the ſame Perſon, and that by the Effect of one of the two Legacies the Legatary had been made Maſter of the Thing bequeathed, he could not pretend by the other Legacy to have the Value of it. For the Intention of both the Teſtators would be fulfilled, ſince he would have that which both the one and the other had a mind to give him. But if he had received by one of the two Teſtaments the Value of the Thing before he had the Thing it ſelf, which might afterwards come to him by the other Legacy of the Teſtator, who was Maſter of it, he would have the Benefit thereof, and the Teſtamentary Heir would be obliged to give it him *n*. For the Value which he had already received, would not diſcharge the Teſtamentary Heir of him who had bequeathed a Thing which was his own; and it would not be juſt that this Teſtamentary Heir ſhould reap the profit of the Thing bequeathed.

n Hac ratione, ſi ex duobus teſtamentis eadem res eidem debeatur: intereſt, utrum rem, an æſtimationem ex teſtamento conſecutus ſit. Nam ſi rem habet agere non poteſt; quia habet eam ex cauſa lucrativa, ſi æſtimationem, agere poteſt. §. 6. *in f. inſt. de legat.*

XI.

11. The Legacie one and

We muſt not reckon among Legacies of one and the ſame Thing, thoſe which

the ſame Sum, are not two Legacies of the ſame thing.

which conſiſt in a like Sum of Money, or in a like Quantity of thoſe ſorts of Things that are given by Number, Weight, or Meaſure; but only thoſe where two Teſtators happen to deviſe one and the ſame Land or Tenement, or other particular Thing which is the ſame in Subſtance. Thus, the Legacies of the like Sums of Money to one and the ſame Legatary in the Teſtaments of two different Perſons, would have their Effect: And if two Teſtators had bequeathed each of them a Penſion, or Alimony, to a Legatee, either of the ſame or different Sums, both theLegacies would be due; for it was the Intention of each of the two Teſtators to give to the Legatee a part of his Goods. Thus, the Legacy of the one would not hinder the Effect of the Legacy of the other. And it would be the ſame thing in the Caſe of two Annuities, or Rents of another nature, if the Legatee having acquired one of them by a Donation, or by ſome other Title, the other ſhould be afterwards left him by a Teſtament *o*.

o Titia Seio teſſeram frumentariam comparari voluit poſt diem trigeſimum a morte ipſius. Quæro, cum Seius, viva teſtatrice teſſeram frumentariam ex cauſa lucrativa habere cœpit, nec poſſit id, quod habet petere: an ei actio competat. Paulus reſpondit ei, de quo quæritur, pretium teſſeræ præſtandum. Quoniam tale fideicommiſſum magis in quantitate quam in corpore conſiſtit. *l.* 87. *ff. de legat.* 2.

XII.

12. The Deviſe of a Land or Tenement in which the Teſtator has only a Share, is reduced to that Share.

If a Teſtator, having a Land or Tenement in common with another Perſon, had deviſed the ſame, without mentioning his Portion of it, but ſaying barely, that he deviſed the ſaid Land or Tenement, the Deviſe would have its Effect only for the Portion thereof that did belong to the Teſtator. For it would be preſumed that he meant only to give away the Share that he had in the ſaid Land or Tenement *p*.

p Cum fundus communis legatus ſit, non adjecta portione, ſed *meum* nominaverit, portionem deberi conſtat. *l.* 5. §. 2. *ff. de leg.* 1.

XIII.

13. A Legacy to a Debtor of what he owes.

A Creditor may bequeath to his Debtor all that he owes him, or a part of it. But this Legacy, as all other Legacies, does no prejudice to the Creditors of the Teſtator, who are preferred to all the Legataries, as has been mentioned in the laſt Article of the firſt Section; and the Debtor who is Legatee for what he owes, will not be diſcharged from his Debt, unleſs there be Goods enough in the Inheritance to ſatisfy all the Creditors of the Teſtator, and likewiſe the *Falcidian* Portion due to the Teſtamentary Heir, as ſhall be ſhewn in the following Title *q*.

q Liberationem debitori poſſe legari jam certum eſt. *l.* 3. *ff. de liber. leg.*

Omnibus debitoribus ea quæ debent recte legantur; licet domini eorum ſint. *l.* 1. *ff. eod.*

¶ It appears from theſe two Texts, that it was a Doubt in the *Roman* Law, whether a Creditor could bequeath to his Debtor that which he owed him. The Doubt was founded, as appears by theſe words, *Licet domini eorum ſint*, upon this, that one cannot bequeath to a Perſon what is already his, and that what is due by a Debtor is ſtill the Debtor's, until he ſtrips himſelf of it by paying it to his Creditor. We make this remark only becauſe of the Difficulty which the Reader might find in theſe Texts. For as to the Validity of ſuch a Legacy, who can doubt of it? But we muſt add on this Subject one Reflexion more, which another Text, relating to the Manner in which a Teſtator might diſcharge his Debtor, ſeems to deſerve. It is a Law in which it is ſaid, That if a Creditor, being ſick, had delivered into the Hands of a third Perſon the Bond or Obligation of the Sum due to him by one of his Debtors, charging the ſaid Perſon to give him back the ſaid Bond or Obligation in caſe he ſhould recover, and to deliver it up to the Debtor in caſe he ſhould die; and that this laſt Caſe happened, the Heir or Executor of the ſaid Creditor could not demand the ſaid Debt of the Debtor *. It is to be remarked on this Deciſion, that ſuch a Diſpoſition would not be juſt, and ought not to be executed except with ſeveral Precautions, which divers Circumſtances might demand. For in the firſt place, it would be null if it were made to defraud the Creditors of the Perſon who ſhould give ſuch an Order. And ſecondly, ſince this Diſpoſition would be only a Donation in proſpect of Death, it would be liable to be curtailed both for the Falcidian Portion of the Teſtamentary Heir, which ſhall be treated of under the following Title, and for the Legitime or Legal Portions of the Children. And it would likewiſe be ſubject to the

* Si quis decedens Chirographum Seii Titio dederit: *Ut poſt mortem ſuam det, aut, ſi convaluiſſet, ſibi redderet:* Deinde Titius, defuncto donatore, Seio dederit, & hæres ejus petat debitum, Seius doli exceptionem habet. *l.* 3. §. 2. *ff. de liber. leg.*

† Dimi-

Diminution which the Cuſtoms make of all Diſpoſitions made in proſpect of Death, in favour of the Heirs of Blood. But altho there ſhould be no Cauſe for diminiſhing or reducing the ſame, and that the Queſtion were only about the Validity of ſuch a Diſpoſition, yet the Circumſtances thereof might give riſe to Difficulties. Thus, for example, if we ſuppoſe that a Creditor, to whom a Rent was due, had depoſited the engroſſed Copy of the Deed, by which the Rent was conſtituted, into the hands of a third Perſon, that he might deliver up the ſame after his Death to his Debtor; ſeeing there would be no other Proof of this Will of the Deceaſed beſides the Declaration which the Depoſitary ſhould make of it, and that the Title or Deed by which the Rent was conſtituted would remain entire, the original Minute thereof being lodged in the hands of the Notary Publick; the bare Declaration of this Depoſitary would not be ſufficient to prove a Diſpoſition made in proſpect of Death, and to annul a Debt, the Title whereof would ſtill be ſubſiſting, and of which there would appear no Diſcharge or Acquittance. But if we ſuppoſe that the Title by which this Rent was conſtituted were an Obligation, of which there were no original Minute, and that the Heir or Executor of this Creditor had cauſed the ſame to be ſeized in the hands of the Depoſitary before he had delivered it to the Debtor, pretending to diſpute the Validity of ſuch a Diſpoſition, or not agreeing that the Deceaſed ever had ſuch an Intention; the Queſtion in ſuch Caſe would ſeem to depend on the Circumſtances of the Sum, the Goods of the Deceaſed, the Quality of the Depoſitary, and other Circumſtances which might help us to judge whether the Declaration of the Depoſitary ought to ſupply the want of a Diſpoſition in proſpect of Death made according to Form.

XIV.

14. The Legacy of what is due from one of two Perſons who are indebted for the ſame Sum, acquits only him to whom it is left.

If a Teſtator, to whom two Debtors ſhould be engaged each of them for the whole Debt, bequeaths to one of the two that which he owes him, this Legacy will acquit only that Legatee, and the other will remain obliged for his Portion. For altho the Legatee was bound for the whole Debt, yet the Legacy would have its entire Effect by diſcharging him of his Share of the Debt, ſince he will not be any ways accountable for the Portion of his Fellow-Debtor, who will owe that all alone *r*. But if theſe Debtors were Copartners, and it appeared that the Intention of the Teſtator was to annul the Debt in favour of the Company, the Legacy would be common both to the one and the other *s*.

r Si cum alio ſim debitor, puta duo rei fuimus promittendi, & mihi ſoli teſtator conſultum voluit: agendo conſequar, non ut accepto liberer, ne etiam conreus meus liberetur contra teſtatoris voluntatem: ſed pacto liberator. *l.* 3. §. 3. *ff. de liber. leg.*

s Conſequenter quæritur, an & ille ſocius pro legatario habeatur cujus nomen in teſtamento ſcriptum non eſt: licet commodum ex teſtamento ad utrumque pertineat, ſi ſocii ſint. Et eſt verum non ſolum eum, cujus nomen in teſtamento ſcriptum eſt legatarium habendum, verum eum quoque qui non eſt ſcriptus ſi & ejus contemplatione liberatio relicta eſſet. *d. l.* 3. §. 4.

XV.

15. The Legacy of a Delay of Payment to a Debtor, diſcharges him of the Intereſt for that Time.

A Teſtator may bequeath to his Debtor a Reſpite for the Payment of that which he owes him. And this Legacy will have this Effect, that the Teſtator's Heir or Executor cannot for the Time of that Forbearance demand any Intereſt. And much leſs could he pretend to Coſts and Damages, if the Debt were of ſuch a nature as the Default of Payment might give a handle for ſuch a Demand *t*.

t Illud videndum eſt, an ejus temporis intra quod petere hæres vetitus eſt, vel uſuras vel pœnas petere poſſit: & Priſcus Neratius exiſtimabat, committere eum adverſus teſtamentum, ſi petiſſet. Quod verum eſt. *l.* 8. §. 2. *ff. de liber. leg.* See the third Article of the ſecond Section of Intereſt, Coſts, and Damages.

XVI.

16. In what Senſe the Father, who is Guardian to his Son, may be diſcharged from giving an Account of his Adminiſtration.

If a Son, whoſe Father had been his Guardian, happening to die without Children, before the Father had made up the account of his Guardianſhip, had ordained by his Teſtament, that his Executors, if he had named others together with his Father, ſhould not demand of him any account of his Adminiſtration, this Diſpoſition would have its intire effect: for it was in his power to give nothing at all to theſe other Executors. But if this Teſtator had Children to whom the Grandfather ought to give an account, it would be reaſonable to give to ſuch a Diſpoſition the Temperaments that Equity might require according to the Circumſtances, ſo as not to oblige the Grandfather to ſo ſtrict an account as might be required of another Guardian, and likewiſe not to do any thing

thing to the prejudice of the Children, under pretext of the Favour that ought to be ſhown to the Grandfather *u*.

u Titius teſtamento facto, & filiis hæredibus inſtitutis, de patre tutore ſuo quondam facto ita loquutus eſt: *Scium patrem meum liberatum eſſe volo ab actione tutelæ.* Quero, hæc verba quatenus accipi debent, id eſt, an pecunias, quas vel ex venditionibus rerum factis, aut nominibus exactis, in ſuos uſus convertit, vel nomine ſuo fœneravit, filiis & hæredibus teſtatoris, nepotibus ſuis debeat reddere? Reſpondit, eum, cujus notio eſt, æſtimaturum: præſumptio enim propter naturalem affectum facit, omnia patri videri conceſſa: niſi aliud ſenſiſſe teſtatorem, ab hæredibus ejus approbetur. *l.* 28. §. 3. *ff. de liber. leg.*

¶ It is to be remarked on the Rule explained in this Article, that we have turned it in ſuch a manner as to accommodate it to our Uſage. For we ſhould not obſerve the Rule, ſuch as it is explained in the Text quoted on this Article. And if a Father, who had had the Tuition of one of his Children, having alſo other Children, had alienated the Goods of the Child whom he had had under his Tuition, and had gather'd in ſome of his Debts; he would be bound to give an account of them to his Grandchildren, Heirs to their Father, whoſe Guardian he was, ſince it would not be juſt that his other Children ſhould have the Profit of the Goods of their Brother to the prejudice of his Children their Nephews.

It may be obſerved in relation to the Accounts of the Adminiſtration which Fathers may have of the Eſtates of their Children, that by the Diſpoſition of ſome Cuſtoms the Fathers are Tutors, Guardians, or Stewards to their Children, and have the Enjoyment of their Revenues without being liable to give an account. But this is to be only of what the Father may conſume for his own uſe, but not of what he may alienate.

XVII.

17. *A Legacy of a thing laid in pawn.*

If a Teſtator bequeaths a thing which he had pawned to a Creditor, the Executor will be bound to pay the Debt in order to redeem and deliver to the Legatee the thing bequeathed, unleſs the Words of the Legacy, or other Proofs, ſhould make it appear that it was the Intention of the Teſtator to charge the Legatary with the Payment of the Debt. But if the Pledge had been ſold for the Debt by the Creditor, the Executor would be bound to give the Value of it to the Legatee, unleſs he ſhould prove that the Intention of the Teſtator was that the Legacy ſhould be null in that Caſe *x*.

x Prædia obligata, per legatum vel fideicommiſ-ſum relicta, hæres luere debet. Maxime cum teſtator conditionem eorum non ignoravit, aut ſi ſciſſet, legaturus tibi aliud quod minus non eſſet, fuiſſet. Si vero a creditore diſtracta ſunt, pretium hæres exſolvere cogitur: niſi contraria defuncti voluntas ab hærede oſtendatur. *l.* 6. *C. de fideic.*

Quod ſi teſtator eo animo fuit, ut quamquam liberandorum prædiorum onus ad hæredes ſuos pertinere noluerit, non tamen aperte utique de his liberandis ſenſerit: poterit fideicommiſſarius per doli exceptionem a creditoribus qui hypothecaria ſecum agerent conſequi, ut actiones ſibi exhiberentur. Quod quamquam ſuo tempore non fecerit, tamen per juriſdictionem præſidis Provinciæ id ei præſtabitur. *l.* 57. *in f. ff. de legat.* 1. *V. l.* 15. *ff. de dote præleg.* §. 5. *inſt. de legat.* See the fifteenth Article of the eleventh Section.

¶ We have not put down in this Article that which is ſaid in the *5th* §. *inſt. de legat.* that the teſtamentary Heir is not bound to redeem the thing bequeathed, except in the Caſe when the Teſtator knew that it was in pawn. For beſides that it is always to be preſumed, that every Man knows what is of his own Fact and Deed, and that a Debtor is not ignorant that he is indebted, and that his Goods are mortgaged for his Debts, whether he have laid any particular thing in pawn in the hands of his Creditor, or that he has only mortgaged his Goods in general; it may be remarked that in the firſt Text cited on this Article, and likewiſe in the beginning of the *57th Law de legat.* 1. it is ſaid, that the Legatee is not bound to redeem the thing bequeathed, altho the Teſtator was ignorant that it was in pawn, if we judge that if the Teſtator had known it he would have left another Legacy of equal Value to that Legatee. Thus this Preſumption being always natural enough, it is alſo natural that the teſtamentary Heir ſhould redeem the thing that is bequeathed. To which we may add, that by the ſecond Text cited upon this Article it would ſeem that the Legatee is not bound to acquit the Debt unleſs he be charged ſo to do by the Teſtament; and that if he pays the Debt, he may get himſelf to be ſubſtituted to the Creditor, in order to recover from the teſtamentary Heir what he ſhall have paid for redeeming his Legacy. And in a word, it may be ſaid that according to our Uſage it can never happen that a Legatee ſhould be bound to redeem the thing bequeathed, unleſs the Teſtator has obliged him to do it. For ſince, according to the Texts that have been quoted, that Burden lies on the teſtamentary Heir, if the Teſtator knew that the thing bequeathed was mortgaged, and that by our Uſage all Mortgages are founded on Titles or Deeds which

which affect in general all the Goods of the Debtor, we ought always to ſuppoſe that the Mortgage was known to the Debtor. And in the caſe of a Legacy of Moveables that have been pawned to a Creditor, the Teſtator can never pretend to be ignorant of that Engagement. Thus it is not likely that in our Uſage there ſhould ever be occaſion for a Proof of the Knowledge which the Teſtator might have of the Engagement of the thing bequeathed, theſe ſorts of Proofs being otherwiſe directly contrary to our Uſage. So that excepting the Caſe of an expreſs Will of the Teſtator, which ſhould oblige the Legatary to redeem the thing bequeathed, it would ſeem that the Burden of it ought always to lie on the teſtamentary Heir.

XVIII.

18. *One may bequeath things that are not in being.*

One may bequeath things which are not as yet in being, but which are to come; as the Fruits that ſhall grow on ſuch a Ground, or the Profit that ſhall be made of a certain Commerce: and theſe ſorts of Legacies imply the Condition that the thing thus bequeathed ſhall happen in its time, and they have their Effect according to the Event *y*.

y Etiam ea quæ futura ſunt legari poſſunt. *l.* 17. *ff. de leg.* 3.

Quod in rerum natura adhuc non ſit, legari poſſe, veluti quidquid illa ancilla peperiſſet. *l.* 24. *ff. de legat.* 1.

XIX.

19. *A Legacy of a certain Quantity of Corn to be taken out of a Crop, or out of a certain Place.*

If a Teſtator had bequeathed a certain Quantity of Corn to be taken out of ſuch a Crop, or out of a Granary, and the ſaid Quantity is not found there, the Legacy will be reſtrained to the Quantity that is there found *z*. But if the Legacy were of a certain Quantity of Corn, without determining whence it ſhould be taken, the ſaid Quantity would be due, altho there were no Corn in the Inheritance *a*, in the ſame manner as a Legacy of a Sum of Money, which would be equally due, whether there were any Money in the Succeſſion, or whether there were none at all *b*.

z Cum certus numerus amphorarum vini legatus eſſet, ex eo quod in fundo Semproniano natum eſſet: non amplius deberi, placuit: & quaſi taxationis vicem obtinere hæc verba, *quod natum erit. l.* 5. *ff. de trit. vin. vel ol. leg.*

Si quis legaverit ex illo dolio amphoras decem: & ſi non decem, ſed pauciores inveniri poſſint: non extinguitur legatum, ſed hoc tantummodo accipit, quod invenitur. *l.* 8. §. 2. *ff. de leg.* 2.

a Si cui vinum ſit legatum centum amphorarum, cum nullum vinum reliquiſſet: vinum hæredem empturum, & præſtaturum. *l.* 3. *ff. de trit. vin. vel de legat.*

b Si pecunia legata in bonis legantis non ſit, ſolvendo tamen hæreditas ſit: hæres pecuniam legatam dare compellitur: ſive de ſuo, ſive ex venditione rerum hæreditariarum, ſive unde voluerit. *l.* 12. *ff. de legat.* 2.

XX.

20. *An indefinite Legacy of Moveables.*

When a Teſtator hath bequeathed Moveables, ſuch as his Hangings and other Furniture of his Houſe, or the Moveables of a Country Houſe that ſerve for the Management of a Farm, this Legacy will have the Bounds or Extent that the Expreſſion and Intention of the Teſtator may give to it. And if it appears that his Intention was to give only what he had at the time of making the Teſtament, what he ſhall happen afterwards to acquire will not be comprehended in the Legacy. As on the contrary, if it appears that the Legacy is meant of the Moveables that ſhall be found at the time of his Death, it will comprehend every thing that ſhall be then found, which is of the Nature of the things bequeathed *c*.

c Lucius Titius fundum, uti erat inſtructus, legaverat. Quæſitum eſt, fundus inſtructus quemadmodum dari debeat: utrum ſicut inſtructus fuit mortis patriſfamiliæ tempore, ut quæ medio tempore adgnata, aut in fundum illata ſunt, hæredis ſint: an vero inſtructus fundus eo tempore inſpici debeat, quo factum eſt teſtamentum, an vero eo tempore, quo fundus peti cœperit, ut quidquid eo tempore inſtrumenti deprehendatur, legatario proficiat. Reſpondit: ea quibus inſtructus ſit fundus, ſecundum verba legati, quæ ſint in eadem cauſa, cum dies legati cedat, inſtrumento contineri. *l.* 28. *ff. de inſtr. vel inſtr. legat.*

Si ita eſſet legatum *veſtem meam, argentum meum, damnas eſto dare:* id legatum videtur, quod teſtamenti tempore fuiſſet. Quia præſens tempus ſemper intelligeretur, ſi aliud comprehenſum non eſſet. Nam cum dicit, *veſtem meam, argentum meum*, hac demonſtratione *meum* præſens non futurum tempus oſtendit. *l.* 7. *ff. de aur. arg.* See the 13th and 14th Articles of the following Section.

XXI.

21. *The Legacy of a thing ſpecify'd as belonging to the Teſtator, is null if the thing is not found among his Goods.*

When a Teſtator bequeaths a certain thing which he ſpecifies as being his own, the Legacy will not have its effect unleſs that thing be found extant in the Succeſſion. Thus, for example, if he had ſaid, *I bequeath to ſuch a one my Watch, or my Diamond-Ring*, and that there were not found in the Succeſſion neither Diamond-Ring, nor Watch, the Legacy would be null *d*. But if he had ſaid, *I bequeath a Diamond-Ring*, or *a Watch*, the Legacy would be due, and would have its Effect, as ſhall be explained in the following Article.

d Species nominatim legatæ ſi non reperiantur, nec dolo hæredis deeſſe probentur: peti ex eodem teſtamento non poſſunt. *l.* 32. §. 5. *ff. de leg.* 2.

XXII.

XXII.

22. *A Legacy of a thing indetermined in its kind, how it ought to be underſtood.*

One may bequeath not only a certain thing deſcribed in particular, as ſuch a Horſe, ſuch a Watch, ſuch a Sute of Hangings; but indefinitely and in general a Horſe, a Sute of Hangings, a Watch, or other things of the like nature. And ſeeing theſe ſorts of things may be of different Qualities in the ſame kind, if the Legacy does not mark the Price of them, or does not determine in particular what the thing bequeathed ought to be, whether there be ſeveral of that thing in the Succeſſion, or whether there be none at all; the Executor or teſtamentary Heir cannot give the worſt, nor the Legatary chuſe the beſt. But this Legacy will be moderated according to the Circumſtances of the Quality of the Teſtator, and of the Legatee, and the other Circumſtances which may help to diſcover the Intention of the Teſtator *e*, purſuant to the Rule explained in the 10th Article of the 7th Section of Teſtaments, and the others which ſhall be explained in the 7th Section of the Title of Legacies.

e Legato generaliter relicto, veluti *homines*, Caius Caſſius ſcribit, id eſſe obſervandum, ne optimus vel peſſimus accipiatur: quæ ſententia reſcripto Imperatoris noſtri & Divi Severi juvatur: qui reſcripſerunt, homine legato actorem non poſſe eligi. *l.* 37. *ff. de legat.* 1.

Illud verum eſt hæredem in hoc teneri, ut non peſſimum det. *l.* 110. *eod.* See the 2d and following Articles of the 7th Section.

We muſt obſerve the Difference between the Caſe in this Article, and that of a Legacy which ſhould give to the Legatee the Right to chuſe, which ſhall be explained in the 5th Article of the 7th Section.

XXIII.

23. *A Legacy of a Work to be done.*

One may bequeath not only Sums of Money, Rights, Debts, and all other things; but likewiſe ſome Work to be done; as if a Teſtator charges his Executor or teſtamentary Heir to rebuild the Houſe of ſome poor Man, or to do ſome other Work, whether for a publick uſe, or for ſome particular Perſon *f*.

f Si Teſtator dari quid juſſiſſet, aut opus fieri. *l.* 49. §. *ult. ff. de legat.* 2.

XXIV.

24. *An indefinite Deviſe of a Land or Tenement is null, if the Teſtator has none.*

If a Teſtator who had two or more Houſes, had deviſed a Houſe without determining by any Circumſtance which of his Houſes he had a mind to give, the Deviſe would be good; and the Executor or teſtamentary Heir would be obliged to give one of the Houſes, according to the Rules which ſhall be explained in the 7th Section. But if this Teſtator who had deviſed a Houſe, had none of his own, or if having no Lands, he had deviſed a Land indefinitely; theſe Deviſes would remain without any Effect. For one could not know what the Teſtator had meant; and it might be ſaid that the Teſtator himſelf did not know his own Meaning, and that he jeſted with him to whom he left ſuch a Legacy *g*.

g Si domus alicui ſimpliciter ſit legata, neque adjectum, quæ domus: cogentur hæredes, quam vellet domum ex his quas teſtator habebat, legatario dare. Quod ſi nullas ædes reliquerit, magis deriſorium eſt, quam utile legatum. *l.* 71. *ff. de leg.* 1.

SECT. IV.

Of Acceſſories to things bequeathed.

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I.

1. *Definition of Acceſſories.*

AN Acceſſory to a thing bequeathed is that which not being part of the thing itſelf, has nevertheleſs ſuch a Connexion with it, as that it ought not to

to be ſeparated from it, and ought to follow it. Thus the Shoes and Halter of a Horſe, and the Frame of a Picture are Acceſſories to them *a*.

a Quæ rebus accedunt. *l.* 1. §. 5. *depoſ.* Ut veſtis homini, equo capiſtrum. *d.* §.

II.

2. Two ſorts of Acceſſories.

We may diſtinguiſh two ſorts of Acceſſories to things bequeathed. Thoſe which follow naturally the thing, and which are comprehended in the Legacy, altho they be not mentioned. And thoſe which are not added to the Legacy except by a particular Diſpoſition of the Teſtator. Thus the Legacy of a Watch comprehends the Caſe of it, and the Legacy of a Houſe includes the Keys thereof. Thus on the contrary, the Legacy of a Houſe will not comprehend the Moveables that are in it, unleſs the Teſtator have expreſs'd the ſame *b*.

b See the Articles which follow.

III.

3. How we diſtinguiſh that which is an Acceſſory to a thing.

There are Acceſſories to certain things which are not ſeparated from them, ſuch as the Trees planted in a Ground: And theſe ſorts of Acceſſories follow always the thing bequeathed, if they are not excepted in the Legacy. And there are Acceſſories which altho ſeparated from the things, yet follow them likewiſe; ſuch as the Harneſs of a Set of Coach-Horſes, and others of the like nature. There may be alſo a Progreſſion of Acceſſories to Acceſſories; ſuch as precious Stones ſet in the Caſe of a Watch. And laſtly there are certain things, of which it may be doubted whether they be Acceſſories to others or not. And this may depend on the Diſpoſition of the Teſtator, and on the Extent or Bounds he gives to his Legacies as he ſees good. Thus there is no other general Rule in Doubts concerning what ought to go along with the thing bequeathed as its Acceſſory, beſides the Intention of the Teſtator, whoſe Expreſſion, together with the Circumſtances and Uſages of the Places, if there be any, may help us to judge what ought to be accounted Acceſſory, and what not *c*. But if the Diſpoſition of the Teſtator leave the thing in doubt, we may in every particular Caſe judge of what ought to be comprehended in the Legacy as Acceſſory, and what not, by the particular Rules on the ſeveral Caſes explained in the Articles which follow.

c In infinitum primis quibuſque proxima copulata procedunt. Optimum ergo eſſe Pedius ait, non propriam verborum ſignificationem ſcrutari: ſed in primis quid teſtator demonſtrare voluerit: deinde in qua præſumptione ſunt qui in quaque regione commorantur. *l.* 18. §. 3. *in f. ff. de inſtr. vel inſtrum. leg.*

IV.

4. Acceſſories to a Houſe.

If a Teſtator deviſes a Houſe without ſpecifying any thing as to what he intends ſhould be comprehended in the ſaid Deviſe, the Legatary or Deviſee will have the Ground, the Edifice and its Dependencies, ſuch as a Court, a Garden, and other Appurtenances of the Houſe, with the Paintings in Freſco, and other Ornaments or Conveniences, which, according to the Expreſſion of ſome Cuſtoms, are fixed to the Houſe with Cramp-Irons and Nails, or with Plaiſter, with intent that they ſhould always remain there; for theſe ſorts of things are of the nature of Immoveables. But there will be no Moveable comprehended in this Legacy, except the Keys, and other things if there were any, which being of the like uſe, would be equally neceſſary *d*.

d Quæcunque infixa inædificataque ſunt, fundo legato continentur. *l.* 21. *ff. de inſtr. vel. inſtrum. leg.*

Domo legata neque inſtrumentum ejus, neque ſupellex aliter legato cedit, quam ſi id ipſum nominatim expreſſum a teſtatore fuerit. *l. ult. ff. de ſupell. legat.*

V.

5. The Edifice is an Acceſſory to the Ground, and likewiſe what is added to its extent.

If he who had deviſed by Teſtament a Land or Tenement, makes afterwards ſome Addition to it; as if he adds any thing to its Extent, or if he builds ſome Edifice upon it, theſe Augmentations become part of the Ground, and go to the Legatee, unleſs the Teſtator hath otherways order'd by his Teſtament *e*.

e Cum fundus legatus ſit, ſi quid (ei) poſt teſtamentum factum adjectum eſt, id quoque legato cedit, etiam ſi illa verba adjecta non ſint, *qui meus erit*, ſi modo teſtator eam partem, non ſeparatim poſſedit, ſed univerſitati prioris fundi adjunxit. *l.* 10. *ff. de legat.* 2.

Si areæ legatæ domus impoſita ſit, debebitur legatario, niſi teſtator mutaverit voluntatem *l.* 44. § 4. *ff. de leg.* 1. *l.* 39. *ff. de leg.* 2. See the 7th and 8th Articles. See the 14th Article of the 6th Section of Teſtaments.

VI.

6. Another Acceſſory of the ſame nature.

It would be the ſame thing in a Deviſe of a particular Eſtate in Land, if the Teſtator after having deviſed it, had added to it new Buildings, and even new Rights, or if he had purchaſed Grounds in order to enlarge either a Park, or ſome other Land or Tenement be-

belonging to the ſaid Eſtate. For all theſe ſorts of Augmentation would be Acceſſories that would follow the Deviſe, either becauſe of their Nature of Acceſſories, or becauſe it could not be preſumed that the Teſtator intended to ſeparate theſe ſorts of things, in order to leave them without the Land to his Executor or teſtamentary Heir *f*.

f This is a Conſequence of the preceding Article.

VII.

7. How that which is added to the Land that is deviſed, belongs or does not belong to the Deviſee.

If the Legacy were of one entire Eſtate in Land, and if after the making of the Teſtament the Teſtator had added to it ſome Lands adjoining, this Augmentation might belong either to the Deviſee, or to the teſtamentary Heir, according as the ſaid new Purchaſe might be conſidered as an Acceſſory to the Legacy, or as being wholly independent on it. For if, for example, it were a Purchaſe of a parcel of Land made with a view to make a Field ſquare, or to ſerve as a Place to draw Water from for the uſe of other Grounds, or for ſome other Service, or even as an Addition only to the Land deviſed; theſe Acquiſitions would be Acceſſories that would go with the Legacy or Deviſe, in the ſame manner as that which ſhould be found to be naturally added to it by ſome Change made by the Courſe of an adjoining River. But if the Land that is purchaſed, and which borders on the Land that is deviſed, were of a different Nature from that which is deviſed, ſuch as a Meadow joining to a Vineyard which the Teſtator had deviſed; or if the Land acquired by the Teſtator were equally contiguous to the Land deviſed by him, and to another Land which the Teſtator had left to his Executor; theſe ſorts of Acquiſitions would not be Acceſſories to the Legacy, unleſs we ſhould be obliged to judge otherways by the Diſpoſition of the Teſtator, and the Circumſtances which might explain his Intention *g*.

g Si quis poſt teſtamentum factum fundo Titiano legato partem aliquam adjecerit, quam fundi Titiani deſtinaret: id, quod adjectum eſt, exigi a legatario poteſt. Et ſimilis eſt cauſa alluvionis: (Et) maxime ſi ex alio agro, qui fuit ejus, cum teſtamentum faceret, eam partem adjecit. *l.* 24. §. 2. *ff. de leg.* 1. Si univerſitati prioris fundi adjunxit. *l.* 10. *ff. de leg.* 2.

It appears by theſe Texts, that theſe Augmentations of the Land are meant of that which is added by the Teſtator, with intent to make it a part of the Land that is deviſed.

VIII.

8. An Augmentation of the Land deviſed, which hath the effect to revoke the Deviſe.

If a Teſtator who had deviſed a Land, builds afterwards upon it, this Acceſſory to the Land will go with the Land to the Legatary, unleſs it ſhould appear that the Teſtator intended to revoke the Legacy, as has been ſaid in the 5th Article. And if, for example, a Teſtator having deviſed a Place in a Town to build in, and afterwards builds a Houſe in it, or if having deviſed a Garden, Orchard, or other Place, he builds in it a Summer-Houſe or Lodge; theſe Buildings under theſe Circumſtances will belong to the Legatary. But if he had built in a Ground which he had deviſed, either a Houſe or other Conveniencies neceſſary for a Farm, to which he had joined the ſaid Ground, giving the ſaid Farm to another Legatary, or leaving it to his Heir or Executor, it would be judged from the uſe of the ſaid Building, that he had revoked the Legacy *h*.

h Si areæ legatæ domus impoſita ſit, debebitur legatario: niſi teſtator mutaverit voluntatem. *l.* 44. §. 4. *ff. de leg.* 1.

The Circumſtances mentioned in the Article ſhew clearly enough the Change of the Will of the Teſtator.

IX.

9. The Deviſe of a Ground comprehends the Service neceſſary to the ſaid Ground from another Ground that is part of the Inheritance.

If for the Uſe of a Ground, of which the Teſtator had deviſed the Uſufruct, the Service of a Paſſage thro another Ground of the Inheritance were neceſſary, the Executor or other Legatee, to whom the Ground that ought to be ſubject to the Service does belong, would be obliged to ſuffer it. For the Legatee ought to enjoy the Ground ſubject to the Uſufruct in the ſame manner as it was enjoyed by the Teſtator who took his Paſſage thro his own Ground: and this Acceſſory is ſuch, that it is the Intention of the Teſtator that it ſhould follow the Legacy *i*.

i Qui duos fundos habebat, unum legavit, & alterius fundi uſumfructum alii legavit. Quæro, ſi fructuarius ad fundum aliunde viam non habeat, quam per illum fundum qui legatus eſt, an fructuario ſervitus debeatur. Reſpondit, quemadmodum ſi in hæreditate eſſet fundus per quem fructuario poteſt præſtari via, ſecundum voluntatem defuncti videtur id exigere ab hærede, ita & in hac ſpecie non aliter concedendum eſt legatario fundum vindicare, niſi prius jus tranſeundi uſufructuario præſtet. Ut hæc forma in agris ſervetur, quæ vivo teſtatore obtinuerit: ſive donec uſusfructus permanet, ſive dum ad ſuam proprietatem redierit. *l.* 15. §. 1. *ff. de uſufr. legat.*

Altho this Text ſpeaks only of the Service that is neceſſary to the Legatee of an Uſufruct; yet the ſame Equity would require that this Service ſhould be likewiſe given to the Legatee of the Property. And the Preſumption of the Teſtator's Intention would be the ſame in this Legacy as in the other; ſince it cannot be ſuppoſed that he intended to make a fruitleſs Deviſe, and ſeeing this Deviſe could not have its Uſe without this Service, which changes nothing in the uſe that the Teſtator himſelf made of

of his own Lands, in making one Ground to ſerve for the neceſſary Paſſage to another.

X.

10. *A reciprocal Service between the Legatees of two contiguous Houſes.*

If a Teſtator who had two Houſes joining to one another, deviſes one of them to one Legatary, and the other to another, or deviſes one of them, and leaves the other to his Heir or Executor; the Partition Wall of theſe two Houſes, which had for its ſole Owner the Teſtator, will become common to the two Proprietors of theſe two Houſes. Thus the reciprocal Service on this common Wall will be as an Acceſſory which will follow the Legacy *l*.

l Si is qui duas ædes habebat, unas ſibi, alteras tibi legavit: & medius paries, qui utraſque ædes diſtinguat, intervenit: eo jure eum communem nobis eſſe exiſtimo. *l.* 4. *ff. de ſervit. leg.*

XI.

11. *The Legatary ought to have the uſe of the thing bequeathed.*

If of two Houſes belonging to a Teſtator, whereof one is left to the Heir or Executor, and the other given to a Legatee, or both are given to two Legatees, one of them could not be raiſed higher without taking away the Light of the other, or damaging it very much; the Executor or Legatee who ſhould chance to have the firſt Houſe, could not raiſe it but in ſuch a manner as that there ſhould remain for the other Houſe ſo much Light as ſhould be neceſſary for the Uſe of it. For it was not the Teſtator's Intention that either his Executor or this Legatee ſhould render the Legacy of the other Houſe uſeleſs *m*.

m Qui binas ædes habebat, ſi alteras legavit, non dubium eſt quin hæres alias poſſit altius tollendo, obſcurare lumina legatarum ædium. Idem dicendum eſt, ſi alteri ædes, alteri aliarum uſumfructum legaverit. *l.* 10. *ff. de ſervit. prad. urb.*

Sed ita officere luminibus, & obſcurare legatas ædes conceditur, ut non penitus lumen recludatur: ſed tantum relinquatur quantum ſufficit habitantibus in uſus diurni moderatione. *d. l. in f.*

XII.

12. *The Moveables of Houſes, whether in Town or Country, are not Acceſſories to them.*

The Legacy of a Houſe in the Town does not comprehend the Moveables that are in it, unleſs they are expreſly added by the Teſtator. Nor does the Legacy of a Houſe in the Country take in what Moveables may be in it that are neceſſary for cultivating the Lands, and for gathering in the Harveſt *n*. But this Legacy comprehends the things that are fixed to the Building,

n Dotes prædiorum, quæ græco vocabulo ἐνθήκαι appellantur, cum non inſtructa legantur, legatario non præſtantur. *l.* 2. §. 1. *de inſtr. vel inſtrum. legat.*

ſuch as in certain Places Preſſes and Tubs *o*.

o Cum fundus ſine inſtrumento legatus ſit, dolia, molæ olivariæ & prælum, & quæcunque infixa inædificataque ſunt legato continentur. *l.* 21. *eod.*

XIII.

13. *In what manner Acceſſories to a Country-Houſe are underſtood.*

The Legacy of a Country Houſe, together with what ſhall be found in it neceſſary for cultivating the Lands, and gathering in the Harveſt, comprehends the Moveables which may ſerve for theſe Uſes *p*. And if there be any doubt as to the Extent which this Legacy ought to have, it muſt be interpreted by the Preſumptions of the Teſtator's Intention, which may be gathered from the Words of the Teſtament, and from the Circumſtances; and we may likewiſe make uſe of what Lights can be had from the Uſage of the Places *q*.

p Inſtrumentum eſt apparatus rerum diutius manſurarum ſine quibus exerceri nequiret poſſeſſio. *l.* 12. *ff. de inſtr. vel inſtrum. legat.*

q Optimum ergo eſſe Pedius ait, non propriam verborum ſignificationem ſcrutari: ſed imprimis, quid teſtator demonſtrare voluerit, deinde in qua præſumptione ſunt, qui in quaque regione commorantur. *l.* 18. §. 3. *in f. eod.*

XIV.

14. *The Legacy of a Houſe with its Moveables.*

If a Teſtator had deviſed a Houſe with all its Moveables, this Legacy would comprehend all the Moveables that were in it deſtined for the Furniture of the ſaid Houſe: ſuch as Beds, Haugings, Pictures, Tables, Chairs, and other things of the like nature. But if there ſhould be found in it Hangings or other Moveables, laid up and deſtined either for Sale, or for the uſe of another Houſe, the Legatary would have no right to them *r*. And if on the contrary ſome Moveables of this Houſe ſhould chance to be ſomewhere elſe at the time of the Teſtator's Death, as if a Sute of Hangings had been lent out, or given to be mended, whatever were out of the Houſe upon ſuch an account, would nevertheleſs be comprehended in the Legacy *s*.

r Si fundus legatus ſit *cum his quæ ibi erant*, quæ ad tempus ibi ſunt, non videntur legata. *l.* 44. *ff. de leg.* 3.

s Neque quod caſu abeſſet, minus eſſe legatum; nec quod caſu ibi ſit magis eſſe legatum. *l.* 86. *eod.*

XV.

15. *Papers are not comprehended in a Legacy of all*

If in the Legacy of a Houſe the Teſtator had comprehended in general and indefinite Terms every thing that ſhould be found in the ſaid Houſe at the time of his Death, without excepting any thing; this

things found in a House.

this Legacy, which would comprehend all the moveable things, and even the Money *t*, would not comprehend the Debts owing to the Teſtator, nor his other Rights, the Deeds or Titles whereof ſhould be found in the ſaid Houſe. For the Debts and Rights do not conſiſt in the Papers which contain the Deeds or Titles of them, and have not their Situation in a certain Place *u*. But their Nature conſiſts in the Power which the Law gives to every one to exerciſe them. Thus the Deeds or Titles are only the Proofs of the Rights, and not the Rights themſelves.

t Si fundus legatus ſit *cum his qui ibi erunt*, quæ ad tempus ibi ſunt, non videntur legata. Et ideo pecuniæ quæ fœnerandi cauſa ibi fuerunt, non ſunt legatæ. *l.* 44. *ff. de leg.* 3.

Uxori uſumfructum domuum & omnium rerum, quæ in his omnibus erant, *excepto argento*, legaverat——Reſpondit, excepto argento, & his quæ mercis cauſa comparata ſunt, cæterorum omnium uſumfructum legatariam habere. *l.* 32. §. 2. *ff. de uſu & uſuf. & red. leg.*

It follows from theſe Texts, that this Legacy would comprehend the Money, if it were not excepted.

u Caius Seius pronepos meus hæres mihi eſto ex ſemiſſe bonorum meorum, excepta domo mea, & paterna, in quibus habito, cum omnibus quæ ibi ſunt. Quæ omnia ſcias ad portionem hæreditatis quam tibi dedi, non pertinere. Quæro, cum ſit in his domibus argentum, nomina debitorum, ſupellex mancipia: an hæc omnia, quæ illic inveniuntur ad alios hæredes inſtitutos debeant pertinere. Paulus reſpondit: nomina debitorum non contineri, ſed omnium eſſe communia: in cæteris vero nullum pronepoti locum eſſe. *l.* 86. *ff. de leg.* 2.

Debts and other Rights have not a Situation in a certain Place, and are not comprehended in Places as Things corporeal are. We may remark this Diſtinction between Rights and other Things in a Law which ſpeaks of it on another occaſion. Quod ſi nec quæ ſoli ſunt ſufficiant, vel nulla ſint *ſoli pignora*, tunc pervenietur etiam ad *jura* *. *We ſee by this Text the Diſtinction between Rights and Things corporeal.*

* *L.* 15. §. 2. *in fine ff. de re jud.*

XVI.

16. *The Acceſſory may be a thing of much greater Value than that whereof it is an Acceſſory.*

The Acceſſories which ought to follow the thing bequeathed, are judged to be ſuch only by the Uſe that is made of them, and not by their Value: So that the Acceſſory is frequently of a much greater Value than the thing it ſelf to which it is Acceſſory; and it goes nevertheleſs to the Perſon to whom the thing is bequeathed. Thus, for example, precious Stones ſet in the Caſe of a Watch, are only an Ornament and an Acceſſory to it, and yet they follow the Legacy of the Watch *x*.

x Plerumque plus in peculio eſt quam in ſervo. Et nonnunquam vicarius, qui accedit, pluris eſt quam is ſervus qui venit. *l.* 44. *ff. de adil. ed.*

Pretioſius fecit additis aliis gemmis & margaritis. *l.* 6. §. 1. *ff. de aur. arg. mund.*

SECT. V.

Of Legacies of an Uſufruct, or a Penſion, or Alimony, and other things of the like nature.

WE have not put down in this Section the Rule of the *Roman* Law, by which it is order'd, that if a Teſtator had bequeathed an Uſufruct to a Town or other Corporation, it ſhould laſt a hundred Years. And ſeeing we have explained in another Place *a* the Reaſon why we have not thought proper to inſert this Rule among the others, it is not neceſſary to repeat it here.

a See the end of the Preamble of the Title of Uſufruct.

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I. When

I.

1. A Legacy of an Uſufruct.

When a Teſtator bequeaths an Uſufruct, or the Enjoyment of a Houſe or other Tenement, the Condition of the Legatee will be the ſame as of other Uſufructuaries, and his Enjoyment will have the ſame Extent and the ſame Bounds. And he will likewiſe be liable in the ſame manner for the Charges of the Houſes or Lands of which he has the Uſufruct. Thus we may apply to this Legatary the Rules relating to Uſufruct, which have been explained in the Title of the ſaid Matter *a*.

a See the Title of Uſufruct. See the ninth Article of the preceding Section.

II.

2. A Legacy of an Uſufruct to ſeveral Perſons, and of the Property to one of them.

If a Teſtator had deviſed to two or more Legatees the Uſufruct of a Houſe or Lands, and the Property thereof to the Survivor of them, this Legacy would regard all the Legataries in two manners; for it would be pure and ſimple with regard to all of them as to the Uſufruct, and conditional likewiſe in reſpect of them all as to the Propriety; every one of them being called to the Propriety thereof upon condition of their ſurviving the others *b*.

b Quoties liberis uſusfructus legatur, & ei, qui noviſſimus ſupervixerit, proprietas: utile eſt legatum. Exiſtimo enim omnibus liberis proprietatem ſub hac conditione, *ſi noviſſimus ſupervixerit*, dari. *l.* 11. *ff. de reb. dub.*

III.

3. The Uſufruct of moveable things.

Since one may bequeath the Uſufruct of moveable things *c*; if a Teſtator had bequeathed to his Wife the Uſufruct or Enjoyment of his Houſe, and of all the things that ſhould be found in it at the time of his Death, excepting the Gold and Silver, and that there were in the ſaid Houſe Merchant-Goods in which the Teſtator traded, and which he kept there for Sale, this Uſufruct would not comprehend theſe ſorts of things *d*. For it would be reſtrained to that which ſhould appear to be deſtined to be kept in the ſaid Houſe.

c See the third Section of Uſufruct.

d Uxori uſumfructum domuum, & omnium rerum, quæ in his domibus erant, excepto argento, legaverat: item uſumfructum fundorum & ſalinarum. Quæſitum eſt, an lanæ cujuſque coloris mercis cauſa paratæ, item purpuræ quæ in domibus erant, uſusfructus ei deberetur. Reſpondit, excepto argento, & his quæ mercis cauſa comparata ſunt, cæterorum omnium uſumfructum legatariam habere. *l.* 32. §. 2. *ff. de uſu & uſufr. leg.*

IV.

If a Teſtator had bequeathed a Portion of the Produce or Income of a certain Land or Tenement, and the Executor ſhould afterwards ſell the ſaid Land, the Legacy will nevertheleſs ſubſiſt. And it will be regulated not on the foot of the ſame Portion of the Intereſt of the Price of the Sale, but according to the Value of that Portion of the Fruits, whether it exceed the ſaid Intereſt, or fall ſhort of it. For the Legacy was of that which the ſaid Portion might be worth every Year. Thus this Change ſhall hurt neither the Executor, nor the Legatee *e*.

4. How the Legacy of a Portion of the Fruit ſubſiſts after the Land is ſold.

e Liberto ſuo ita legavit: *Præſtari volo Philoni, uſque dum vivet, quinquageſimam omnis reditus, quæ prædiis a colonis vel emptoribus fructus ex conſuetudine domus meæ præſtantur.* Hæredes prædia vendiderunt ex quorum reditu quinquageſima relicta eſt. Quæſitum eſt an pretii uſuræ, quæ exconſuetudine in Provincia præſtarentur, quinquageſima debeatur? reſpondit, reditus duntaxat quinquageſimas legatas, licet prædia vendita ſunt. *l.* 21. *ff. de ann. legat.*

V.

If the Legatary of an Uſufruct had been burdened by the Teſtator with a Fiduciary Bequeſt to ſome other Perſon, and the ſaid Legatary either could not, or would not accept the Legacy, the Heir or Executor who ſhould reap the Benefit of the Legacy would be obliged to ſatisfy the ſaid Fiduciary Bequeſt. For altho this Bequeſt regarded only the Perſon of the Legatary becauſe of his Uſufruct, and that the ſaid Uſufruct does not ſubſiſt any longer; yet the Enjoyment of the thing bequeathed, which was burdened with this Fiduciary Bequeſt does not go to the teſtamentary Heir or Executor, but with this Charge *f*.

5. The Burden on a Legacy of an Uſufruct paſſes to the Executor, if the Legacy does not take place.

f Si ab eo cui legatus eſſet uſusfructus, fideicommiſſum fuerit relictum: licet uſusfructus ad legatarium non pervenerit, hæres tamen penes quem uſusfructus remanet, fideicommiſſum præſtat. *l.* 9. *ff. de uſu & uſufr. leg.*

VI.

One may bequeath a certain Sum of Money, or a certain Quantity of Corn, or other Things, by way of Penſion, to be paid every Year to the Legatary, either during a certain Time, or during his Life. And there is this Difference between a Legacy of this Nature, and a Legacy of an Uſufruct, that in this laſt the Legatee has an uncertain Enjoyment, and may have either more or leſs, or ſometimes nothing at all; and that an annual Legacy of a certain Quantity is always the ſame. There is alſo this Difference between theſe two kinds of Legacies, that whereas the Legacy of an

6. The Difference between an annual Legacy, and a Legacy of an Uſufruct.

an Uſufruct is only one Legacy of a Right to enjoy always, as long as it ſhall laſt; an annual Legacy contains as many Legacies as it may laſt Years. For every Year the Legatee ought to receive of the Executor the Revenue which is bequeathed him. Thus this Legacy is, as it were, conditional, and implies the Condition that the Legatary ſhould be living at the beginning of every Year, in order to have Right to the Legacy, and to tranſmit the Right of that Year to his Heir or Executor *g*.

g *Si in ſingulos annos* alicui legatum ſit: Sabinus (cujus ſententia vera eſt) plura legata eſſe ait. Et primi anni purum, ſequentium conditionale: videri enim hanc ineſſe conditionem, *ſi vivat:* & ideo mortuo eo, ad hæredem legatum non tranſire. *l.* 4. *ff. de ann. leg.* See the following Articles.

See as to what is ſaid at the end of this Article concerning the Tranſmiſſion of an annual Legacy, the ninth Article; and as for the Uſufruct, there is no Tranſmiſſion of it, for it periſhes by the Death of the Uſufructuary. See the firſt Article of the ſixth Section of Uſufruct, and the fourth Article of the firſt Section of the ſame Title, and the Remark there made upon it.

VII.

7. *Another Difference.*

There is likewiſe this Difference between the Legacy of an Uſufruct and an annual Legacy, that a Legacy of an Uſufruct cannot be perpetual, becauſe it would annul the Right of Property; but an annual Legacy may be perpetual, whether it be in favour of a Corporation, or of the Heirs of ſome Family *h*.

h In annalibus legatis vel fideicommiſſis, quæ teſtator non ſolum certæ perſonæ, ſed & ejus hæredibus præſtari voluit, eorum exactionem omnibus hæredibus & eorum hæredum hæredibus ſervari pro voluntate teſtatoris præcipimus. *l.* 22. *C. de leg.*

VIII.

8. *Another Difference.*

There is alſo this other Difference between theſe two kinds of Legacies, that if the Lands which are ſubject to an Uſufruct ſhould produce nothing, the Right of the Uſufructuary would be of no uſe. But the Legacy of a certain Quantity of Corn, Wine, or other Things, is altogether independent of what may be reaped in the Harveſt or Vintage. And even altho ſuch a Legacy were aſſigned to be taken out of the Crop of every Year, it would nevertheleſs be due in a Year when there were no Crop, provided that the other Years could ſupply the ſaid Deficiency, and that the Intention of the Teſtator were not contrary thereto *i*.

i *Vini Falerni quod domi naſceretur quotannis in annos ſingulos binos culeos hæres meus Attio dato:* Etiam pro eo anno, quo nihil vini natum eſt, debere duos culeos: ſi modo ex vindemia cæterorum annorum dari poſſit. *l.* 17. §. 1. *ff. de ann. leg.*

Quæ ſententia, *ſi voluntas non adverſetur*, mihi quoque placet. *l.* 13. *ff. de trit. vin. vel. ol. leg.*

IX.

9. *An annual Legacy is acquired at the beginning of the Year.*

Annual Legacies accrue to the Legatary when the Year begins: And altho he dies as ſoon as the Year is begun, yet the Legacy for that whole Year is due *l*. For it is natural that a Legacy which is in lieu of a Fund for a Maintenance ſhould be acquired before hand.

l Si competenti judici annua legata vel fideicommiſſa tibi relicta probaveris, ab initio cujuſque anni exigendi ea habebis facultatem. *l.* 1. *C. quando dies leg. vel fid. ced. v. l.* 5. *ff. de ann. leg.* In omnibus quæ in annos ſingulos relinquuntur hoc probaverunt, ut initio cujuſque anni hujus legati dies cederet. *l.* 12. *ff. quando dies leg. ced.* See the ſixth Article.

X.

10. *A Legacy that is payable in ſeveral Years, is of another Nature than an annual Legacy.*

We muſt not reckon in the Number of annual Legacies, a Legacy of a certain Sum that is made payable every Year until a certain Time, for ſome other Cauſe than that of a Maintenance or Alimony, no more than a Legacy of a Sum made payable at ſeveral Terms of ſeveral Years. For theſe Payments being thus divided only to leſſen the Charge of the Executor, theſe Legacies would be of the ſame Nature with others, and as one ſingle Legacy, of which the entire Right would accrue to the Legatee at one and the ſame time. So that this Legatee happening to die before theſe Years were expired, he would tranſmit to his Heir or Executor the annual Payments that ſhould remain due *m*.

m Si cum præfinitione annorum legatum fuerit, veluti, *Titio dena uſque ad annos decem:* Julianus libro trigeſimo digeſtorum ſcripſit, intereſſe. Et ſi quidem alimentorum nomine legatum fuerit: plura eſſe legata & futurorum annorum legatum legatarium mortuum ad hæredem non tranſmittere. Si vero non pro alimentis legavit, ſed in plures penſiones diviſit exonerandi hæredis gratia, hoc caſu ait, omnium annorum unum eſſe legatum: & intra decennium decedentem legatarium, etiam futurorum annorum legatum ad hæredem ſuum tranſmittere. Quæ ſententia vera eſt. *l.* 20. *ff. quand. leg. ced.*

XI.

11. *How we are to judge whether a Legacy of a Sum of Money to be diſtributed on a certain Day, be perpetual, or only for one ſingle time.*

If a Teſtator had left a Legacy of a Charity to be given on a certain Day, or of a Sum of Money to be diſtributed, either to the Canons of a Chapter, or to the Eccleſiaſticks of ſuch a Pariſh, or to ſome other ſuch like Uſe, upon ſome Feſtival or Solemnity, which ſhould return every Year, as on a Saint's Day, or on ſome Feſtival of ſome of the Myſteries of Religion, without mentioning expreſly that the ſaid Charity or Dole ſhould

ſhould be reiterated every Year on the ſaid Day; we ſhould judge by the Circumſtances, whether the Intention of this Teſtator was to leave a Legacy of a Sum to be paid only for one ſingle Time, or to be paid yearly at the Return of the ſaid Day. Which would depend on the Quality of the Perſon, on the Largeneſs of his Eſtate, on the Words of the Teſtament, on the Motive of the Legacy, on the Fund ſet apart for the ſaid Charity or Dole, and on the other Circumſtances which might help us to judge of the Intention of this Teſtator *n*.

n Cum quidam decurionibus diviſiones dari voluiſſet die natalis ſui: Divi Severus & Antoninus reſcripſerunt, non eſſe veriſimile teſtatorem de uno anno ſenſiſſe, ſed de perpetuo legato. *l.* 23. *ff. de ann. leg.*

Attia fideicommiſſum his verbis reliquit, *quiſquis mihi hæres erit, fidei ejus committo, uti det ex reditu cœnaculi mei & horrei, poſt obitum, ſacerdoti, & hierophylaco, & libertis, qui in illo tempore erunt, denaria decem die nundinarum quas ibi poſui.* Quæro, utrum his duntaxat qui eo tempore quo legabatur, in rebus humanis, & in eo officio fuerint, debitum ſit, an etiam his, qui in locum eorum ſucceſſerunt? Reſpondit, ſecundum ea quæ proponerentur, miniſterium nominatorum deſignatum, cæterum datum templo. Item quæro, utrum uno duntaxat anno decem fideicommiſſi nomine debeantur, an etiam in perpetuum decem annua præſtanda ſint? Reſpondit, in perpetuum. *l.* 20. *eod.*

Altho theſe Texts ſeem not to make the Perpetuity of a Legacy of this kind to depend on the Circumſtances, yet it appears evidently that the Legacies there mentioned are declared to be perpetual only becauſe of the Circumſtances which reſult from the Quality of the ſaid Legacies, according to the Uſage of thoſe Times. And as for the Uſage with us, it is hardly poſſible that ſuch a Doubt ſhould happen; for a Teſtator who ſhould leave a perpetual Legacy of the nature of theſe explained in the Article, would not fail to expreſs it, and to aſſign a Fund for a Charge of this kind.

XII.

12. *Legacies of Alimony are for Life.*

Legacies of Alimony, or of a Maintenance, laſt during the Life of a Legatary, unleſs the Teſtator has limited the Time. For Alimony, and a Maintenance, left indefinitely, not being reſtrained to a certain Duration of Time, are for the whole Time that the Legatee ſhall ſtand in need of them, which comprehends his whole Life *o*.

o Mela ait, ſi puero vel puellæ alimenta relinquantur, uſque ad pubertatem deberi. Sed hoc verum non eſt, tamdiu enim debebitur donec teſtator voluit: aut ſi non paret quid ſentiat, per totum tempus vitæ debebuntur. *l.* 14. *ff. de alim. vel cib. leg.*

XIII.

13. *A Legacy of Alimony to the Years of Puberty, is underſtood to be meant of full Puberty.*

Seeing a Legacy of Alimony, or of a Maintenance, is altogether favourable, if a Teſtator had deviſed ſuch a Legacy to laſt only until the Legatary ſhould attain the Age of Puberty, it would not end till he had attained the Age of full Puberty, that is, eighteen Years compleat in Males, and fourteen in Females *p*.

p Certe ſi *uſque ad pubertatem* alimenta relinquantur, ſi quis exemplum alimentorum, quæ dudum pueris & puellis dabantur, velit ſequi, ſciat Hadrianum conſtituiſſe, ut pueri uſque ad decimumoctavum, puellæ uſque ad quartumdecimum annum alantur, & hanc formam ab Hadriano datam obſervandam eſſe Imperator noſter reſcripſit. Sed etſi generaliter pubertas non ſic definiatur, tamen pietatis intuitu in ſola ſpecie alimentorum hoc tempus ætatis eſſe obſervandum, non eſt incivile. *l.* 14. §. 1. *ff. de alim. vel cib. leg.*

See touching theſe two ſorts of Puberty, the Remark on the eighth Article of the ſecond Section of Perſons.

XIV.

14. *A Legacy of Alimony comprehends Clothing and Lodging.*

A Legacy of Maintenance, or barely of Alimony, comprehends Food, Raiment, and Lodging, unleſs the Teſtator ſhall have ſet ſome Bounds to it; for one cannot live without Clothes and Lodging. But this Legacy does not comprehend that which relates to the Inſtruction of the Legatee, either for a Trade, or ſome Profeſſion, or for his Learning at School. For theſe Wants are of another nature, and are not ſo neceſſary as Food, Clothing, and Lodging *q*.

q Legatis alimentis, cibaria & veſtitus & habitatio debebitur: quia ſine his ali corpus non poteſt, cætera quæ ad diſciplinam pertinent, legato non continentur. *l.* 6. *ff. de alim. vel cib. leg.* Niſi aliud teſtatorem ſenſiſſe probetur. *l.* 7. *eod.*

Rogatus es *ut quendam educes*, ad victum neceſſaria ei præſtare cogendus es. *Paulus:* cur plenius eſt alimentorum legatum, ubi dictum eſt & veſtiarium, & habitationem contineri? imo ambo exæquanda ſunt. *l. ult. eod.*

XV.

15. *Legacies of Alimony are regulated according to the Circumſtances.*

If a Teſtator had bequeathed Alimony, or a Maintenance, indefinitely, without ſpecifying any thing, and if he had been wont to maintain the Perſon to whom he had left this Legacy, it would be regulated on the ſame foot: If not, it would be fixed either at a certain Sum of Money yearly, or a certain Quantity of Neceſſaries to be paid in Specie, and in proportion to the Quality of the Legatee, the Quality of the Teſtator and of his Eſtate, the Conſideration which the Teſtator might have had for the Perſon of this Legatee, either out of Affection to him, or becauſe of ſome Duty or other Tie, and according to the other Circumſtances which might help us to judge of the Intention of

of the Teſtator *r*, as has been ſaid in another Place *s*.

r Cum alimenta per fideicommiſſum relicta ſunt non adjecta quantitate, ante omia inſpiciendum eſt quæ defunctus ſolitus fuerat ei præſtare: deinde quid cæteris ejuſdem ordinis reliquerit: ſi neutrum apparuerit, tum ex facultatibus defuncti, & caritate ejus cui fideicommiſſum datum erit, modus ſtatui debebit. *l.* 22. *de alim. vel cib. leg.*

s See the twelfth Article of the ſixth Section of Teſtaments.

XVI.

16. *How a Legacy of Alimony which the Teſtator had been uſed to give in his Lifetime is regulated.*

If he who gave always Alimony, or a Maintenance, to a Perſon, leaves him a Legacy of what he was wont to give him, and it does appear that he gave him differently, ſometimes more, and ſometimes leſs; the Legacy will be regulated upon the foot of what he gave the laſt time immediately preceding his Death, whether he had given more before that time, or leſs *t*.

t Sed ſi alimenta *quæ vivus præſtabat*, reliquerit, ea demum præſtabuntur quæ mortis tempore præſtare ſolitus erat. Quare ſi forte varie præſtiterit: ejus tamen temporis præſtatio ſpectabitur quod proximum mortis ejus fuit. Quid ergo ſi cum teſtaretur, minus præſtabat, plus mortis tempore, vel contra? adhuc erit dicendum, eam præſtationem ſequendam quæ noviſſima fuit. *l.* 14. §. 2. *ff. de alim. vel cib. leg.*

XVII.

17. *A Legacy of Alimony is due, altho the Legatary have been maintained ſome other way.*

Although Legacies of Alimony, or Maintenance, be deſtined for the Diet, Clothing, and Lodging of the Legatee, yet if the Teſtamentary Heir does not furniſh them to the Legatary, and he have them ſomewhere elſe, and even gratis, this Teſtamentary Heir, or his Heirs or Executors, if he were dead, would nevertheleſs be accountable for the Arrears to the ſaid Legatee. And the Ceſſation of Payment for ſeveral Years would be of no manner of prejudice to him either for the Time paſt, or the Time to come. For altho the Motive of the Teſtator was barely that the Legatee ſhould be maintained, and that he has had his Maintenance; yet this was a Charge that the Teſtator impos'd on his Teſtamentary Heir: And on his part it would be unjuſt that he ſhould reap the Benefit of it, as it is juſt on the part of the Legatary, that he ſhould have the Advantage both of the Bounty of this Teſtator, and of the Liberality of other Perſons who had nouriſhed and maintained him, or of his own Induſtry, if he had lived by that *u*.

u Præteriti temporis alimenta reddenda ſunt. *l.* 10. §. 1. *ff. de alim. vel cib. leg.*

Manumiſſis teſtamento cibaria annua, *ſi cum matre morabuntur*, per fideicommiſſum dedit. Mater filio triennio ſupervixit: neque cibaria, neque veſtiaria eis præſtitit, cum in petitione fideicommiſſi liberti ceſſarent. Sed & filia, poſteaquam matri hæres extitit, quoad vixit, annis quatuordecim interpellata de iiſdem ſolvendis non eſt. Quæſitum eſt an poſt mortem filiæ à noviſſimo hærede petere poſſint, & tam præteriti temporis, quam futuri, id quod cibariorum nomine & veſtiarii relictum eſt? reſpondit ſi conditio extitiſſet, nihil proponi cur non poſſent. *l.* 18. §. 1. *eod.*

XVIII.

18. *Legacies of Alimony are favourable.*

Legacies of Alimony are diſtinguiſhed from the greateſt part of other Legacies, by the Conſideration of the Neceſſity that renders them ſo favourable, that one may bequeath Alimony even to Perſons that are incapable of other Legacies, as has been ſaid in its Place *x*. And if a Legacy of Alimony or Maintenance, or of a yearly Penſion, were made in favour of poor Perſons, it might be ranked in the Number of Legacies to pious Uſes, which are the Subject-matter of the enſuing Section.

x See the ſixth Article of the ſecond Section.

SECT. VI.

Of Legacies to pious Uſes.

The CONTENTS.

1. *What are Legacies to pious Uſes.*
2. *Difference between Legacies to pious Uſes and other Legacies by their Motives and their Uſe.*
3. *Difference between a Legacy to pious Uſes, and a Legacy which regards the publick Good.*
4. *A Legacy to a pious Uſe, without any particular Deſtination, how to be applied.*
5. *Execution of Legacies to pious Uſes.*
6. *Deſtination of a pious Legacy to another Uſe than that which the Teſtator had appointed.*
7. *Privilege of Legacies to pious Uſes.*

I.

1. *What are Legacies to pious Uſes.*

Legacies to pious Uſes are thoſe Legacies that are deſtined to ſome Work of Charity *a*; whether they relate to ſpiritual or temporal Concerns. Thus, a Legacy of Ornaments for a Church, a Legacy for the Maintenance of a Clergyman to inſtruct poor Children, and a Legacy for their Suſtenance, are Legacies to pious Uſes.

a Diſpoſitiones pii teſtatoris. *l.* 28. *C. de Epiſc. & Cler.* †

II.

II.

2. Difference between Legacies to pious Uſes, and other Legacies, by their Motives, and their Uſe.

We may make this a firſt Difference between Legacies to pious Uſes, and the other ſorts of Legacies, that the Name of Legacies to pious Uſes is properly given only to thoſe Legacies which are deſtined to ſome Work of Piety and Charity, and which have their Motives independent of the Conſideration which the Merit of the Legatees might procure them *b*; whereas the other Legacies have their Motives confined to the Conſideration of ſome particular Perſon, or are deſtined to ſome other Uſe than to a Work of Piety or Charity, as ſhall be ſhewn in the Article which follows.

b It is in this Motive that the eſſential Part of Legacies to pious Uſes does conſiſt.

III.

3. Difference between a Legacy to pious Uſes, and a Legacy which regards the publick Good.

All Legacies which have not for their Motive the particular Conſideration of ſome Perſon, are not for all that of the Number of Legacies to pious Uſes, altho they be deſtined for a publick Good, if that Good be any other than a Work of Piety or Charity. Thus, a Legacy deſtined for ſome publick Ornament, ſuch as the Gate of a City, for the Imbelliſhment or Conveniency of ſome publick Place, and others of the like nature, or a Legacy of a Prize to be given to the Perſon who ſhould excel others in ſome Art or Science, would be Legacies of another nature than thoſe to pious Uſes *c*.

c Si quid relictum ſit civitatibus, omne valet, ſive in diſtributionem relinquatur, ſive in opus, ſive in alimenta, vel in eruditionem puerorum, ſive quid aliud. *l.* 117. *ff. de leg.* 1.

Civitatibus legari poteſt etiam quod ad honorem ornatumque civitatis pertinet. *Ad ornatum* puta quod ad inſtruendum forum, theatrum, ſtadium, legatum fuerit. *Ad honorem* puta, quod ad munus, venationemve, ludos ſcenicos, ludos circenſes, relictum fuerit: aut quod ad diviſionem ſingulorum civium, vel epulum relictum fuerit: hoc amplius quod in alimenta infirmæ ætatis, puta ſenioribus, vel pueris puelliſque, relictum fuerit ad honorem civitatis pertinere reſpondetur. *l.* 122. *eod.*

IV.

4. A Legacy to a pious Uſe, without any particular Deſtination, how to be applied.

If a Legacy to pious Uſes was not deſtined to any particular Uſe, as, if a Teſtator had left a Legacy in general either to the Church, or to the Poor; the Legacy to the Church would be for the Pariſh-Church of the Place where the Teſtator lived; and the Legacy to the Poor would be for the Hoſpital of that Place, if there were any: If there were no Hoſpital, the Legacy would go to the Poor of that Pariſh. And it would be the ſame thing, if inſtead of a bare Legacy, the Teſtator had inſtituted for his Teſtamentary Heirs the Church, or the Poor *d*.

d Si quis in nomine magni Dei & Salvatoris noſtri Jeſu Chriſti hæreditatem, aut legatum reliquerit, jubemus, Eccleſiam loci illius, in quo teſtator domicilium habuerit, accipere quod dimiſſum eſt. *Nov.* 131. *c.* 9.

It appears by this Text, that it was the Uſage of thoſe Times to leave Legacies to God. And if ſuch a Legacy ought to belong to the Church of the Place, with much more Reaſon ought a Legacy that is left to the Church indefinitely belong to the Teſtator's Pariſh-Church.

V.

5. Execution of Legacies to pious Uſes.

If the Teſtator himſelf had not directed particularly the Application of a Legacy to pious Uſes; as, if he had left a Legacy to the Poor indefinitely in a Place where there were no Hoſpital, or for the Redemption of Captives, without ſpecifying in what Place; the Execution of theſe Diſpoſitions would depend on the Executor of the Teſtament, or other Perſon to whom the Teſtator had explained and intruſted his Intention. And if there were no Perſon to whom he had imparted his Will, and that it were not ſafe to truſt to the Integrity of the Teſtamentary Heir, the ordinary Judge would give Directions therein, at the Inſtance of the Perſons whoſe Duty it ſhould be to ſee theſe Legacies duly applied *e*.

e Si quidem teſtator deſignaverit per quem deſiderat redemptionem fieri captivorum, is qui ſpecialiter deſignatus eſt, legati vel fideicommiſſi habeat exigendi licentiam: & pro ſua conſcientia votum adimpleat teſtatoris. Sin autem perſona non deſignata, teſtator abſolute tantummodo ſummam legati vel fideicommiſſi taxaverit, quæ debeat memoratæ cauſæ proficere: vir reverendiſſimus Epiſcopus illius civitatis ex qua teſtator oritur habeat facultatem exigendi quod hujus rei gratia fuerit derelictum, pium defuncti propoſitum ſine ulla cunctatione, ut convenit, impleturus. *l.* 28. §. 1. *C. de Epiſc. & Cler.*

¶ What is ſaid in this Text, that if the Teſtator has named no body for the Execution of his Legacies to pious Uſes, the Biſhop of the Place may demand the Sum bequeathed, in order to execute the Intention of the Teſtator, is not altogether conformable to our Uſage. For the Biſhop may indeed take care that the Legacies left to the Poor be duly applied; but it is not he himſelf that demands and receives the Sums appropriated to theſe ſorts of Legacies. And if it be neceſſary to ſue the Executor at Law, this Function will belong to the Perſons who are charged with this Care, ſuch as the Go-

vernors of an Hoſpital, or of an Alms-Houſe, according as theſe Legacies happen to be deſtined. And if the Legacy were not appropriated to any particular Houſe, as a Legacy of an Alms to be diſtributed on a certain Day in a certain Place, which were not applied to any particular Hoſpital, or a Legacy to the Poor in a Place where there were no Houſe allotted for them, the Officers of Juſtice would be obliged to give Directions therein at the Inſtance of the King's Procurators. Which does not hinder the Biſhops and Curates from doing their Diligence on their part to procure the Execution of theſe ſorts of Legacies. We may conſult on this Subject the Ordinances which have provided for the Recovery, Preſervation, and Adminiſtration of the Goods belonging to the Poor. *See the Edict of* 1561, *the Ordinance of* Moulins, *Art.* 73. *that of* Blois, *Art.* 65, *&* 66. *and that of* Melun, *Art.* 10.

VI.

6. Deſtination of a pious Legacy to another Uſe than that which the Teſtator had appointed.

If a pious Legacy were deſtined to ſome Uſe which could not have its Effect, as if a Teſtator had left a Legacy for building a Church for a Pariſh, or an Apartment in an Hoſpital, and it happened either that before his Death the ſaid Church, or the ſaid Apartment had been built out of ſome other Fund, or that it was no ways neceſſary or uſeful, the Legacy would not for all that remain without any Uſe; but it would be laid out on other Works of Piety for that Pariſh, or for that Hoſpital, according to the Directions that ſhould be given in this matter by the Perſons to whom this Function ſhould belong *f*.

f Legatum civitati relictum eſt, *Ut ex reditibus quotannis in ea civitate memoriæ conſervandæ defuncti gratia ſpectaculum celebretur*, quod illic celebrari non licet. Quæro quid de legato exiſtimes? Modeſtinus reſpondit: cum teſtator ſpectaculum edi voluerit in civitate, ſed tale, quod ibi celebrari non licet: iniquum eſſe hanc quantitatem quam in ſpectaculum defunctus deſtinaverit, lucro hæredum cedere. Igitur adhibitis hæredibus, & primoribus civitatis, diſpiciendum eſt, in quam rem converti debeat fideicommiſſum, ut memoria teſtatoris alio & licito genere celebretur. *l.* 16. *ff. de uſu & uſuf. & red. leg.*

Altho this Text relates to another ſort of Diſpoſitions, yet the Rule that reſults from it is with much more Reaſon very juſt in Legacies to pious Uſes.

VII.

7. Privilege of Legacies to pious Uſes.

Since Legacies for Works of Piety and Charity have a double Favour, both that of their Motive for holy and pious Uſes, and that of their Utility for the publick Good; they are conſidered as being privileged in the Intention of the Law *g*.

g See the ſixth Article of the eighth Section, and the Remark on the fourth Article of the ſecond Section of Codicils.

The Favour of Legacies to pious Uſes may diſtinguiſh them from other Legacies in the Caſes mentioned in the Places which we have juſt now quoted; and in general, this Favour may be conſidered in the Caſes relating to the Interpretation of any Diſpoſition for a Legacy to a pious Uſe.

See concerning this Subject of Privileges of Legacies to pious Uſes, the Preamble to the ſecond Section of the Falcidian Portion.

SECT. VII.

Of Legacies of one of ſeveral Things, at the Choice of the Executor, or of the Legatee.

WE have endeavoured to form the Rules which compoſe this Section in ſuch a manner, as that they may reconcile ſome Contrarieties, at leaſt, ſuch in appearance, as we meet with in ſome Laws relating to this Matter. Thus, for example, it is ſaid in one Law, That if a Teſtator hath bequeathed in general a Man, that is to ſay, a Slave, the Legatary ſhall have the Choice of the Perſon; *Homine generaliter legato, arbitrium eligendi quem acciperet, ad legatarium pertinet. l.* 2. §. 1. *ff. de opt. vel el. leg.* And it is ſaid in another Law, That if a Teſtator hath bequeathed in general a Silver Baſon, he having ſeveral, and not diſtinguiſhing which Baſon he intends to give; the Teſtamentary Heir will have it in his Choice to give which Baſon he pleaſes. *Sed etſi lancem legaverit, nec apparuerit quam, æque electio eſt hæredis quam velit dare. l.* 37. *in fine ff. de leg.* 1.

It would ſeem by theſe Texts, that whoever ſhould take both the one and the other in a literal Senſe, might think it indifferent in point of Law, whether the Election were given to the Teſtamentary Heir, or to the Legatee, which certainly cannot be juſt; but in order to reconcile them together, it is neceſſary to obſerve a Diſtinction of the antient *Roman* Law between Legacies which were called *per vindicationem*, and thoſe that were called *per damnationem*, of which mention hath been made in another Place *a*. In the Legacies of the firſt ſort, the Legacy being conceived in theſe or the like Terms, *I will that*

a See the Preamble of the ninth Section of Teſtaments.

ſuch

ſuch a one take a Horſe out of my Stable, the Legatee had the Choice; for he himſelf took the Thing that was bequeathed to him: And it is of a Legacy of this kind, that we are to underſtand the firſt of the Texts which have been now quoted. And in the Legacies of the ſecond kind, the Legacy being conceived in theſe Terms, *I will that my Heir give to ſuch a one, one of my Horſes,* the Teſtamentary Heir made the Choice; for it was he that was charged to give the Thing that was bequeathed *b*: And it is of a Legacy of this ſecond kind that we are to underſtand the ſecond Text. Thus altho the Differences of theſe two ſorts of Legacies, and of ſome others, of which it would be to no purpoſe to ſpeak here, have been aboliſhed *c*, yet it is neceſſary to make uſe of them for conciliating the Contrarieties of theſe, and of many other Laws, which have very much perplexed ſeveral Interpreters, and that not without reaſon. And we may likewiſe ſay of theſe two kinds of Legacies, which were thus diſtinguiſhed in the *Roman* Law, that their different Expreſſions may point out ſome Difference in the Intention of the Teſtator; and that that Expreſſion which gives to the Legatee the Right to take, ſeems to have a greater relation to the Right of chuſing, than that which charges the Teſtamentary Heir to give to the Legatee.

We have been obliged to make this Reflexion on a Difficulty, which it was neceſſary to clear up before we ſhould proceed to explain the Rules relating to this Matter. But ſeeing in our Uſage there is only one manner of Expreſſion uſed by Teſtators, which has no relation to any one of theſe two ſorts of Legacies that were diſtinguiſhed in the *Roman* Law, and that almoſt all Legacies are conceived in theſe Terms, *I give and bequeath to ſuch a one,* or, if it is in the Name of a third Perſon, *gives and bequeaths*; theſe Expreſſions mark nothing at all of the Intention of the Teſtator, that favours either the Teſtamentary Heir or the Legatee. Thus, unleſs the Legacy be conceived in ſuch a manner as to leave the Choice either to the one or to the other, it muſt be interpreted according to the Rules that have been explained in the ſixth, ſeventh, eighth, ninth, tenth, and eleventh Articles of the ſeventh Section of Teſtaments. And ſince it is not proper to repeat in this Section what has been ſaid in thoſe Articles, the Reader may have recourſe to them, and join them here.

b V. Tit. Ulp. 24. §. 14.
c §. 2. Inſt. de legat.

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I.

1. Three Manners of bequeathing one out of ſeveral things.

One may bequeath one of two or more things in three manners. For one may leave ſuch a Legacy without making mention of the choice; as if a Teſtator bequeaths ſimply a Horſe to be taken from among thoſe in his Stable, a Picture to be taken out of thoſe in his Cloſet; and one may leave the Choice either to the Legatary or to the Executor *a*.

a See the following Articles.

II.

2. Of Legacies where no mention is made who ſhall have the choice.

If a Teſtator bequeaths a thing to be taken out of ſeveral of the ſame kind that ſhall be found in this Succeſſion, or even that are not part of the Succeſſion, and does not expreſs to whom the Choice ſhall belong, whether to the Executor or to the Legatee, this Legacy will depend on the Rule explained in

the twenty ſecond Article of the third Section of this Title, and on the Rules which follow *b*.

b See that twenty ſecond Article of the third Section of this Title, and the tenth Article of the ſeventh Section of Teſtaments. See the following Rules.

III.

3. *If the Expreſſion of the Teſtator determines the Choice, we muſt hold to that.*

If the Expreſſion of the Teſtator is conceived in ſuch Terms as to make us judge, that altho he has not given the Choice either to the Executor or to the Legatary, in a Legacy of one out of two or more things, his Intention was to bequeath one of them rather than the other; the Legacy will be underſtood of that thing to which the Teſtator's Expreſſion ſhall have a greater relation than to the other, whether it be of more or leſs value. Thus, for example, if a Teſtator had bequeathed his Saddle-Horſe, having ſeveral of that kind, the Legacy would be underſtood of the Horſe which the Teſtator himſelf was wont to ride. Thus, for another example, if he who had two Houſes, one in *Paris* in which he himſelf dwelt, and the other at *St. Denis* occupied by a Tenant, had left a Legacy in theſe Terms, *I give and bequeath my Houſe to ſuch a one*; this Expreſſion would determine the Legacy to be meant of the Houſe in which the Teſtator lived, unleſs it ſhould appear by the Circumſtances that his Intention was to bequeath the other. But if the Expreſſion of the Teſtator ſhould not determine particularly for any one of the two Houſes, as if he had barely deviſed one of his Houſes; or if having two Lands called by the ſame Name, he had deviſed one of them, the Executor might give only the Houſe or the Land that is of leaſt value *c*, for by that he will have ſatisfy'd the Legacy. And in general in all Doubts of this nature, where nothing determines to one of the things which are comprehended in a Legacy, the Preſumption is for the Executor, as has been explained in another Place *d*.

c Si de certo fundo ſenſit teſtator, nec appareat de quo cogitaverit: electio hæredis erit, quem velit dare: aut ſi appareat, ipſe fundus vindicabitur. *l.* 37. §. 1. *ff. de leg.* 1.

Scio ex facto tractatum: cum quidam duos fundos ejuſdem nominis habens, legaſſet fundum Cornelianum: & eſſet alter pretii majoris, alter minoris: & hæres diceret minorem legatum, legatarius majorem vulgo fatebitur, utique minorem eum legaſſe, ſi majorem non potuerit docere legatarius. *l.* 39. §. 6. *ff. de leg.* 1.

d See the ſixth, ſeventh, and other following Articles of the ſeventh Section of Teſtaments.

IV.

4. *A Legacy left to the choice of the Executor.*

If a Teſtator had bequeathed a Silver Baſon, having ſeveral of that ſort, the Executor would be at liberty to give which Silver Baſon he pleaſed *e*. For the Legatary would have that which was left him; and this is a Conſequence of the Rule explained in the third Article. And the Executor would with much more reaſon have this Liberty, if the Teſtator had left the Choice to him. But if the Legacy were of things which altho of the ſame kind might be of different Qualities, good or bad, ſuch as Horſes, Hangings, the Liberty of chuſing which the Executor would have, would not extend to a Power of chuſing a Sute of old Hangings that are falling to pieces, or a Horſe that is broken-winded. For it could not be preſumed that the Teſtator had given this Extent to the Right of Election which he had left to his Executor *f*.

e Sed etſi lancem legaverit, nec apparuerit quam, æque electio eſt hæredis, quam velit dare. *l.* 37. *in f. ff. de leg.* 1.

f Si hæres generaliter ſervum *quem ipſe voluerit*, dare juſſus, ſciens furem dederit, iſque furtum legatario fecerit, de dolo malo agi poſſe ait. Sed quoniam illud verum eſt, *hæredem in hoc teneri ut non peſſimum det*, ad hoc tenetur ut & alium hominem præſtet, & hunc pro noxæ deditione relinquat. *l.* 110. *ff. de leg.* 1. See the twenty ſecond Article of the third Section, and the eighth and tenth Articles of the ſeventh Section of Teſtaments.

V.

5. *A Legacy left to the choice of the Legatary.*

When a Teſtator gives to the Legatary the Right of chuſing out of ſeveral things, ſuch as the Horſes in his Stable, any of them which he pleaſes, and in like manner of other things; the Legatary has the Liberty to chuſe the moſt precious of them *g*. And to put the Legatee in a condition to make this Choice, the Executor is obliged to ſhew all that there is in the Inheritance of that kind of thing of which the Election is bequeathed. And if there ſhould be any which by ſome Chance, without the Deed of the Executor, had not appear'd, the Legatary who without knowing any thing of them, had made his choice, might chuſe anew after he came to the knowledge of them *h*. But if among all theſe things

g Quoties ſervi electio vel optio datur, legatarius optabit quem velit. *l.* 2. *ff. de opt. vel elect. leg.*

h Scyphi electione data, ſi non omnibus ſcyphis exhibitis legatarius elegiſſet, integram ei optionem manere placet. Niſi ex his duntaxat eligere voluiſſet, cum ſciret & alios eſſe. *l.* 4. *eod.* Nec ſolum ſi fraude hæredis, ſed etiam ſi alia qualibet cauſa id evenerit. *l.* 5. *eod.*

there

there ſhould be any one that were ſingularly neceſſary to the Executor for matching ſome other Goods of the Succeſſion, it would be equitable to except it out of the choice of this Legatary, eſpecially if the Executor is willing to make up to the Legatary what this neceſſary thing ſhould exceed the others in value, if none of the others be found of an equal Value to it. For the Right of the Legatary does not extend ſo far as to put it in his power to hurt the Executor *i*.

i As the Executor or Teſtamentary Heir, ought not to abuſe the Liberty of Election, as has been ſaid in the preceding Article; ſo neither ought the Legatary to abuſe it when he has it. Homine legato, actorem non poſſe eligi. *l.* 37. *ff. de leg.* 1. See the tenth Article of the ſeventh Section of Teſtaments.

VI.

6. A Legacy left to the choice of a third Perſon.

If the Teſtator had left to a third Perſon the Choice of the thing bequeathed, either becauſe he did not think the Legatary capable of making the ſaid Choice, or becauſe he was willing to make uſe of that Temperament between the Intereſts of the Executor and of the Legatee, the Legacy would be fixed by that third Perſon. And if he ſhould fail, or refuſe to determine it, the right of Election would go to the Legatary, who might demand of the Executor ſuch of the things as he ſhould pitch upon, providing it were not the moſt precious of all, but a thing of middle Value between that which were moſt precious and that of leaſt Value *l*. And in caſe they could not agree among themſelves, the Election would be determined by the Arbitration of ſome Perſon whom they themſelves ſhould agree on, or who ſhould be named by the Judge *m*.

l Si quis optionem ſervi vel alterius rei reliquerit, non ipſi legatario, ſed quam Titius forte elegerit: Titius autem vel noluerit eligere, vel non potuerit. vel morte fuerit præventus, & in hac ſpecie dubitabatur apud veteres quid ſtatuendum ſit: utrumne legatum expiret, an aliquod ei inducatur adjutorium, ut viri boni arbitratu procedat electio. Cenſemus itaque, ſi intra annale tempus ille qui eligere juſſus eſt hoc facere ſuperſederit, vel minime potuerit, vel quandocunque deceſſerit, ipſi legatario videri eſſe delatam electionem. Ita tamen, ut non optimum ex ſervis, vel aliis rebus quidquam eligat, ſed mediæ æſtimationis. Ne dum legatarium ſatis eſſe fovendum exiſtimamus, hæredis commoda defraudentur. *l. ult.* §. 1. *C. comm. de legat.*

m Arbitri officium invocandum eſt. *l.* 13. *in f. ff. de ſervit. prad. ruſt.*

The Delay of a Year, mentioned in the firſt of theſe two Texts, would not be agreeable to our Uſage nor to Equity. For ſeeing this third Perſon who ſhould put off ſo long the making of this choice, was named only that he might make a reaſonable choice, and that others can do it as well as he, it would not be juſt to wait ſo long a time till he ſhould be pleaſed to determine the Matter, eſpecially if the thing bequeathed were of ſuch a nature as to be in hazard of periſhing during the Delay.

VII.

7. He who has the choice ought not to defer it.

When the Teſtator hath given power to chuſe, whether it be to the Executor or to the Legatary, he who ought to make the choice cannot put it off any longer time than what the Condition of the things ſhall make neceſſary, or what ſhall have been regulated by the Teſtator, or by mutual conſent of the Parties, or even by the Judge, if the Matter cannot be otherwiſe ſettled. And he who has the Choice in his power, if he delays to make it, may be ſued by the other, who may cauſe him to be ſummoned in order to make his Option; and may proteſt for his Coſts and Damages becauſe of the delay: Which would have the Effect that ſhall be explained by the following Rules *n*.

n Mancipiorum electio legata eſt. Ne venditio quandoque eligente legatario interpelletur, decernere debet Prætor, niſi intra tempus ab ipſo præfinitum elegiſſet, actionem legatorum ei non competere. *l.* 6. *ff. de opt. vel elect. leg. l.* 8. *eod.*

What is ſaid in this and the other Articles which follow, concerning the Delay of the Executor or of the Legatee, is to be underſtood of the Caſes where there has been a Citation of the Party to come and make his choice, or where there appears to be ſome Knavery in the delay; as for example, if an Executor ſhould keep up and conceal for ſome time a Teſtament or Codicil in which he was charged with a Legacy left to his own choice.

VIII.

8. Penalty when the Executor defers to make the choice.

If the Executor to whom the Choice was left was in delay, and in the mean while the things, of which one was to be given to the Legatary, ſhould happen to periſh, or to ſuffer damage, he would be liable to make good the Loſs or Diminution to which his Delay had given occaſion. For the Legatary might have perhaps been able to ſell the thing, or prevent its periſhing or being damaged; and if the things being ſtill in being, the Legatary had ſuffered Damages becauſe one of them was not delivered to him, the Executor would be accountable for the ſame *o*. But if ſome of the things of which the Choice was to be made were not preſent, and that too long a Delay would be prejudicial to the Legatary, he might oblige the

o See the Text cited upon the preceding Article which may agree as well to the Delay of the Executor, as to that of the Legatary.

Exe-

Executor either to chuſe for him one of the things that were preſent, or to give him the Value of one of the things that were abſent *p*.

p Si Stichus aut Pamphilus legetur, & alter ex his vel in fuga ſit, vel apud hoſtes: dicendum erit præſentem præſtari, aut abſentis æſtimationem. Toties enim electio eſt hæredi committenda, quoties moram non eſt facturus legatario. *l.* 47. §. 3. *ff. de leg.* 1.

IX.

9. *Penalty when the Legatary defers to make the choice.*

If the Choice belongs to the Legatary, and he puts it off, he will be liable for the Coſts and Damages which may have been occaſioned by his Delay, in the ſame manner as the Executor is liable for the Conſequences of his Delay. Thus, for Example, if two Horſes, one whereof (which ſoever he ſhould chuſe) had been left him by Legacy, ſhould happen to die during his Delay to make his option, and that the ſaid Loſs might be imputed to him, becauſe the Executor who had no occaſion for any of the Horſes might have been able to ſell the Horſe which the Legatary would have left him, and would not have been obliged to keep both the Horſes, might recover againſt this Legatary Coſts and Damages for that Expence and that Loſs, according to the Circumſtances *q*.

q See the Text cited on the ſeventh Article, in which theſe Words are to be remarked: Ne venditio quandoque eligente legatario interpelletur.

X.

10. *If there remains only one of the things whereof the choice was bequeathed, it belongs to the Legatary.*

If after the Death of the Teſtator and before the Election, whether it were to be made by the Legatary or by the Executor, the things of which the Election was to be made, ſhould happen to periſh, without the Fault either of the one or the other, one of the things is loſt to the Legatary, and the others to the Executor *r*. But if there remains only one of them, it belongs to the Legatary. For altho his Legacy was of a Right to chuſe, and that there is now no room left for choice; yet the Intention of the Teſtator was that the Legatary ſhould have one of them; and therefore he ought to have that which is the only one that remains *s*.

r The firſt part of this Article may have its uſe in a Caſe where the teſtamentary Heir were to deduct the Falcidian *Portion. For one would not reckon to him as part of his* Falcidian *Portion the Value of that thing which the Legatary was to have, but only the other things which were to have been his own.* See the ſeventh and eighth Articles of the firſt Section of the *Falcidian* Portion.

s Whether the Choice belongs to the Executor or to the Legatee; if there remains only one, it goes to the Legatee. For this Event determines the thing that remains to be the Legatary's, as much or rather more than the Choice would do that which ſhould be choſen.

XI.

11. *If after the choice is made, the thing choſen periſhes, the Legatary bears the loſs of it.*

If after that he who was to chuſe, whether it was the Executor or the Legatee, has made and declared his Choice, the thing choſen ſhould happen to periſh, the loſs of it would fall upon the Legatary, and he would have no right to thoſe things that ſhould remain. For the Choice had diſtinguiſhed that thing which he was to have, and had made it his own. So that it is he who ought to bear the loſs of it *t*.

t Stichum aut Pamphilum, utrum hæres meus volet Titio dare: ſi dixerit hæres Stichum ſe velle dare, Sticho mortuo liberabitur. *l.* 84. §. 9. *ff. de leg.* 1.

Altho this Text ſpeaks only of the Caſe where the Choice belongs to the Heir or Executor, yet the Rule is with much more reaſon juſt in the Caſe where the Legatary has himſelf made the Choice.

XII.

12. *He who has made his choice, cannot change and make another.*

The Executor or Legatary who has once made his Option, whether judicially or extrajudicially by mutual Conſent, cannot afterwards change or make another Choice. For the right of chuſing, which the Teſtator had given him, is conſummated by this firſt Choice *u*.

u Cum ſemel dixerit hæres utrum dare velit, mutare ſententiam non poterit. *l.* 84. §. 9. *ff. de legat.* 1. Apud Aufidium libro primo reſcriptum eſt: Cum ita legatum eſt; *Veſtimenta, quæ volet, triclinaria ſumito, ſibique habeto*; ſi is dixiſſet, quæ vellet deinde, antequam ea ſumeret, alia ſe velle dixiſſet; mutare voluntatem eum non poſſe, ut alia ſumeret: quia omne jus legati prima teſtatione, qua ſumere ſe dixiſſet, conſumpſit: quoniam res continuo ejus fit ſimul ac ſi dixerit eam ſumere. *l.* 20. *ff. de opt. vel elect. leg.* Electione legata, ſemel duntaxat optare poſſumus. *l.* 5. *ff. de legat.* 1. *l.* 11. *in f. ff. de legat.* 2.

XIII.

13. *The choice cannot be made before the Executor has accepted the Succeſſion.*

The Legatary who has the Right of chuſing, cannot make his choice till the Executor has accepted the Succeſſion. For till then there being no Executor, there would be no Party to whom he could intimate his Choice, and who could either conteſt it or approve it, and deliver the Legacy. So that it would be to no purpoſe that he had made his choice *x*.

x Optione legata, placet non poſſe ante aditam hæreditatem optari: & nihil agi ſi opteretur. *l.* 16. *ff. de opt. vel elect. legat.*

XIV.

14. *The Legatary of what ſhall remain after the choice of this*

If a Teſtator had bequeathed one or two things out of many at the choice of one Legatary, and the Remainder of them to another, and that he who had

another will have all, if no choice is made.

this choice would not make uſe of his Right, all the things would belong to the ſecond Legatary, and the Executor would have none of them. For the Expreſſion of thoſe things that ſhould remain after the Choice of the firſt of the two Legataries would comprehend them all, if he took none of them *y*.

y Cum optio duorum ſervorum Titio data ſit, reliqui Mævio legati ſint: ceſſante primo in electione, reliquorum appellatione omnes ad Mævium pertinent. *l.* 17. *ff. de opt. vel elect. leg.*

XV.

15. The Right of Election paſſes to the Heir or Executor of the Legatee.

If the Legatary who had a right to chuſe, dies without having made a choice, he tranſmits to his Heir or Executor both his Right to the Legacy, and the Right of Election *z*.

z Illud aut illud, utrum elegerit legatarius, nullo a legatario electo, decedente eo poſt diem legati cedentem, ad hæredem tranſmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the tenth and following Articles of the tenth Section of Teſtaments, and the ſeventeenth Article of the ninth Section of this Title of Legacies.

SECT. VIII.

Of the Fruits and Intereſt of Legacies.

BY Fruits of Legacies we are to unſtand not only the Product of Lands, but likewiſe all other ſorts of Revenues or Profits that may be made of any other thing. And by Intereſt is meant the Reparation of Damages which Debtors of Sums of Money, who fail to make Payment, owe from the time of the Demand, as has been explained in the Title of Intereſt.

As to the Fruits of Lands deviſed, it is neceſſary to diſtinguiſh between thoſe which are upon the Ground at the time that it is delivered to the Legatary, and which are commonly called the Fruits hanging by the Root, and thoſe which have been ſeparated from the Ground by the Executor before he delivered it, and which were ſeparated only after the Death of the Teſtator. Theſe are the ſubject Matter of this Section, as alſo the Intereſt and other Revenues that were fallen due before the Delivery of the Legacy; and the Fruits hanging on the Ground at the time of the Delivery are as it were Acceſſories, which have been treated of in the fourth Section.

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6. *The Fruits and Intereſt of Legacies to pious Uſes are due without any Demand.*

I.

1. Three ſorts of things that may be bequeathed.

We may diſtinguiſh into three kinds all the things which Teſtators have the liberty to give away in Legacies. The firſt is of thoſe which of their own nature produce no Revenue; ſuch as a Watch, a Picture, Silver Plate. The ſecond is of thoſe things which of their own Nature produce a Revenue, as a Houſe, a Meadow, or other Ground, a Herd of Cattle, Hackney-Horſes to thoſe who let them out to hire, and other things of the like nature. The third is of Sums of Money, which of their own nature produce nothing, but which making the Price of every thing that is in Commerce, are the Inſtrument of the Commerce it ſelf: Which is the Reaſon why the Laws condemn thoſe who are dilatory in paying the Sums which they owe in Damages, which they have fixed to what is called Intereſt, of which mention has been made in its proper place *a*. And we may place in this third Rank all the Legacies which are reduced to a Valuation, ſuch as a Legacy which a Teſtator ſhould make of ſome Work, or other thing that he ſhould oblige his Executor to do for a Legatee, or a Legacy of a thing which the Executor could not give in ſpecie; for in this Caſe he would owe the Value of it *b*.

a See the Title of the Loan of Money and other things to be reſtored in kind.

b See the ſixth Article of the firſt Section of the ſame Title of the Loan of Money and other things to be reſtored in kind.

Ubi quid fieri ſtipulemur, ſi non fuerit factum, pecuniam dari oportere. *l.* 72. *ff. de verb. obl.*

II.

2. If the Teſtator has regulated the Fruits and Revenues of the Legacy, his Will will ſerve as a Rule.

If a Teſtator hath regulated by his Diſpoſition what concerns the Fruits or other Revenues which the thing deviſed may produce, his Will muſt ſerve as a Law, and the Executor will be accountable or not accountable for them, according as the Teſtator ſhall have order'd. Thus he who deviſes a Land, may order it to be delivered either after the Harveſt is over, or after ſome Years, during

during which ſpace of time he leaves the Enjoyment of it to his Executor *c*.

c Semper veſtigia voluntatis ſequimur teſtatorum. *l.* 5. *C. de neceſſ. ſerv. hæred. inſt.* See touching the Intereſt of Money the fourth Article.

III.

3. *The Fruits of Legacies are due only from the time they are demanded.*

If the Teſtator has ordered nothing about the Fruits and other Revenues which the things deviſed might produce, they will be due only from the time that they are demanded. But if the Executor had dealt any way knaviſhly, as if he had concealed the Teſtament, he would be liable not only for all the Fruits from the time of the Teſtator's Death, but likewiſe for Coſts and Damages, if there had been any *d*.

d In legatis & fideicommiſſis fructus poſt litis conteſtationem non ex die mortis conſequuntur, ſive in rem ſive in perſonam agatur. *l. ult. C. de uſur. & fructib. legat. ſeu fideicom. l.* 1. *eod.*

Is qui fideicommiſſum debet poſt moram, non tantum fructus, ſed etiam omne damnum quo affectus eſt fideicommiſſarius, præſtare cogitur. *l.* 26. *ff. de leg.* 3. *l.* 23. *de leg.* 1. *l.* 8. *l.* 39. *ff. de uſur.* See the tenth Article of the firſt Section of Subſtitutions direct and fiduciary; and the fifteenth Article of the ſecond Section of the ſame Title.

We have not put down in the Article that the Fruits are due from the Conteſtation of Suit, as it is ſaid in the firſt of theſe Texts; but that they are due from the time of the Demand. For by our Uſage, and by the Ordinances, a legal Demand hath the Effect of the Conteſtation of Suit in the Roman *Law. See the Remark on the fifth Article on the firſt Section of Intereſt.*

*We have added to the Article the Exception of the Caſe of Knavery in the Executor. For this Rule cannot be contrary to the general Rule which obliges every knaviſh Poſſeſſor to make reſtitution of the Fruits *, with much more reaſon than him who is backward in paying what he owes after it has been demanded of him.*

* *See the fourth Article of the third Section of Intereſt.*

¶ It is neceſſary to obſerve on this Article a Difficulty which ought not to be ſuppreſſed. For beſides that it has divided the Interpreters, it requires that ſome neceſſary Reflections ſhould be made on the Rule explained in this Article. This Rule diſcharges the Executor not only from the Intereſt of Money, and of other things which produce no Revenue, but likewiſe from the Fruits of Lands and Tenements which produce a Revenue, and obliges him to make reſtitution of theſe Fruits only after a legal Demand. And ſeeing it makes no Exception, it comprehends not only the Caſes where the Executor and the Legatee ſhould have equally knowledge of the Teſtament, and where the Legatee ſhould neglect to demand his Legacy; but alſo the Caſes where the Legatary being ignorant of his Legacy, the Executor who ſhould know of it, and ſee that he was obliged to deliver the thing deviſed, ſhould nevertheleſs retain it: Which ſeemed to thoſe Interpreters to be contrary to Equity. For it cannot be ſaid, eſpecially in the *Roman* Law, that the things deviſed are a part of the Goods of the Inheritance, and may be conſidered as belonging to the teſtamentary Heir until the time of their being delivered; ſeeing it is a Principle of the *Roman* Law in the matter of Legacies, that the Propriety of the thing bequeathed belongs to the Legatary from the moment of the Teſtator's Death; and that altho the Legatary know nothing of his Right till a long time after, yet his Acceptance of the Legacy has this effect, that he is accounted to be Maſter of the thing bequeathed from the moment of the Teſtator's Death, and that he is ſo much Maſter of it, that it is ſaid in a Law, that the thing bequeathed paſſes to the Legatary in the ſame manner as the Goods of the Inheritance paſs to the teſtamentary Heir, and that the teſtamentary Heir never had any right to them *a*.

It would ſeem to follow from theſe firſt Reflections, that ſince the Fruits belong regularly to the Proprietor of the Ground, thoſe of a Ground deviſed did belong to the Legatary or Deviſee from the Death of the Teſtator; and that the teſtamentary Heir who was not ignorant of the Teſtament, having known that he was in poſſeſſion of Goods that were not his own, ought to be obliged to reſtore thoſe Fruits. Theſe Reaſons could not be unknown to thoſe who framed the Laws cited on this Article; and what ſtill augments the Difficulty, is that *Juſtinian* has made an Exception from the Rule explained in this Article in favour of Legacies to pious Uſes, having ordained, with reſpect to theſe ſorts of Legacies, that no Enquiry ſhould be made whether the Legacy had ever been demanded, but that it ſhould ſuffice that the teſtamentary Heir not having delivered the Legacy,

a Si legatarius repulerit a ſe legatum, nunquam ejus fuiſſe videbitur: ſi non repulerit, ex die aditæ hæreditatis ejus intellegitur. *l.* 86. §. 2. *de leg.* 1. Quia ea quæ legantur, recta via ab eo qui legavit ad eum cui legata ſunt tranſeunt. *l.* 64. *in f. ff. de jurt.*

Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res ſingulas. Quod eo pertinet, ut ſi pure res relicta ſit, & legatarius non repudiavit defuncti voluntatem, recta via dominium, quod hæreditatis fuit ad legatarium tranſeat, *nunquam factum hæredis.* l. 80. ff. de legat. 2.

he ſhould be reckoned guilty of delay *ipſo jure*, that is to ſay by the Effect of the Law it ſelf *b*.

To reſolve this Difficulty, ſome of thoſe Interpreters have been of opinion, that it was neceſſary to reſtrain the Laws which diſcharge the teſtamentary Heir from the Fruits until the time of a legal demand, to the Caſe of a Legacy of a thing that was not the Teſtator's own: but theſe Laws are conceived in too clear Terms to admit of ſo remote a Senſe. Others ſay that their Meaning is, that the teſtamentary Heir is not accountable for all the Fruits which the Legatary might have reaped by his Induſtry, and that he is only liable for thoſe which he has really and truly gather'd: but this Diſtinction does not ſuit with theſe Laws, and does not remove the Difficulty. There are ſome who think that theſe Laws are to be underſtood of the Fruits which had been gather'd before the Death of the Teſtator, and not of thoſe which have been gathered ſince his Death: But what Right could the Legatary pretend to the Fruits which accrued to the Teſtator in his Life-time? Others will have it, that the teſtamentary Heir is obliged to reſtore the Fruits reaped after his entering to the Poſſeſſion of the Inheritance, and not thoſe reaped before; but theſe Laws diſcharge the teſtamentary Heir from the Reſtitution of the Fruits without any diſtinction; and his Right of Enjoyment takes in the Fruits preceding his entring to the Inheritance, for they belong to him, and he recovers them from thoſe who had gather'd them. So that his Condition ought to be the ſame as to the Fruits of both theſe times. And laſtly there are ſome who have thought it neceſſary to diſtinguiſh between the Legacies which are called *per damnationem*, and the Legacies *per vindicationem*, of which mention has been made in the Preamble to the foregoing Section; that in theſe the Fruits are due to the Legatary from the time of the teſtamentary Heir's entring to the Succeſſion; and that in thoſe they are due only from the time that the teſtamentary Heir has been guilty of delay. But there would be as much or more reaſon to give to the Legatary the Fruits from the time of the Teſtator's Death in the Caſe of a Legacy *per damnationem*, ſeeing in this caſe the teſtamentary Heir who was charged to deliver the thing bequeathed would be more faulty than he would be in the Caſe where the Legatary himſelf ought to take the thing bequeathed to him; and beſides, the Diſtinction of theſe two ſorts of Legacies hath been aboliſh'd, as has been remarked in the ſame Place. It ſeems likewiſe that the firſt of the Texts cited on this Article relates to both theſe ſorts of Legacies indifferently, and that theſe two Expreſſions *ſive in rem, ſive in perſonam agatur*, may be underſtood the one of the Legacy *per damnationem*, which the Legatary demanded by a perſonal Action, and the other of the Legacy *per vindicationem*, which was demanded by a real Action. Whence it appears to follow, that even when the Diſtinction of theſe two ſorts of Legacies was in uſe, the Rule explained in this Article was equally applicable to the one ſort and to the other.

We relate here the ſeveral Sentiments of thoſe Interpreters to ſhew, that this Rule which diſcharges the teſtamentary Heir or Executor from the Fruits of Legacies until the time of a legal Demand, ſeemed to them to be unjuſt, being taken in a literal and general Senſe. But ſeeing none of all theſe Interpretations appears to agree with the Senſe of theſe Laws, the Terms whereof are ſo clear and diſtinct, and that the Exception which *Juſtinian* has made from this Rule in favour of Legacies to pious Uſes, determines for the Senſe which diſcharges in general the teſtamentary Heirs or Executors from the Fruits of Legacies until the time of Demand; it is but fair and ingenuous freely to own, that *Juſtinian*'s Intention, and that of the preceding Laws, was to make a general Rule of it, which, after the manner of other general Rules, ſhould be obſerved in Caſes where there were no cauſe to make any Exception from it. Thus *Juſtinian* hath excepted from this Rule Legacies to pious Uſes. Thus one may except the Caſes where the Executor ſhould be guilty of any Roguery. And if, for example, an Executor had concealed a Codicil which contained Legacies, he would be without doubt condemned to make Reſtitution of the Fruits and Intereſt of thoſe Legacies, if the ſaid Codicil came to light. But when no unfair Dealing can be imputed to the Executor, and that it was not his fault that the Legataries had no knowledge of the Teſtament, and had not received their Legacies, the Cir-

b See the laſt Article.

cumſtances might juſtly diſcharge the Executor from making Reſtitution of the Fruits which he had enjoyed. Thus, for example, if a Teſtament having been opened in a Court of Juſtice, or depoſited with a Notary Publick living in the Place where the Teſtator had his Abode, and it having by that means been known and made publick, there were ſome of the Legataries whoſe Place of Abode was unknown, or even whoſe Perſons were not known, or who were abſent in a remote Country, ſo that it were not poſſible to acquaint them; the Executor who on one part ought to continue in poſſeſſion of the Goods, and to take care of them, and who on the other part ought to remain Proprietor of what cannot be acquired by the Legataries, whether it be that they cannot or will not receive their Legacies, or that they are incapable of them, may without injuſtice remain in poſſeſſion of all the Goods of the Inheritance, and enjoy thoſe that had been bequeathed as well as the other Goods. So that his Enjoyment of thoſe things not being an Uſurpation, and ſince it may have ſome other good Foundation, beſides the Negligence of the Legatee, it is but juſt that the Executor under theſe circumſtances ſhould be free from any fear of being afterwards called upon to make reſtitution of the Fruits which he had enjoy'd without any Fraud or Covin. Thus the Rule which frees him from this Reſtitution, hath its Equity founded in the Circumſtances which may clear him from all Roguery; and it hath likewiſe its Uſefulneſs for the publick Good, becauſe of the Inconveniences which it removes of an infinite number of Difficulties that would happen if Executors were obliged without diſtinction to reſtore all the Fruits which they had gathered ſince the Death of the Teſtator. And ſeeing the delay of Payment of Legacies may happen either thro the Roguery of the Executor, or without any knaviſh dealing on his part, and that ſuch Knavery ought not to be preſumed without Proof, it was but juſt to preſume Uprightneſs and Integrity in an Executor who ſhould have ſeveral Excuſes to alledge. But this Law being founded only on the Preſumption of the Integrity of the Executor, and on the Conſequences of the publick Good, which demands that all Occaſions of Law-Suits ſhould be cut off as much as is poſſible, it would be altogether uſeleſs for juſtifying the Conſcience of an Executor, who, altho no body ſhould be able to diſcover and prove his Roguery, ought to tax himſelf with it, and if he would do juſtice upon himſelf, ought to reſtore the Fruits which he had unjuſtly reaped of a Land or Tenement that was deviſed, and which he might have delivered to the Deviſee.

IV.

Legacies of Money, and other things which of their nature produce no Revenue, ought to be paid, as all other Legacies, at the time appointed by the Teſtament; or if there be no time fixed, they are due after the Death of the Teſtator. But altho they be not acquitted at the time appointed, yet Intereſt is only due from the time of the Demand *e*; unleſs the Teſtator had order'd that the Legatary ſhould have the Intereſt *f*.

4. *The Intereſt of Legacies of Money is due only from the time of the Demand.*

e Legatorum ſeu fideicommiſſorum uſuras ex eo tempore quo lis conteſtata eſt, exigi poſſe manifeſtum eſt, ſed & fructus rerum & mercedes ſervorum qui ex teſtamento debentur, ſimiliter præſtari ſolent. *l.* 1. *C. de uſur. & fruct. legat.*

f The Intereſt in this Caſe would not be uſurious: For it would not be a Loan, but the Liberality of the Teſtator which would encreaſe the Legacy.

V.

If the thing bequeathed were of ſuch a nature as that it ought to produce to the Legatary Profits of another ſort than the Fruits of a Ground, or Intereſt of Money, as if it were a certain number of Mares, or a Set of Inſtruments and Machines for ſome Manufacture, the Executor who is in fault for not delivering the Legacy, will be accountable for the Profits which theſe ſorts of things might yield. But if the Legacy were of a Stud of Mares, the Colts would be a part of the Legacy, and would belong to the Legatary, altho the Executor had not been guilty of any delay in delivering the ſame *g*.

5. *Profit of Legacies, which is of another nature than the Fruits or Intereſt.*

g Is qui fideicommiſſum debet, poſt moram non tantum fructus, ſed etiam omne damnum quo affectus eſt fideicommiſſarius præſtare cogitur. *l.* 26. *ff. de legat.* 3.

Equis per fideicommiſſum relictis, poſt moram fœtus quoque præſtabitur ut fructus. *l.* 8. *ff. de uſur.*

Equis per fideicommiſſum legatis, poſt moram hæredis fœtus quoque debentur. Equitio autem legato etiam ſi mora non intercedat, incremento gregis fœtus accedunt. *l.* 39. *eod.*

VI.

The Executor who does not pay the Legacies to pious Uſes within the time regulated by the Teſtator, if he has ſet

6. *The Fruits and Intereſt of Legacies to pious Uſes*

are due without any Demand.

ſet any time, or within the Delay that is neceſſary according to the Quality of the Teſtator's Diſpoſition, will be accountable for the Fruits, the Intereſt, and other Revenues, according to the Nature of the thing bequeathed, to reckon from the Term, if there was any ſet by the Will, or from the Death of the Teſtator, if there was no Term fixed *h*.

h Supra autem omne tempus quo diſtulerint facere diſpoſita ſcripti hæredes: eos cogi ſolvere & fructus & reditus & omnem legitimam acceſſionem, a tempore ejus, qui diſpoſuit, mortis ſancimus: non inſpecta mora a litis conteſtatione, aut conventione, ſed ipſo jure intellecta (quod dicitur vulgo) mora præceſſiſſe & locum habeme fructuum & aliarum rerum acceſſione. Hoc eodem obtinente, & ſi non ab hærede, ſed a fideicommiſſario, aut legatario relictum fuerit hujuſmodi pium legatum. *l.* 46. §. 4, & 5. *C. de Epiſc. & Cler. v. Nov.* 131. *c.* 12.

¶ Altho the Juſtice of this Rule be founded not only on the Favour of Legacies to pious Uſes, but alſo on this particular Conſideration, that theſe Legacies may be unknown or neglected by the Perſons who ought to call for them, ſuch as the Governors of an Hoſpital, and others who happen to be entruſted with this Care; yet this is not always preciſely obſerved, leſt ſuch a Strictneſs ſhould happen ſometimes to degenerate into Rigour. And it is even prudent for Governours of Hoſpitals not to exact Legacies to pious Uſes in ſuch a manner as to make them uneaſy and burdenſome to Families. For ſuch a rigid Conduct as this might ſome time or other divert thoſe who were injured by it, from making the like Diſpoſitions in favour of Hoſpitals, and incline them to diſpoſe to ſome other Uſes of what they had piouſly deſigned for the poor.

SECT. IX.

How the Legatary acquires his Right to the Legacy.

IT has been remarked at the end of the Preamble to the tenth Section of Teſtaments, where the Right of Tranſmiſſion is treated of, that mention ſhould likewiſe be made of it in this Place in ſome Articles relating to this Right. But what ſhall be ſaid in theſe Articles ought not to be taken for a Repetition of what has been ſaid in that tenth Section of Teſtaments. For there we have explained the Rules of Tranſmiſſion in general, and here we ſhall only make Application of thoſe Rules to ſome Caſes where it is neceſſary to ſhew their Uſe.

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I.

Seeing the Legatee acquires his Right by a Teſtament, or other Diſpoſition made

1. The Legatary acquires his Right

at the inſtant of the Teſtator's Death.

made in conſideration of Death, and that theſe ſorts of Diſpoſitions are confirmed, and have their Effect at the moment of the Death of the Perſon who has made the Diſpoſition; the Right to the Legacy is acquired to the Legatee at the ſame inſtant *a*, unleſs it be that the Will of the Teſtator has made ſome Change to it; and that depends on the Rules which follow.

a Si purum legatum eſt, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fid. ced.*

Hæredis aditio moram legati quidem petitioni facit, ceſſioni diei non facit. *l.* 7. *eod.* See the tenth Article of the tenth Section of Teſtaments.

II.

2. Legacies of two ſorts, either pure and ſimple, or conditional.

We muſt diſtinguiſh two ſorts of Legacies: Thoſe which are pure and ſimple, that is to ſay, whoſe Validity does not depend on any Condition: And thoſe which are conditional, and which have not their Effect but by the Event of the Condition on which they depend; as if a Teſtator deviſes a certain Eſtate in Land, on condition that the Legatary happens to have Children *b*. And the Right to theſe ſeveral Legacies accrues differently to the Legataries by the following Rules.

b Purum legatum. *l.* 5. §. 1. *ff. quand. dies legat. vel fideic. ced.* Legatum ſub conditione relictum. *d. l.* §. 2.

III.

3. The pure and ſimple Legacy is acquired at the moment of the Death of the Teſtator.

If the Legacy was pure and ſimple, the Legatary acquires his Right to it at the moment of the Death of the Teſtator, whether he knew or was ignorant of the Teſtament, and the ſaid Death. And if the Thing deviſed be a Houſe or Lands, or ſome moveable Thing belonging to the Inheritance, or any other Thing that is actually among the Goods of the Succeſſion, it paſſes directly from the Deceaſed to the Legatary, and he is Maſter of it, and the Executor has no manner of Right to it *c*. Or if it be a Thing that is not part of the Succeſſion, or a Sum of Money, he has a Right to have it delivered to him at the Time that the Executor ſhall be obliged to deliver it *d*.

c Si purum legatum eſt, ex die mortis dies ejus cedit. *l.* 5. §. 1. *ff. quand. dies leg. vel fideic. ced.*

Legatum ita dominium rei legatarii facit, ut hæreditas hæredis res ſingulas. Quod eo pertinet, ut ſi pure res relicta ſit, & legatarius non repudiavit defuncti voluntatem: recta via dominium, quod hæreditatis fuit, ad legatarium tranſeat numquam factum hæredis. *l.* 80. *ff. de legat.* 2. *l.* 75. §. 1. *eod. l.* 64. *in f. ff. de furt.*

Si fideicommiſſum ab inteſtato fuerit ſorori tuæ relictum codicillis, & poſtea quam dies fideicommiſſi ceſſit, rebus humanis, licet ignorans fideicommiſſum, exceſſerit, actionem hujuſmodi acquiri potuiſſe, diſſimulare non poteris: ſalva ſcilicet ab inteſtato ſuccedenti quarta portione. *l. ult. C. quand. dies leg. vel fideic. ced. l.* 3. *eod.*

d See the tenth Section.

IV.

4. As alſo the conditional Legacy, the Condition whereof is fulfilled before the Teſtator's Death.

If a Legacy being conditional, the Condition was come to paſs in the Lifetime of the Teſtator, or at the Time of his Death, this Event would make the conditional Legacy to become pure and ſimple; ſo that the Legatary would acquire his Right to it at the Time of the Teſtator's Death *e*.

e See the ſixteenth Article of the eighth Section of Teſtaments.

V.

5. If the Condition does not happen till after the Teſtator's Death, the Legacy hath not its Effect till it happens.

If the Condition comes to paſs only after the Death of the Teſtator, the Right of the Legatee will not veſt in him at the Time of the ſaid Death, even altho the Condition ſhould depend on his own Fact, and that he ſhould offer to perform it, unleſs the Executor ſhould accept his Offer. But the Legacy will not be due to him till after he ſhall have actually fulfilled the Condition, or if it was independent of his Deed, till it ſhall have come to paſs *f*.

f Si ſub conditione ſit legatum relictum, non prius dies legati cedit quam conditio fuerit impleta: ne quidem ſi ea ſit conditio, quæ in poteſtate ſit legatarii. *l.* 5. §. 2. *ff. quand. dies leg. vel fideic. ced. l. un.* §. 7. *C. de caduc. toll.*

VI.

6. Three ſorts of Legacies neceſſary to be diſtinguiſhed for the Effect of the Right of the Legatary.

It is neceſſary to diſtinguiſh three ſorts of Legacies, with regard to the Time at which the Legatary may have acquired his Right, and to the Time in which he may exerciſe the ſaid Right: The Legacies that are pure and ſimple without any Term, the Legacies that have a certain Term, and the Legacies that are conditional. And this Difference hath the Effect that ſhall be explained by the Rules which follow *g*.

g See the following Articles.

VII.

7. Difference between the Time when the Legacy is acquired, and the Time when it may be demanded.

In all ſorts of Legacies it is neceſſary to diſtinguiſh two ſeveral Effects of the Right of the Legatee. One, which renders him Maſter of the Thing bequeathed, whether he may demand immediately the Delivery of it, or may not demand it as yet: And the other, which puts him in a Condition to demand the Delivery of it. It is of this firſt Effect that it is ſaid, that then the time is come in which the Legatary's Right veſts

veſts in him, and the Legacy is due: And it is of the ſecond Effect that it is ſaid, That then the Time is come when the Legatary may demand the Legacy. Thus, when the Legacy is pure and ſimple, and without any Term, the Moment of the Death of the Teſtator hath both theſe Effects; and the Time is then come in which the Right to the Legacy veſts in the Legatary, and in which likewiſe he may demand the Thing bequeathed. Thus, when there is a Term preſcribed for the Payment of the Legacy that is pure and ſimple, the firſt of theſe two Effects comes to paſs on the Day of the Teſtator's Death; and the ſecond does not happen till the Day of the Term. Thus, when the Legacy is conditional, and without any other Term, it hath theſe two Effects at the moment that the Condition comes to paſs; or if it has a Term, the ſecond Effect is ſuſpended until the ſaid Term. And if the Condition is not come to paſs, the Time is not come in which the Right to the Legacy is acquired, and much leſs the Time of demanding it *h*.

h Deberi dicimus & quod die certa præſtari oportet, licet dies nondum venerit. *l.* 9. *ff. ut legat. ſeu fideic. cauſ. caveat.*

Si dies appoſita legato non eſt, præſens debetur, aut confeſtim ad eum pertinet cui datum eſt. Adjecta, quamvis longa ſit, ſi certa eſt, veluti Kal. Januariis centeſimis, dies quidem legati ſtatim cedit: ſed ante diem peti non poteſt. *l.* 21. *ff. quando dies leg. vel fideic. ced.*

Cedere diem ſignificat incipere deberi pecuniam. *Venire* diem ſignificat eum diem veniſſe quo pecunia peti poſſit. Ubi pure quis ſtipulatus fuerit; & ceſſit, & venit dies. Ubi in diem: ceſſit dies ſed nondum venit. Ubi ſub conditione, neque ceſſit, neque venit dies, pendente adhuc conditione. *l.* 213. *ff. de verb. ſignif.*

VIII.

8. *The Legatary tranſmits, or doth not tranſmit the Legacy to his Heirs or Executors, according to the Condition in which his Right is when he dies.*

It follows from the preceding Articles, that if the Legatary chances to die before he has received the Thing bequeathed, the Legacy may paſs, or may not paſs to his Heirs or Executors, according to the Condition in which his Right is at the time of his Death. And he tranſmits the Legacy, if the Right to it was veſted in him, or he does not tranſmit it, if the Time was not come that the Legacy was due to him *i*.

i Si poſt diem legati cedentem legatarius deceſſerit, ad hæredem ſuum transfert legatum. *l.* 5. *ff. quand. dies leg. vel fideic. eod.*

Ad hæredem ejus legatum non tranſit, quia non ceſſit dies vivo eo. *l.* 1. §. 2. *ff. de condit. & demonſtr.*

IX.

9. *Two Caſes in which there can be no Tranſmiſſion.*

Of what nature ſoever the Legacy be, if the Legatary was dead at the time of making the Teſtament, or if he dies before the Teſtator, his Heir or Executor will have no Right to the Legacy. For the Legatary himſelf could have no Right to it but at the time of the Teſtator's Death, which was to give the Effect to his Teſtament *l*.

l See the fifth Article of the tenth Section of Teſtaments.

X.

10. *The conditional Legacy is not tranſmitted, if the Condition be not come to paſs.*

If the Legacy is conditional, and the Legatary dies before the Condition of the Legacy be fulfilled, he dies without having had any manner of Right to the Legacy; ſo that he tranſmits no Right to his Heir or Executor *m*.

m See the eleventh Article of the tenth Section of Teſtaments.

XI.

11. *The Legacy is tranſmitted, altho the Legatary die before the Term of paying the Legacy.*

When the Legacy is pure and ſimple, whether there be a Term fixed for Payment of it, or whether there be no Term fixed, the Legatary who has ſurvived the Teſtator, having thereby acquired his Right to the Legacy, tranſmits it to his Heir or Executor, whether he die before or after the Term *n*.

n See the Texts cited on the ſeventh and eighth Articles of this Section, and the third Article of the tenth Section of Teſtaments.

XII.

12. *Which are the Legacies that are truly conditional.*

We muſt not reckon in the number of conditional Legacies all thoſe in which the Teſtator may perhaps have made uſe of the word *Condition*. For as it has already been obſerved in its proper place, Conditions are often confounded with the Charges which Teſtators impoſe on Legacies; which renders this word *Condition* equivocal *o*. But we ought not to call any Legacies conditional, except thoſe whereof the Validity depends on a Condition, ſo as that until it be accompliſhed, the Legatary can have no manner of Right *p*. Thus, for example, if a Teſtator bequeaths a Sum of Money in caſe the Legatary be married at the time of the Teſtator's Death, or that he have Children, or that he be provided of an Office,

o See the ſeventh and following Articles of the eighth Section of Teſtaments.

p See the ſame Articles, as alſo the ſecond Article of this Section.

theſe

theſe are conditional Legacies, altho the word *Condition* be not expreſs'd in the Teſtament. But if the Teſtator deviſes a Land or Tenement, on condition that the Legatary ſuffer therein a Service for the Uſe of other Lands or Tenements which he deviſes to ſome other Perſon; this Expreſſion will indeed impoſe upon the Legatary the Charge of this Service, but it will not make the Legacy conditional: And if the Legatary dies before the Right of Service have been put in uſe, the Legacy will nevertheleſs be tranſmitted to the Heir or Executor of the ſaid Legatary.

XIII.

13. The Legatary who leaves his Wife big with Child, tranſmits the Legacy left him on condition that he have Children.

If the Condition of a Legacy were, That the Legatary ſhould have Children, the Teſtator having order'd, that when he ſhould have Children the Executor ſhould give him either a Sum of Money, or a certain Houſe or Land, and the ſaid Legatary ſhould die without having Children, but ſhould leave his Wife big of a Child that ſhould afterwards be born; this Legacy would have its Effect; and this Legatary would have tranſmitted his Right to his Heir. For his Heir would be this Child, whom the Teſtator had in view when he made his Teſtament, and whoſe Birth had accompliſhed the Condition *q*.

q Is cui ita legatum eſt, *quando liberos habueris*, ſi prægnante uxore relicta deceſſerit, intelligitur expleta conditione rdeceſſiſſe, & legatum valere, ſi tamen poſthumus natus fuerit. *l.* 18. *ff. quand. dies legat. ced. l.* 20. *ff. ad Senat. Trebell.*

XIV.

14. Indecent or impoſſible Conditions do not ſuſpend the Legacy.

If the Teſtator had made the Legacy to depend on a Condition that were either unjuſt, indecent, or impoſſible, ſeeing this Condition would be of no manner of Obligation, as has been ſhewn in its proper place; this Legacy would be of the Nature of a pure and ſimple Legacy, and the Legatary happening to die before he received it, would tranſmit his Right to his Heir or Executor *r*.

r Si ea conditio fuit quam prætor remittit, ſtatim dies cedit. Idemque & in impoſſibili conditione, quia pro puro hoc legatum habetur. *l.* 5. §. 3, & 4. *ff. quand. dies leg. ced.* See the eighteenth Article of the eighth Section of Teſtaments.

XV.

15. Legacies left to an uncertain Time are conditional.

Legacies, whoſe Effect depends on an uncertain Time, that is, of which there is no Certainty that it will ever happen, are of the ſame nature with conditional Legacies. For they imply the Condition, that they ſhall not have their Effect, unleſs the ſaid Time comes to paſs. So that if the Legatary of a Legacy of this nature ſhould chance to die, the ſaid Time not being as yet come to paſs, he would not tranſmit the Legacy to his Heir or Executor. Thus, *Example.* for example, if a Teſtator had left a Sum of Money to a Legatary in caſe he ſhould arrive at the Age of Majority; this Legatary happening to die before he attained the Age of Majority, his Heir or Executor would have no Right to the Legacy *s*.

s Si cui legetur *cum quatuordecim annorum erit*: certo jure utimur, ut tunc ſit quatuordecim annorum, cum impleverit. *l.* 49. *ff. de legat.* 1.

Non putabam diem fideicommiſſi veniſſe, cum ſextumdecimum annum ingreſſus fuiſſet, cui erat relictum, *cum ad annum ſextumdecimum perveniſſet.* Et ita etiam Aurelius Imperator Antoninus ad appellationem ex Germania judicavit. *l.* 48. *ff. de condit. & dem. V. l.* 74. §. 1. *ff. ad Senat. Trebell.*

¶ We muſt take notice that we have added to the Texts quoted on this Article the Citation of the *74th Law*, §. 1. *ff. ad Senat. Treb.* becauſe it is contrary to them. For whereas it is ſaid in theſe Texts, that if a Legacy or fiduciary Bequeſt be left to a Perſon when he ſhall have fourteen Years of Age, or, as it is expreſſed in the ſecond Text, when he ſhall attain the Age of fourteen, the Legacy will not be due until theſe Years are compleated; it is ſaid in that other Law, that it ſuffices that they be begun. It is true, that that is in a Caſe where the Circumſtances made this Deciſion favourable; but it is, however, the ſame Expreſſion explained in two different Senſes. In our Uſage this Expreſſion, *When he ſhall arrive at ſuch a Year*, or, *When he ſhall attain to ſuch a Year*, ſeems to be meant of the Year begun. But this other Expreſſion, *When he ſhall have attained the Age of Majority*, is not equivocal, and demands Majority, which is not acquired but by the five and twentieth Year being compleat. For which reaſon we have made uſe of this Expreſſion in the Article, that we might not ſay any thing contrary to any one of theſe Texts, and that we might make it ſute with our Uſage.

XVI.

16. Another Example.

We may give for another Example of a Legacy which depends on an uncertain Time, that which a Teſtator ſhould bequeath in ſuch Terms as to make the Legacy to depend on the Death of his

† Executor;

Executor; as, if he ſhould charge him to give or deliver when he ſhould die ſuch a Houſe or Land, or other Thing, to a Legatary. For altho this Caſe be different from that of the preceding Article, in that it is certain that the Time will come when the ſaid Executor will die, whereas the Majority of the Legatary may perhaps never come to paſs; yet in this Caſe, as well as in the other, the Time is uncertain, and it implies the Condition, That when the Time ſhall come to paſs, the Legatary ſhall be in a condition to reap the Profit of the Legacy, and that he be then alive. So that if this Legatee chance to die before the Executor, he will have acquired no Right to the Legacy, and he will have tranſmitted nothing to his Succeſſors *t*.

t Si cum hæres morietur, legetur, conditionale legatum eſt. Denique vivo hærede defunctus legatarius ad hæredem non transfert. *l.* 4. *ff. quand. dies leg. vel fid. ced.*

Tale legatum, *cum morietur hæres dato :* certum eſt debitum iri, & tamen ad legatarium non tranſit, ſi vivo hærede decedat. *l.* 13. *in f. eod.* See the thirteenth Article of the eighth Section of Teſtaments, and the Remark which is there made on it.

XVII.

17. The Legatary who dies before the Election tranſmits his Right.

We are not to reckon among conditional Legacies, or thoſe which depend on an uncertain Time, a Legacy left to the Choice of the Legatary, or of the Executor. For altho, if the Legatary ſhould happen to die before the Election had been made, it would remain uncertain which were the Thing bequeathed, and that the Legacy could not have its Effect, in order to be acquitted, till after this Choice had been made; yet the Right of the Legatary was veſted in him independently of this Election, which was only to determine which was the Thing bequeathed, and not to veſt the Right to it in the Legatary. Thus, altho the Legatary ſhould die before the Election were made, yet he would tranſmit his Right to his Heir *u*.

u Illud aut illud utrum elegerit legatarius, nullo a legatario electo, decedente eo poſt diem legati cedentem, ad hæredem tranſmitti placuit. *l.* 19. *ff. de opt. vel elect. leg.* See the fifteenth Article of the ſeventh Section.

XVIII.

18. Legacies annexed to Perſons are not tranſmitted.

Legacies which are annexed to the Perſon of the Legatee, ſuch as an Uſufruct, an Annuity, a Legacy of Alimony, and others of the like nature, which the Teſtator intended only to beſtow on the Perſon of the Legatee, are not tranſmitted to his Heir. And if, for example, a Teſtator had given leave to one of his Friends to dig Stones out of a Quarry, or to uſe a Paſſage, or other Service, for ſome Ground, this Right being only for the Uſe of the ſaid Perſon, his Death would make it to ceaſe, unleſs the Expreſſion of the Teſtator ſhould relate likewiſe to the Heirs of the Legatee *x*.

x Quoties cohæret perſonæ id quod legatur, veluti perſonalis ſervitus, ad hæredem ejus non tranſit. *l.* 8. §. 3. *in f. ff. de liber. leg.*

Si quis alicui legaverit, licere lapidem cædere : quæſitum eſt an etiam ad hæredem hoc legatum tranſeat. Et Marcellus negat, ad hæredem tranſmitti, niſi nomen hæredis adjectum legato fuerit. *l.* 39. §. 4. *ff. de leg.* 1. *l.* 6. *ff. de ſervit. legat.*

XIX.

19. An annual Legacy contains ſeveral.

The Legacy of a Sum of Money to be paid every Year to a Legatary during his Life, either by way of Penſion, or for Alimony, or otherwiſe, is conſidered as containing ſo many Legacies as there ſhall be Years in the Life of the ſaid Legatary; and the Legacy of every Year is due to him as ſoon as it is begun, purſuant to the Rules explained in another Place *y*. Thus his Right to every Legacy is acquired according as he goes out of one Year into the other. And when he dies, he tranſmits to his Heir not only the Arrears of the Years that were fallen due, but alſo the Year which he had begun, and which his Death has interrupted *z*.

y See the ſixth and ninth Articles of the fifth Section.

z Cum in annos ſingulos legatur, non unum legatum eſſe, ſed plura conſtat. *l.* 10. *ff. quand. dies leg. ced.*

Nec ſemel diem ejus cedere, ſed per ſingulos annos. Sed utrum initio cujuſque anni, an vero finito anno cedat, quæſtionis fuit. Et Labeo Sabinus, & Celſus, & Caſſius, & Julianus in omnibus quæ in annos ſingulos relinquuntur, hoc probaverunt, ut initio cujuſque anni hujus legati dies cederet. *l.* 12. *eod. d. l.* §. 1. *l.* 1. *C. eod.*

Item Celſus ſcribit, quod & Julianus probat, hujus legati diem ex die mortis cedere, non ex quo adita eſt hæreditas. Et, ſi forte poſt multos annos adeatur hæreditas, omnium annorum legatario deberi. *d. l.* 12. §. 3.

XX.

20. Example of a Legacy annexed to the Perſon of the Legatary.

If a Father who had two Sons, one of Age, and the other under fourteen Years, had named them both his Executors, and given to the youngeſt ſome Lands or Houſes, and a Sum of Money to be paid him after his Majority, leaving till that time this Sum, and the Enjoyment of thoſe Lands or Houſes, to his eldeſt Son, on condition that he ſhould acquit the Charges of the Eſtate, and

and that he ſhould give every Year to their Mother a certain Penſion for the maintenance of the youngeſt Son; and that the eldeſt Son ſhould chance to die before this Time were expired, his Death would make this Enjoyment which he had of the ſaid Lands to ceaſe; and it would not go to his Children, or other Heirs whom he ſhould leave behind him. For altho that if he had lived, the Enjoyment would have laſted to the Time regulated by the Teſtament, yet it was given him only as a perſonal Bounty annexed to the good Office which he was to render to his Brother, and which the Father had conſidered as a Function of a Tutor, altho this ſecond Son had other Tutors. Thus, the Death of the eldeſt Son putting an end to the Motive of the Father, which was limited to the Perſon of the eldeſt Son, would likewiſe put an end to an Enjoyment which the Father had left to him only with this view *a*.

a Pater duos filios æquis ex partibus inſtituit hæredes; majorem & minorem, qui etiam impubes erat: & in partem ejus certa prædia reliquit: & cum quatuordecim annos impleverit certam pecuniam ei legavit: idque fratris ejus fideicommiſit: a quo petit in hæc verba. *A te peto Sei, ut ab annis duodecim ætatis ad ſtudia liberalia fratris tui inferas matri ejus annua tot uſque ad annos quatuordecim: eo amplius tributa fratris tui pro cenſu ejus dependas, donec bona reſtituas: & ad te reditus prædiorum illorum pertineant quoad perveniat frater tuus ad annos quatuordecim.* Quæſitum eſt, defuncto majore fratre, hærede alio relicto: utrum omnis conditio percipiendi reditus fundorum, anniverſaria præſtetur: alia quæ præſtaturus eſſet, ſi viveret Seius, ad hæredem ejus tranſierint: an vero id omne protinus ad pupillum & tutores transferri debeat. Reſpondit: ſecundum ea quæ proponerentur, intelligitur teſtator quaſi cum tutore locutus: ut tempore quo tutela reſtituenda eſt, hæc quæ pro annuis præſtari juſſiſſet, percipiendiſque fructibus finiantur, ſed cum major frater morte præventus eſt: omnia, quæ relicta ſunt, ad pupillum & tutores ejus confeſtim poſt mortem fratris tranſiſſe. *l.* 21. §. *ult. ff. de ann. leg.*

It muſt be obſerved in this Text, that the Tutorſhip ended at the Age of fourteen Years according to the Roman *Law, as has been mentioned in the Preamble of the Title of Tutors.*

XXI.

21. *The Delay of the Right of the Executor does not ſuſpend that of the Legatee.*

When the Succeſſion is open by the Death of the Teſtator, if it happens that there be not as yet any teſtamentary Heir or Executor, as if he who was named to be ſo were a poſthumous Child not yet born, or if the Executor ſhould defer accepting of the Succeſſion, or if he could not accept it, by reaſon that ſome Condition kept his Right in ſuſpence; the Legacy is nevertheleſs veſted in the Legatary, and he has his Right ſecure *b*.

b Hæredis aditio moram legati quidem petitioni facit, ceſſioni diei non facit. Proinde ſive pure inſtitutus, tardius adeat, ſive ſub conditione per conditionem impediatur, legatarius ſecurus eſt. Sed & ſi nondum natus ſit hæres inſtitutus, aut apud hoſtes ſit, ſimiliter legatario non nocebit, eo quod dies legati ceſſit. *l.* 7. *d. l.* §. 1, *&* 2. *ff. quand. dies leg. ced.* See the nineteenth Article of the fifth Section of Teſtaments, and the Remark that is there made on it.

XXII.

22. *A Legacy whoſe effect is ſuſpended, and which is tranſmitted.*

If a Teſtator had deviſed to one of his Friends a Land which he had in Marriage with his Wife, and to his Wife inſtead of the ſaid Land a Sum of Money, and that after the Teſtator's Death his Widow delaying to make her Election whether ſhe would take the Legacy of the Sum of Money, or her Land, the Legatary ſhould happen to die before ſhe had made her Option, he would tranſmit his Right to his Heir. And if the Widow ſhould afterwards reſolve to take the Legacy of the Money, that of the Land which he had with his Wife in Marriage would go to the Heir of this Legatary. For altho this Legacy did imply the Condition that the Widow ſhould part with the Land; yet ſeeing ſhe might have determined herſelf as to the Choice at the moment that the Succeſſion was open, and that this Delay was not within the Intention of the Teſtator, as the waiting for the Event of another ſort of Condition which he had impoſed would be; but this Delay ariſing only from the Fact of a third Perſon, it is altogether foreign to the Teſtator's Intention, and ought not to hurt the Legatary *c*.

c Si extrinſecus ſuſpendatur legatum, non ex ipſo teſtamento; licet ante decedat legatarius, ad hæredem tranſmiſiſſe legatum dicimus: veluti ſi rem dotalem maritus legaverit extero, & uxori aliquam pro dotali re pecuniam: deinde deliberante uxore de electione dotis, deceſſerit legatarius, atque legatum elegerit mulier: ad hæredem tranſire legatum dictum eſt: idque & Julianus reſpondit. Magis enim mora, quam conditio legato injecta videtur. *l.* 6. §. 1. *ff. quand. dies leg. ced.*

¶ It is ſaid in this Text that it was rather a Delay which the Teſtator had annexed to this Legacy, than a Condition on which he had made it to depend. But this Legacy did in effect imply this Condition, that the Widow ſhould accept the Legacy of the Money, and part with the Land. For if ſhe had taken back the Land, there would have been nothing for the Legatary, unleſs the Teſtator had deviſed to him alternatively either the Land which he had in Marriage with his Wife, or the Sum of Mo-

Money. But altho the Legacy be in this Senſe conditional, yet ſeeing the Condition conſiſts in the Choice which the Wife is to make, it would not be juſt that her Delay ſhould make the Legacy to periſh. And ſeeing it was both natural and agreeable to the Intention of the Teſtator, that this Election ſhould be made immediately after the Teſtator's Death, this Delay, which proceeds from the Fact of a third Perſon, and not from the Intention of the Teſtator, ought not to prejudice the Right of the Legatary. And if the Widow chuſes the Sum of Money, this Election is conſidered as if it had been made, as it ought to have been, at the moment of the Teſtator's Death.

XXIII.

23. The Legacy with which the Perſon who is ſubſtituted Executor is charged, is acquir'd by the Death of the Teſtator.

If a Teſtator having ſubſtituted a ſecond Heir or Executor to ſucceed him in default of the firſt, by that Form of Subſtitution which is called vulgar, which ſhall be explained in the firſt Title of the fifth Book, had made a Bequeſt, with which he had charged only the Heir or Executor who was ſubſtituted in the ſecond place, and not him who was inſtituted in the firſt, and that it ſo fell out that the Legatary died before the Inheritance paſſed to the Perſon ſubſtituted to the firſt Heir or Executor, the Legacy would be tranſmitted to the Heir of this Legatary. For the Inheritance could not paſs to the ſubſtituted Heir but with this Burden; and he coming to ſucceed in the room of the firſt Heir, is reputed to be Heir from the Moment of the Teſtator's Death, purſuant to the Rule which hath been explained in its Place *d*: So that he ought not to profit by the Death of the Legatary, which happen'd during this delay of his coming to the Inheritance. And it would be the ſame thing in the Caſe of that ſort of Subſtitution which is called pupillary, which ſhall be conſider'd in the ſecond Title of the fifth Book, if the Perſon ſubſtituted to the Pupil were charged with the Legacy *e*. And altho in theſe two Caſes of theſe two ſorts of Subſtitution the Legacy implies the Condition that the Perſon who is ſubſtituted ſhall ſucceed, yet it is not for all that conditional. For with regard to the Perſon ſubſtituted who is charged with the Legacy, it is pure and ſimple, ſince it cannot fall out that he ſhould be Heir or Executor without owing the Legacy.

d See the fifteenth Article of the firſt Section of Heirs and Executors in general.

e Mortuo patre, licet vivo pupillo, dies legatorum a ſubſtituto datorum cedit. *l.* 1. *ff. quand. dies leg. ced.*

Si a ſubſtituto legatum ſit relictum quamdiu inſtitutus deliberat defuncto legatario non nocebit, ſi poſtea hæres inſtitutus repudiavit: nam ad hæredem ſuum tranſtulerit petitionem. Tantumdem, etſi ab impuberis ſubſtituto legetur: nam ad hæredem ſuum legatum transfert. *l.* 7. §. 3 & 4. *ff. eod.*

SECT. X.

Of the Delivery and Warranty of the Thing bequeathed.

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paid before the Condition on which it was left was accomplished.

18. *Exception to the preceding Article as to the Interest of a third Person.*

I.

1. *The Legatary ought to have the Legacy delivered to him, and not to take it by force.*

SINCE the Legacy is to be taken out of the Inheritance, the Poſſeſſion whereof paſſes from the Teſtator to the Executor, it is from his hands that the Legatary ought to have the thing that is bequeathed; and in what Terms ſoever the Bequeſt be conceived, even altho the Teſtator ſhould ordain that the Legatary ſhould take the thing bequeathed, yet he cannot ſeize upon it, and take it out of the poſſeſſion of the Executor without his Conſent. For it would be an Act of Violence, which is unlawful. But if the Executor ſhould refuſe to deliver the thing to him, he ought to apply to Juſtice for an Order to have it delivered *a*.

a Quod quis legatorum nomine non ex voluntate hæredis occupavit, id reſtituat hæredi. Etenim æquiſſimum prætori viſum eſt unumquemque non ſibi ipſum jus dicere occupatis legatis, ſed ab hærede petere. *l.* 1. §. 2. *ff. quod leg.*

If the Legacy were of an Immoveable Thing, it would ſeem to be leſs neceſſary to oblige the Legatee to make a Demand of it from the Executor, in caſe he did not of his own accord offer to deliver it; but it might happen that the Executor ſhould have a mind to conteſt the Legacy, or that he might have a right to retain the Poſſeſſion of it for ſome time, as if it were a Houſe of which he had the Keys, and in which there were Moveables belonging to the Inheritance; or if it were ſome Lands of which the Crop was to be his. And there might be other juſt Cauſes why the Legatary ſhould not put himſelf in poſſeſſion of the Legacy. So that the Rule appears to be juſt for all ſorts of Legacies without diſtinction; And it is ſo ordered by many Cuſtoms. The Legacy ought to be deliver'd either by the Executor of the Teſtament, or by the Heir.

II.

2. *The Executor ought to take care of the thing bequeathed.*

While the thing bequeathed remains in the cuſtody of the Executor, he is bound to preſerve it until he delivers it to the Legatary; and if it periſhes, or is damaged, thro his Fault or Negligence, he will be accountable for it: For he is obliged to take exact care of it, and he ought to anſwer for the Faults that are contrary to this Care *b*.

b Si res aliena vel hæreditaria ſine culpa hæredis perierit, vel non compareat; nihil amplius quam cavere eum oportebit. Sed ſi culpa hæredis res perit, ſtatim damnandus eſt. Culpa autem qualiter ſit æſtimanda, videamus: an non ſolum ea, quæ dolo proxima ſit, verum etiam quæ levis eſt: an numquid & diligentia quoque exigenda eſt ab hærede, quod verius eſt. *l.* 47. §. 4, & 5. *ff. de legat.* 1. See the eleventh Article of the firſt Section of Subſtitutions direct and fiduciary. See the eleventh Article of this Section.

III.

3. *Legacies without any Term or Condition, are due from the Acceptance of the Succeſſion.*

The Legacies for the Delivery or Payment of which there is no Term ſet, and which are not conditional, ought to be paid immediately after the Executor has accepted the Succeſſion *c*.

c Omnia quæ teſtamentis ſine die vel conditione adſcribuntur, ex die aditæ hæreditatis præſtentur. *l.* 32. *ff. de leg.* 2.

IV.

4. *The Legacy ought to be deliver'd in the Place where it is at the time of the Teſtator's Death.*

The thing bequeathed ought to be delivered to the Legatee in the Place where it was at the time of the Teſtator's Death; unleſs it ſhould appear that it was his Intention that it ſhould be delivered in another Place; in which Caſe the Executor muſt cauſe it to be tranſported thither at his own Charges *d*.

d Cum res legata eſt, ſiquidem propria fuit teſtatoris, & copiam ejus habet hæres moram facere non debet, ſed eam præſtare. Sed ſi res alibi ſit, quam ubi petitur, primum quidem conſtat, ibi eſſe præſtandam, ubi relicta eſt, niſi alibi teſtator voluit. Nam ſi alibi voluit, ibi præſtanda eſt, ubi teſtator voluit, vel ubi veriſimile eum voluiſſe. *l.* 47. *ff. de leg.* 1. *l.* 38. *ff. de judic. l. un. C. ubi fideic. pet. op.*

V.

5. *If a Horſe that is bequeathed were run away in the Lifetime of the Teſtator, the Executor is not obliged to make ſearch after him.*

If the Legacy was of a Horſe, or of a Herd of Cattle, or of Animals of other kinds, and that before the Death of the Teſtator the Horſe was run away, or ſome of the Cattle ſtrayed, the Executor would not be bound to make ſearch after it, and to bring it back; and if the Legatee would reap the Benefit of the Legacy, he would be obliged to be at this Expence himſelf. But if this Caſe had happen'd after the Death of the Teſtator, the Executor would be obliged to be at this expence, purſuant to the Rule explained in the ſecond Article *e*.

e Si quis ſervum hæredis, vel alienum legaverit: & is fugiſſet, cautiones interponendæ ſunt de reducendo eo. Sed ſiquidem vivo teſtatore fugerit, expenſis legatarii reducitur: ſi poſt mortem, ſumptibus hæredis. *l.* 8. *ff. de legat.* 2.

Si ſervus legatus vivo teſtatore fugiſſe dicatur, & impenſa & periculo ejus cui legatus ſit reddi debet: quoniam rem legatam eo loco præſtare hæres debet in quo a teſtatore ſit relicta. *l.* 108. *ff. de legat.* 1.

VI.

6. *The Legatary is liable to Coſts and Damages for not receiving his Legacy.*

If the thing bequeathed were of ſuch a nature as that the Legatary delaying to receive it, the Executors ſhould by his delay ſuffer ſome Loſs or Damage, the Legatary would be bound to make it good. Thus, for example, if it were a Legacy of Cattle, the Legatee would be

be liable for the Charges of keeping them, of feeding them, and for the other Coſts and Damages which the Executor might chance to be at. Thus, for another example, if thro the Legatary's default of receiving Wine, Corn, or other things which ſhould take up Places, or Moveables neceſſary for other Uſes, the Executor ſhould loſe the Occaſion of letting out to hire the ſaid Places, or could not himſelf make uſe of them and the other things for his own Concerns; the Legatary would be anſwerable for all theſe Damages. But the Executor could not pour the Wine out of the Veſſels, or throw the Corn out of the Barns, under pretext of the Delay *f*.

f Si hæres damnatus ſit dare vinum quod in doliis eſſet, & per legatarium ſtetit, quominus accipiat: periculoſe hæredem facturum, ſi id vinum effundat. Sed legatarium petentem vinum ab hærede doli mali exceptione placuit ſummoveri, ſi non præſtet, id quod propter moram ejus damnum paſſus ſit hæres. *l.* 8. *ff. de trit. vin. vel ol. leg.*

VII.

7. Security for Legacies and fiduciary Bequeſts.

If the Legatees ſhould be in fear of loſing their Legacies, and ſhould be unwilling to leave the Goods of the Inheritance to the Diſpoſal and Management of the Executor, they might provide againſt ſuch danger, either by obliging him to give caution, or ſome other Security, or by getting an Order for ſeizing the Goods, and ſealing up the Places in which the Moveables and Papers belonging to the Inheritance ſhould be, in order to have an Inventary of them made, and to have them expoſed to ſale, if that ſhould be neceſſary for their Payment. And it would be the ſame thing for the Security of fiduciary Bequeſts *g*.

g Legatorum nomine ſatiſdari oportere prætor putavit. Ut quibus teſtator dari fierive voluit, his diebus detur, vel fiat. *l.* 1. *ff. ut legat. ſeu fideic. ſerv. cauſ. cav.*

Idemque in fideicommiſſis quoque probandum eſt. *d. l.* 1. §. 10.

Nec ſine ratione hoc prætori viſum eſt, ſicuti hæres incumbit poſſeſſioni bonorum, ita legatarios quoque carere non debere bonis defuncti: ſed aut ſatisdabitur eis, aut, ſi ſatis non datur, in poſſeſſionem bonorum venire prætor voluit. *d. l.* §. 2. *l.* 1. *C. ut in poſſ. legat. vel fid. ſerv. c. m.*

It is ſaid in the ſecond and ſeventh Laws of this Title in the Code, that the Teſtator may diſcharge the teſtamentary Heir from giving Security for the Payment of the Legacies and the fiduciary Bequeſts; and it is very juſt that a Teſtator ſhould have this Liberty. But our Uſage and Equity would apply ſome Temperament in this Matter, ſhould the teſtamentary Heir make a bad uſe of the Teſtator's Indulgence to him; and if there were any danger for the Legatees, they might apply for Remedy to a Court of Juſtice. For it would be preſumed, even as to the Teſtator's Will, that he did not intend to countenance any knaviſh dealing on the part of his teſtamentary Heir.

VIII.

8. Two Caſes where the Father and Mother being charged with a fiduciary Bequeſt to their Children, ought to give Security.

If a Father or a Mother inſtituting their Children or Grand-Children their Executors, had ſubſtituted to them their Children or other Deſcendants, the Perſons ſubſtituted could not demand Security for the Goods of the fiduciary Bequeſt from their Father or Mother who ſhould be charged therewith, unleſs they had married a ſecond time, or that the Teſtator, out of a miſtruſt of their Conduct, had expreſly order'd ſome Security to be given *h*.

h Si pater vel mater, filio ſeu filia inſtitutis hæredibus rogaverit eos eaſve nepotibus vel neptibus, pronepotibus vel proneptibus, ac deinceps reſtituere hæreditatem: in ſupradictis caſibus fideicommiſſorum ſervandorum ſatiſdationem ceſſare, ſi non ſpecialiter eandem ſatiſdationem teſtator exigi diſpoſuerit: & cum pater vel mater ſecundis exiſtimant nuptiis non abſtinendum. In his enim duobus caſibus, id eſt, cum teſtator ſpecialiter ſatiſdari voluerit, vel cum ſecundis ſe pater vel mater matrimoniis junxerit, neceſſe eſt, ut eadem ſatiſdatio pro legum ordine præbeatur. *l.* 6. *d. l.* § 1. *C. ad Senat. Trebell.*

Altho the Security mentioned in this Law ſeems to be meant of a Caution or Bail according to the ordinary meaning of this Word ſatisdationem, *yet the moſt learned Interpreters take it in another Senſe which this Word may bear, and that is a bare Submiſſion. Which would be but a ſlender Security, in caſe there were occaſion for any: and it would ſeem as if the Uſe of this Rule ought very much to depend on that which Equity may require, according to the Quality of the Goods, that of the Perſons, and the other Circumſtances that might come into conſideration.*

IX.

9. The Executor recovers what he has laid out on the Legacies and fiduciary Bequeſts.

If the Executor who is charged with a Legacy or a fiduciary Bequeſt, has been at any charges for the Preſervation of the thing bequeathed, he will recover them, unleſs they are ſuch as ought to be taken out of the Profits or Revenues of the thing. Thus, for example, if an Executor being charged with a fiduciary Bequeſt of a Houſe which he ſhould reſtore after his Death, and the ſaid Houſe having periſhed, or being damaged without any fault of his, he had rebuilt it, or repair'd it, this Expence would be eſtimated in proportion to the quality and neceſſity of the Repairs, and the Condition in which the Houſe was at the time of the Teſtator's Death, the time that it had laſted, and according to the other Circumſtances neceſſary to be conſidered in making the ſaid Eſtimate *i*.

i Domus hæreditarias exuſtas, & hæredis nummis extructas, ex cauſa fideicommiſſi poſt mortem hæredis reſtituendas, viri boni arbitratu, ſumptuum rationibus deductis, & ædificiorum ætatibus examinatis, reſpondit. *l.* 58. *ff. de leg.* 1. See the twelfth Article of the firſt Section of direct Subſtitutions.

X.

10. *He ought to acquit the Charges of the Lands deviſed until the time of Delivery.*

The Executor is alſo bound to acquit the Taxes, Ground-Rents, and other Charges of the Things deviſed, whether they fell due in the Time of the Teſtator, if there remain any Arrears due, or ſince the Teſtator's Death during the Time that the Executor had the Enjoyment of them. And if he is obliged to reſtore the Fruits which he has reaped, theſe kinds of Charges will be deducted out of them *l*.

l Hæres cogitur legati prædii ſolvere vectigal præteritum, vel tributum, vel ſolarium, vel cloacarium, vel pro aquæ forma. *l.* 39. §. 5. *ff. de leg.* 1.

XI.

11. *The Executor bears the Loſs, if the Thing periſhes after his Delay to deliver it.*

If the Executor being in fault for not delivering the Thing bequeathed, it happens to periſh, or to be damaged, even altho it were by an Accident, he will be accountable for it. For if the Thing bequeathed had been delivered, the Legatary might have perhaps either prevented the Loſs of it, or might have ſold it *m*.

m Ipſius quoque rei interitum poſt moram debet, ſicut in ſtipulatione, ſi poſt moram res interierit æſtimatio ejus præſtatur. *l.* 39. §. 1. *ff. de leg.* 1.

Item ſi fundus chaſmate perierit: Labeo ait, utique æſtimationem non deberi. Quod ita verum eſt, ſi non poſt moram factam id evenerit. Potuit enim eum acceptum legatarius vendere. *l.* 47. §. *ult. eod. l.* 3. *C. de uſur. & fruct. leg.*

Si ſervus legatus ſit & moram hæres fecerit, periculo ejus & vivit, & deterior ſit: ut, ſi debilem forte tradat, nihilominus teneatur. *l.* 108. §. 11. *eod.*

If it were Lands or Houſes that were deviſed, and that they periſh by the overflowing of a River, as it is ſaid in the ſecond of theſe Texts, it would require particular Circumſtances to make the Teſtamentary Heir anſwerable for this Loſs; for it is not ſo eaſy to ſell Lands or Houſes as a Moveable Thing.

XII.

12. *All other Loſs, whereof nothing can be imputed to the Executor, falls on the Legatee.*

If it was the Legatary who, having it in his power to receive the Thing bequeathed, had delayed to do it, the Loſs or Diminution which might happen would fall upon him. And it would be the ſame thing, if the Thing bequeathed had periſhed before the Time that it was to be delivered, and that nothing could be imputed to the Executor *n*.

n Si certum corpus hæres dare damnatus ſit, nec fecerit, quominus ibi, ubi id eſſet, traderet: ſi id poſtea ſine dolo & culpa hæredis perierit, deterior fit legatarii conditio. *l.* 26. §. 1. *ff. de legat.* 1.

XIII.

13. *When a Thing is bequeathed indefinitely, the Executor ought to warrant the Thing which he gives.*

If the Legacy were in general of a Thing indefinitely, ſuch as a Horſe, a Sute of Hangings, without ſpecifying any particular Sute, or any particular Horſe, the Executor would be bound to warrant the Thing which he had given for acquitting this Legacy, if it ſhould happen that the Legatary were evicted of it. And whether the Thing had been found among the Goods of the Inheritance, or that the Executor had taken it ſomewhere elſe, and that he knew or were ignorant whoſe it was, he would be bound to give another in its place; for the Teſtator meant to make an uſeful Bequeſt *o*.

o Si hæres tibi, ſervo generaliter legato, Stichum tradiderit, iſque à te evictus fuiſſet: poſſe te ex teſtamento agere, Labeo ſcribit. Quia non videtur hæres dediſſe, quod ita dederat, ut habere non poſſis. Et hoc verum puto. *l.* 29. §. 3. *ff de leg.* 3.

Hæres ſervum non nominatim legatum tradidit, & de dolo poſtea repromiſit, ſervus evictus eſt. Agere cum hærede legatarius ex teſtamento poterit, quamvis hæres alienum eſſe ſervum ignoraverit. *l.* 58. *ff. de evict. V. l.* 71. §. 1. *ff. de leg.* 1. See the following Article.

XIV.

14. *Warranty of the Legacy of a Thing particularly named.*

If the Legacy were of a Thing particularly named by the Teſtator, as if he had deviſed ſuch a Ground, or ſuch a Moveable, which he believed to be his own, but which in reality was not his, the Executor would be bound only to deliver the Thing ſpecified in the Teſtament, and would not be obliged to warrant it. For it would be preſumed that the Teſtator had deviſed it only becauſe he took himſelf to be the Owner of it, and that he would not have made ſuch a Deviſe, if he had known that the Thing was not his own *p*. Thus, in a like Caſe, if a Father, diſpoſing of his Goods among his Children, had charged one of them with a fiduciary Bequeſt for another of the Children of ſome Land or Tenement which the Teſtator believed to be his own, he who in performance of this Diſpoſition had delivered the ſaid Land or Tenement to his Brother at the Time required by the fiduciary Bequeſt, would not be bound to warrant the ſaid Land or Tenement, if his Brother ſhould chance to be evicted thereof. But if inſtead of a fiduciary Bequeſt, the Father's Diſpoſition were a Partition that he had made among his Children, giving to one of them this Land or Tenement for

p Si certus homo legatus eſt, talis dari debet qualis eſt. *l.* 45. §. 11. *ff. de legat.* 1. Forſitan enim ſi ſciviſſet alienam rem eſſe, non legaſſet. §. 4. *inſt. de legat.* See the fifth Article of the third Section.

his

his Share, his Coheirs would be bound to warrant the ſaid Land or Tenement *q*, purſuant to the Rules explained in their place *r*.

q Evictis prædiis, quæ pater, qui ſe dominum eſſe crediderit, verbis fideicommiſſi filio reliquit: nulla cum fratribus & cohæredibus actio erit. Si tamen inter filios diviſionem fecit, arbiter, conjectura voluntatis, non patietur, eum partes cohæredibus prælegatas reſtituere, niſi parati fuerint & ipſi patris judicium fratri conſervari. *l.* 77. §. 8. *ff. de legat.* 2.

r See the ſixth Article of the firſt Section, and the firſt Article of the third Section of Partitions.

XV.

15. *If he who evicts the Thing from the Legatary is obliged to reſtore the Price, it will go to the Legatary.*

If the Legatee of Lands or Houſes be evicted of them, and that he who evicts them is obliged to reſtore the Price of them, this Price which is reſtored will belong to the Legatee, and not to the Executor. For the Intention of the Teſtator in deviſing to him the ſaid Lands or Houſes, implies his Intention that the Legatee ſhould at leaſt have the benefit of the Price. Thus, for example, if the Deviſe were of Lands purchaſed by the Teſtator with a Reſervation of Power to the Seller to redeem them, whether the ſaid Lands were part of the King's Demeſnes, or belonging to ſome particular Perſon, the Money that ſhould be for redeeming the Lands, would belong to this Legatee *s*.

s Cum poſt mortem emptoris, venditionem reipublicæ prædiorum optimus maximuſque princeps noſter Severus Auguſtus reſcindi, hæredibus pretio reſtituto, juſſiſſet: de pecunia legatario, cui prædium emptor ex ea poſſeſſione legaverat, conjectura voluntatis, pro modo æſtimationis, partem ſolvendam eſſe, reſpondi. *l.* 78. §. 1. *ff. de legat.* 2.

XVI.

16. *The Executor cannot be reſtored againſt the Payment of a Legacy, altho it be null.*

If an Executor had voluntarily executed a Diſpoſition of the Teſtator by acquitting a Legacy or fiduciary Bequeſt which ſhould be found to be null, he could not afterwards diſpute the Validity thereof. For having accompliſhed a Diſpoſition which his Reaſon and Conſcience had obliged him to approve and execute, he could not revoke what he had done out of Motives which made this Payment a Duty incumbent on him *t*.

t Et ſi inutiliter fideicommiſſum relictum ſit, tamen ſi hæredes comperta voluntate defuncti, prædia ex cauſa fideicommiſſi avo tuo præſtiterunt, fruſtra ab hæredibus ejus de ea re quæſtio tibi movetur. Cum non ex ea ſola ſcriptura, ſed ex conſcientia relicti fideicommiſſi defuncti voluntati ſatisfactum eſſe videatur. *l.* 2. *C. de fideicomm.*

XVII.

17. *Nor likewiſe of a Legacy which he had paid before the Condition on which it was left was accompliſhed.*

Since the Executor may acquit a Legacy which he cannot be compelled by Law to pay, he may with much more Reaſon deliver ſooner than he is obliged either a Legacy or a fiduciary Bequeſt, whether it be univerſal of the whole Inheritance, or particular of a Sum of Money, or of ſome other Thing, for the Delivery of which a Term was ſet which would delay the Execution thereof, or even to which a Condition were annexed which would ſuſpend the Validity of it. And altho after the Delivery of the Thing the Condition on which it was left not happening, the Diſpoſition ſhould be found to be null, yet this Event would not have the Effect to make this Payment not to ſubſiſt. For the Executor might diſcharge the Legatee of the Condition, and acquit the Legacy or fiduciary Bequeſt as pure and ſimple, ſince he might acquit a Legacy that was null from the beginning, as has been ſhewn in the ſixteenth Article *u*.

u Poſt mortem ſuam rogatam reſtituere hæreditatem, defuncti judicio, & antequam fati munus impleat, poſſe ſatisfacere, id eſt reſtituere hæreditatem, quarta parte vel retenta, vel omiſſa, ſi voluerit, explorati juris eſt. *l.* 12. *C. de fideic.*

Altho no mention be made in this Text of a Legacy or fiduciary Bequeſt that is left upon a Condition, yet it cannot be doubted that the Executor, who ſhould know of the Condition, and who without waiting for the Accompliſhment of it ſhould execute the Diſpoſition of the Teſtator, could not revoke his Approbation of the ſaid Diſpoſition. And this Approbation ought to ſubſiſt with much more Reaſon than that of a Diſpoſition which is void from the beginning, of which notice hath been taken in the preceding Article.

XVIII.

18. *Exception to the preceding Article, as to the Intereſt of a third Perſon.*

The Rule explained in the preceding Article is to be underſtood of the Caſes, where a Payment made before it falls due would be of no prejudice to third Perſons. For if, for example, an Executor were charged to reſtore after his Death, either the whole Inheritance, or a part of it, or a Sum of Money, to ſome Perſon, and that in caſe the Perſon who is ſubſtituted ſhould die before the Executor, the Teſtator had called another Perſon to ſucceed to the ſame fiduciary Deviſe, the Executor, who, having a mind to favour the Perſon ſubſtituted in the firſt place, had delivered up to him the Thing which was deviſed in Truſt, would not be diſcharged of it, if the Perſon ſubſtituted in the firſt

firſt place ſhould die before him; and the Right of the Perſon ſubſtituted in the ſecond place would remain entire for him to exerciſe it, the Caſe happening that he out-lived the Executor *x*.

x Seium maritum ſcripſit hæredem, eique ſubſtituit Appiam alumnam, fideique hæredis commiſit ut, poſt mortem ſuam hæreditatem eidem alumnæ reſtitueret: aut ſi quid ante contigiſſet alumnæ, tunc Valeriano fratris filio reſtitueret eandem hæreditatem; quæſitum eſt, ſi Seius vivus quidquid ad eum ex hæreditate perveniſſet alumnæ reſtituiſſet, an ſecundum voluntatem defunctæ id feciſſe videretur, præſertim cum hæc eidem ſubſtituta eſſet? Réſpondit, ſi vivo Seio Appia deceſſiſſet, non eſſe liberatum a fideicommiſſo Valeriano relicto. *l.* 41. §. 12. *ff. de legat.* 3.

If the Caſe explained in this Article ſhould happen, the Perſon ſubſtituted in the ſecond place might, without waiting for the Death of the Executor, take care that the Goods ſhould not go the Perſon ſubſtituted in the firſt place unleſs with the Burden of his Right, if the Caſe on which the ſame is founded ſhould happen, and unleſs ſufficient Security were given that the Goods ſhould be preſerved.

SECT. XI.

How Legacies may be null, revoked, diminiſhed, or transferred to other Perſons.

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I.

A Legacy may be null two ways, either by reaſon of a Nullity which is in the Legacy from its beginning, or by reaſon of ſome Cauſe which happens afterwards, and annuls it. Thus, a Legacy is null from its beginning, if the Teſtament which contains it be null *a*; if the Teſtator was incapable to diſpoſe of his Goods at the time that he made his Will *b*; if the Thing bequeathed could not be given away, as if it was a Thing belonging to the Publick *c*. Thus, a Legacy which was not null at firſt, is afterwards annulled, if the Teſtator falls under an Incapacity which laſts till his Death *d*; if the Legatary happens to be at the ſame time under a like Incapacity *e*; if he dies before the Teſtator *f*; and if the Thing bequeathed ſhould happen to periſh *g*.

1. *A Legacy may be either null at firſt, or become ſo afterwards.*

a See the third Section of Teſtaments.

b See the ſecond Section of Teſtaments.

c See the ſecond Article of the third Section of Legacies.

d See the twenty ſeventh and twenty eighth Articles of the ſecond Section of Heirs and Executors in general.

e See the third Article of the ſecond Section of Legacies.

f See the ſeventh Article of this Section.

g See the nineteenth Article of this Section.

II.

2. *A Legacy may be either revoked, or diminish'd, or transferred from one Legatee to another.*

A Legacy may be revoked *h*, or diminished, by taking something from it *i*, or it may be transferred from one Legatary to another *l*, according as the second Diſpoſitions alter the former, as ſhall be hereafter explained.

h See the eleventh Article, and thoſe that follow.

i See the twenty ſecond and twenty third Articles.

l See the twenty fourth Article.

III.

3. *A Legacy that is null in its beginning, remains always ſo.*

If a Legacy is null in its beginning at the time that the Teſtament is made, and in ſuch a manner, as, that if the Teſtator ſhould happen to die at the ſame time, the Legacy would be uſeleſs, it will not be afterwards made valid at what time ſoever the Teſtator chances to die, and what Change ſoever may happen. For the Vice which hath annulled this Legacy from its beginning, is not to be repaired, but this is to be underſtood in the Senſe of the Rules which follow *m*.

m Quod initio vitioſum eſt, non poteſt tractu temporis convaleſcere. *l.* 29. *ff. de reg. jur.*

Omnia quæ ex teſtamento proficiſcuntur, ita ſtatum eventus capiunt, ſi initium quoque ſine vitio ceperint. *l.* 201. *eod.*

Catoniana regula ſic definitur. *Quod, ſi teſtamenti facti tempore deceſſiſſet teſtator, inutile foret id legatum, quandocumque deceſſerit, non valere.* Quæ definitio in quibuſdam falſa eſt. *l.* 1. *ff. de reg. Caton.*

The Rule explained in this Article is the ſame with that which is called in the Roman *Law the* Catonian *Rule, of which we have taken notice in the Remark on the thirty firſt Article of the ſecond Section of Heirs and Executors in general. See that Remark, as alſo what has been ſaid in that ſecond Section, and in the ſecond Section of Teſtaments, touching the ſeveral ſorts of Incapacity, in order to apply to this and the following Articles ſuch of thoſe Rules as may be applicable to this Section.*

IV.

4. *An Example of this Rule.*

If one under the Age of Fourteen having made his Teſtament, and being afterwards arrived at that Age which rendered him capable of making a Teſtament, dies without making another, this Teſtament, which would have been null if the Teſtator had died immediately after he made it, will remain ſuch, altho at the time of his Death he was capable of making a Teſtament. For the Incapacity, under which he was at the time of making his Teſtament, is not removed by the Capacity which he acquires afterwards, and which changes nothing in the preceding time *n*.

n See the ſecond Article of the ſecond Section of Teſtaments.

V.

5. *Another Example of this Rule.*

If the Legacy was vitious and null in its Origin, by reaſon of the Nature of the Thing bequeathed, as, if it was a publick Place; this Legacy, which would be null if the Teſtator had died at the time he made his Teſtament, would not be valid afterwards, even altho it ſhould happen that before his Death the Thing bequeathed had changed its Nature, and had come into Commerce. For this Change not being followed by a new Diſpoſition of the Teſtator, would leave the former Diſpoſition in its Nullity *o*. And it would be the ſame thing, if a Teſtator having bequeathed a Thing which belonged to the Legatary, it ſhould happen afterwards that this Legatary had alienated it before the Teſtator died. For altho that the Legacy would have been good if this Change had preceded the Deviſe; yet ſeeing it was null at the time when the Thing bequeathed was already the Legatary's own, it remains ſo for ever after *p*.

o Si talis ſit res cujus commercium non ſit, vel adipiſci non poteſt, nec æſtimatio ejus debetur. §. 4. *inſt. de legat.*

Tractari tamen poterit, ſi quando marmora, vel columnæ fuerint ſeparatæ ab ædibus, an legatum convaleſcat. Et ſiquidem ab initio non conſtitit legatum, ex poſt facto non convaleſcet. Quemadmodum nec res mea legata mihi, ſi poſt teſtamentum factum fuerit alienata: quia vires ab initio legatum non habuit. Sed ſi ſub conditione legetur, poterit legatum valere. *Si exiſtentis conditionis tempore mea non ſit. l.* 41. §. 2. *ff. de leg.* 1. See in relation to the laſt Words of this laſt Text the following Article.

p See the third and eighth Articles of the third Section.

VI.

6. *An Exception to this Rule, as to conditional Legacies.*

The Rule explained in the preceding Articles does not take place in conditional Legacies. Thus, for example, in the ſame Caſe of the foregoing Article of a Legacy of a Thing that were not in Commerce, if the Teſtator had bequeathed it upon condition, in caſe it ſhould change its Nature, and be capable of being acquired by the Legatary; this Legacy, which without this Condition would remain null if the Teſtator had died after making ſuch a Diſpoſition, would have its effect, if this Change ſhould afterwards happen before the Death of the Teſtator. Thus, for example, if a Teſtator had left a Legacy to a Foreigner on condition that he ſhould be naturalized, this Legacy, which without this Condition would

would have been null if the Teſtator had died immediately after making his Teſtament, would have its effect if the ſaid Foreigner ſhould happen to be naturalized before the Death of the Teſtator. For in theſe Caſes, and others of the like nature, the Conditions have this effect, that the Validity or Nullity of the Legacy remains in ſuſpence until the Event either annuls it, or makes it valid *q*.

q Placet Catonis regulam ad conditionales inſtitutiones non pertinere. *l.* 4. *ff. de reg. Caton.*

Purum legatum Catoniana regula impediet; conditionale non, quia ad conditionalia Catoniana non pertinet. *l.* 41. §. 2. *in f. ff. de legat.* 2.

In tempus capiendæ hæreditatis inſtitui hæredes poſſe benevolentiæ eſt. Veluti, Lucius Titius, cum capere poterit, hæres eſto. Idem & in legato. *l.* 62. *ff. de hæred. inſt.*

Hæredem meum ita tibi obligare poſſum, ut ſi, quandoque ego moriar, tuus ſervus Stichus non erit, dare eum tibi damnas ſit. *l.* 18. *ff. de leg.* 2. *l.* 1. §. 2. *ff. de reg. Cat. See the Cloſe of the ſecond Text cited on the fifth Article. See the Remark on the thirty firſt Article of the ſecond Section of Heirs and Executors in general, where notice is taken of the Caſe of this ſixty ſecond Law*, ff. de hæred. inſt.

VII.

7. The Legacy is null if the Legatary was dead before the Teſtament was made, or if he dies before the Teſtator.

The Legacy becomes null if the Legatary dies before the Teſtator. For it was only at the moment of the Teſtator's Death that the Legatary's Right could accrue to him. So that he not being alive at that time, cannot acquire it: For which reaſon he does not tranſmit to his Heir a Right which he himſelf never had. And the Legacy would be null with much more reaſon, if the Legatary had been dead before the Teſtament was made, the Teſtator knowing nothing of his Death *r*.

r Si eo tempore quo alicui legatum adſcribebatur, in rebus humanis non erat, pro non ſcripto hoc habebitur. *l.* 4. *ff. de his quæ pro non ſcrip. hab.*

Ea etenim vel his relinquebantur qui in rerum natura tunc temporis, cum condebantur ultima elogia, non fuerant, forte hoc ignorantibus teſtatoribus: & ea *pro non ſcriptis* eſſe leges exiſtimabant. Vel vivo teſtatore, is qui aliquid ex teſtamento habuit, poſt teſtamentum ab hac luce ſubtrahebatur: vel ipſum relictum expirabat, forte quadam conditione ſub qua relictum fuerat deficiente: quod veteres appellabant in cauſa Caduci. *l. un.* §. 2. *C. de cad. toll.* See the fifth Article of the tenth Section of Teſtaments.

VIII.

8. The Charge impoſed on the Legacy which proves to be null, paſſes to him who reaps the Benefit thereof.

If in the Caſe where the Legacy happens to be null becauſe of the Legatary's dying before the Teſtator, the ſaid Legacy had been accompanied with ſome Charge, as if the Teſtator had obliged the Legatary to give a Sum of Money, or ſomething elſe, to ſome other Perſon, the Nullity of the Legacy would not annul the Charge which the Teſtator had impoſed on it in favour of this third Perſon. For it was as it were another Legacy which ought to ſubſiſt. Thus this Charge will go to the Perſon who reaps the Benefit of the Legacy, whether it be the Executor, or another Legatee who was ſubſtituted to him that could not reap the Benefit of the Legacy, or that was joined with him in the Bequeſt, and who by Right of Accretion or Survivorſhip ought to have the thing bequeathed *s*.

s Pro ſecundo vero ordine, in quo ea vertuntur quæ *in cauſa caduci* fieri contingebant, vetus jus corrigentes, ſancimus, ea quæ ita evenerint, ſimili quidem modo manere apud eos a quibus ſunt relicta, hæredes forte vel legatarios, vel alios qui fideicommiſſo gravari poſſunt: niſi & in hunc caſum vel ſubſtitutus, vel conjunctus, eos antecedat. Sed omnes perſonas quibus lucrum per hunc ordinem defertur, eas etiam gravamen quod ab initio fuerat complexum omnimodo ſentire; ſive in dando ſit conſtitutum, ſive in quibuſdam faciendis, vel in modo, vel conditionis implendæ gratia, vel alia quacunque via excogitatum. Neque enim ferendus eſt is qui lucrum quidem amplectitur, onus autem ei annexum contemnit. *l. un.* §. 4. *C. de caduc. toll.*

¶ It is to be obſerved on this Article, that we have ſet down in it only the Caſe where the Legatary happens to die before the Teſtator, and not the Caſe where he was dead at the time of making the Teſtament, altho both theſe Caſes be comprehended in the preceding Article. For there was this Difference in the *Roman* Law between theſe two Caſes, that in that Caſe where the Legatary was dead before the Teſtament was made, not only was the Legacy null, but alſo the Charge annex'd to the Legacy *a*; whereas in the other caſe the Charge ſubſiſted *b*. This Difference was founded upon this, that the Legacy left to the Legatary who was already dead was held as not being written, and as a Diſpoſition as null as if it had never been made; whereas the Legacy to the Legatary who was living when the Teſtament was made, and who died before the Teſtator, was only confiſcated, and fell to the Exchequer before the Change which *Juſtinian* made by the Law cited on this Article. Which hath no manner of relation to our Uſage, ſince with us the Exchequer never reaps the Profit of Legacies that are null. But it may be remarked touching thoſe Legacies which are held to be not written, that there were Caſes in which the Charges impoſed on

a l. un. §. 3. *C. de cad. toll.*

b See the Text cited on this eighth Article.

the

the ſaid Legacies were to ſubſiſt *c*. And what was juſt in thoſe Caſes according to the *Roman* Law, would ſeem in our Uſage, and according to the Principles of Equity, to be ſo in all Caſes: And that if a Teſtator had charged a Legatary who was already dead before the Teſtament was made, to give a Sum of Money or other Thing out of his Legacy to another Perſon, the Executor or other Perſon who reaps the Benefit of the thing bequeathed, ought to be bound to acquit the ſaid Charge; ſince it would be, as is ſaid in the Article, as it were another Legacy which the Teſtator had a mind to give, the Validity of which it would ſeem ought not to depend on that of the Legacy, which was to bear the ſaid Charge.

c d. §. 3. *l.* 17. *ff. de leg. Corn. de falſ. l. ult. ff. de his quæ pro non ſcript. hab.*

IX.

9. A Legacy that was good at the time of making the Teſtament, may become null by a change.

A Legacy which would have had its effect if the Teſtator had died immediately after the making of his Teſtament, may become null in proceſs of time, if before the Legatary has acquired his Right, there happens a Change, which puts things into ſuch a condition, that if they had been the ſame at the time that the Teſtament was made, the Legacy had been void. Thus, for example, if a Legatary who was capable of a Legacy at the time of making the Teſtament, be incapable thereof at the time of the Teſtator's Death, as if he was a profeſſed Monk, or condemned to a Puniſhment which ſhould carry along with it a civil Death; or if the thing bequeathed, which at the time of making the Teſtament, was in Commerce, be at the time of the Teſtator's Death deſtined to a publick Uſe; theſe Legacies, which would have been uſeful if the Teſtator had died before theſe Events, are null after they have happened *t*.

t Item ſi ſervo alieno quid legatum fuerit, & poſtea a teſtatore redemptus ſit, legatum extinguitur. Nam quæ in eam cauſam pervenerunt, a qua incipere non poterant, pro non ſcriptis habentur. *l.* 3. §. 2. *ff. de his quæ pro non ſcript. hab. V. l.* 12. *ff. de jur. fiſc. See the following Article. See the ſixteenth Article of the ſecond Section of Teſtaments, and the Remark that is there made on it.*

X.

10. Remark on the preceding Article.

We have ſaid in the preceding Article, that a Legacy which was uſeful in its Origin may become null, if after the making of the Teſtament it happen that things be in ſuch a condition, that if they had been the ſame at the time the Teſtament was made, the Legacy would have been null; and we have not ſaid that in general and without diſtinction every Legacy is annulled by an Event of this nature. For it may happen that ſuch a Change may not have the effect to annul the Legacy. Thus for example, if a Teſtator who at the time of making his Teſtament was capable of doing it, happened to be incapable thereof at the time of his Death, becauſe he was fallen into a State of Madneſs; this kind of Incapacity would not hinder the Validity of the Teſtament, nor that of the Legacy. So that the Rule of the preceding Article ought not to be literally underſtood in the Senſe of the Words of the Text from which it is drawn. But this Rule, as alſo that of the third Article, are to be taken in the Senſe that hath been given them, and according to the Temperaments which reſult from the Examples and Exceptions that have been explain'd, every one of which ſufficiently explains the Cauſe which diſtinguiſhes it from the Caſes to which theſe Rules ought to be applied *u*.

u See the preceding Articles, the fourth Article of the ſecond Section of Teſtaments, and the ſixteenth Article of the ſame Section, together with the Remark that is there made upon it.

XI.

11. Divers Ways of revoking Legacies.

A Teſtator may revoke Legacies either by expreſs Diſpoſitions, ſuch as a ſecond Teſtament, or a Codicil, or without any expreſs Diſpoſition, as if he diſpoſes otherways of the thing bequeathed. Thus, for example, if a Father who had deviſed to his Daughter certain Lands, happening afterwards to marry her, gives her the ſame Lands for her Marriage-Portion, the Legacy will be tacitely revoked by ſuch a Diſpoſition. And this Daughter having theſe Lands for her Dowry, cannot pretend a ſecond Effect of this Legacy *x*.

Example.

x Filia legatorum non habet actionem, ſi ea quæ ei in teſtamento reliquit vivus pater poſtea in dotem dederit. *l.* 11. *C. de legat.*

XII.

12. The Legacy of a Debt is revoked if the Teſtator procures Payment of it.

If a Teſtator had bequeathed to his Debtor the Debt which he owed him, and that afterwards he obliged the Debtor to pay it, the Legacy would be revoked *y*. For it was not a Sum of

y Liberatio autem debitori legata ita demum effectum habet, ſi non fuerit exactum id a debitore dum vivat teſtator. Cæterum ſi exactum eſt, evaneſcit legatum. *l.* 7. §. 4. *ff. de liber. leg.*

Money to be received that was bequeathed, but an Acquittance. Thus the Payment annuls the Legacy.

XIII.

13. *The Alienation of the thing bequeathed revokes the Legacy.*

If a Teſtator ſells, or alienates any other way, the thing bequeathed, the Legacy is revoked. For ſeeing he ſtrips himſelf of it, much more doth he deprive the Legatary of it who was to have it from him *z*.

z Si rem ſuam teſtator legaverit, eamque neceſſitate urgente alienaverit, fideicommiſſum peti poſſe; niſi probetur, adimere ei teſtatorem voluiſſe. Probationem autem mutatæ voluntatis ab hæredibus exigendam. *l.* 11. §. 12. *ff. de leg.* 3.

Si rem ſuam legaverit teſtator, poſteaque eam alienaverit; Celſus putat, ſi non adimendi animo vendidit, nihilominus deberi. Idemque Divi Severus & Antoninus reſcripſerunt. §. 12. *inſt. de leg.*

¶ We have thought proper to leave out of this Rule that which is added in the firſt of theſe Texts, that if the Teſtator has ſold for an urgent Neceſſity the thing which he had bequeathed, the Legacy is not revoked unleſs the teſtamentary Heir prove that the Teſtator had an Intention to revoke it. And we have alſo thought proper to leave out what is ſaid in the ſecond of theſe Texts, that the Sale of the thing bequeathed is no hindrance why the Legacy ſhould not ſubſiſt, if when the Teſtator ſold it, he had not an intention to revoke the Legacy. *Si non adimendi animo vendidit, nihilominus deberi.* And we have ſet down only the bare Rule, that the Alienation annuls the Legacy, and ſuch as we ſee it in other Places without theſe Exceptions. It is in this manner that the Lawyer *Paulus* has quoted this Rule in the fourth Book of his Sentences; Tit. 1. §. 9. *Teſtator ſupervivens ſi eam rem quam reliquerat vendiderit, extinguitur fideicommiſſum.* And we ſee in a Law, that the Sale of the thing bequeathed annuls the Legacy in ſuch a manner, that if a Teſtator having ſold a Slave whom he had bequeathed, ſhould afterwards purchaſe him, this Slave would not be due to the Legatary, altho he belonged to the Teſtator at the time of his Death, unleſs the Legatary could prove that the Teſtator had a new Intention to leave him to him *a*. Seeing therefore the Rule is, that the Alienation annuls the Legacy, and that to make the Legacy ſubſiſt it was neceſſary, by the *Roman* Law, to have Proofs of the Teſtator's Intention, in order to know whether he intended that the Legacy ſhould ſubſiſt or not, it was not proper to add to the Rule theſe Exceptions which do not ſuit with our Uſage. For we do receive no other Proof of the Will of a Teſtator than his Teſtament, together with the known Circumſtances which may explain his Intention. And the Inconveniences would be infinite if ſuch Proofs were admitted, as well as Proofs of Covenants prohibited by the Ordinances *b*.

As to what concerns the Caſe of a Sale which the Teſtator may have made out of neceſſity, it would be neceſſary likewiſe in that caſe to come to Proofs of the Teſtator's Intention. For it is ſaid in the firſt of theſe Texts, that notwithſtanding the neceſſity the Heir or Executor ought to be admitted to prove that it was the Teſtator's Intention to revoke the Legacy, whence it would follow that the Legatee would be received on his part to prove the contrary; becauſe in the Matter of Proofs of Facts, each Party is at liberty to make his Proof *c*. Thus this Proof, which it would be neceſſary to make in order to know whether the Teſtator, having alienated the thing bequeathed out of neceſſity, had had an intention to revoke the Legacy, would likewiſe be contrary to our Uſage.

a V. *l.* 15. *ff. de adim. vel transf. leg.*

b See the Ordinances quoted on the twelfth Article of the firſt Section of Covenants, and at the end of the Preamble of the ſecond Section of Proofs.

c See the ſixth Article of the firſt Section of Proofs.

XIV.

14. *A Donation has the ſame effect.*

If he who had bequeathed a thing had afterwards given it away to ſome other Perſon than to the Legatary, this Donation would annul the Legacy with much more reaſon than a Sale. For one may be obliged to ſell out of neceſſity a thing which he had bequeathed, and that without changing the Good-Will which he had for the Legatary; but one cannot be preſumed to give it away to another except freely, preferring the Donee to the Legatee *a*.

a Rem legatam ſi teſtator vivus alii donaverit, omnimodo extinguitur legatum. Nec diſtinguimus utrum propter neceſſitatem rei familiaris, an mera voluntate donaverit: ut ſi neceſſitate donaverit, legatum debeatur: ſi nuda voluntate, non debeatur. Hæc enim diſtinctio in donantis munificentiam non cadit. Cum nemo in neceſſitatibus liberalis exiſtat. *l.* 18. *ff. de adim. vel transf. legat.*

¶ It is ſaid in another Law that altho the Donation be found to be null, yet the Legacy nevertheleſs is revoked;

voked *; which is founded upon this, that the Donation, altho it be in it ſelf null, yet it marks the expreſs Intention of the Teſtator to revoke the Legacy. And if, for example, a Teſtator having made a Deed of Gift of a thing which he had before bequeathed to another Perſon than the Donee, had continued in the ſame mind as to that Donation until his Death, it would be certain that his Intention was to revoke the Legacy. And altho the Heir or Executor of the ſaid Donor ſhould afterwards procure the Deed of Gift to be annulled by reaſon of ſome Flaw in it, yet he might purſuant to this Law maintain againſt the Legatary that his Legacy was annulled. But if it was the Donor himſelf that had procured the Deed of Gift to be vacated, and that he afterwards had made no change in his Teſtament; and had died without making other Diſpoſitions; that Donation which the Teſtator himſelf had revoked, ought it to have the effect of revoking a Legacy which he had ſuffered to remain in his Teſtament? And would there not be juſt ground to preſume that this Teſtator intended that his Legacy ſhould have its effect, not only becauſe of his revoking the Deed of Gift; but becauſe that having made no Alteration in his Teſtament, he had confirmed all the Diſpoſitions thereof, and had ſignified his Will to die in the ſame Intentions, and that they ſhould all of them have the ſame effect that the Death of Teſtators gives to their Teſtaments.

* Pater hortos inſtructos filiæ legavit: poſtea quædam ex mancipiis hortorum uxori donavit; ſive donationes confirmavit, ſive non confirmavit, poſterior voluntas filiæ legato potior erit. Sed etſi non valeat donatio, tamen minuiſſe filiæ legatum pater intelligitur. *l.* 24. §. 1. *ff. de adim. vel transf. legat. v. l.* 3. §. *ult. ff. de inſtr. vel inſtrum. leg.*

XV.

15. *The pawning of the thing bequeathed does not revoke the Legacy.*

Altho the Teſtator pawns after the making of his Teſtament the thing which he had bequeathed, yet that will be no Revocation of the Legacy. For the making of his Teſtament doth not debar him of the Uſe of his Goods, and this Uſe of them does not annul the Diſpoſitions of his Teſtament, which will have their effect, or not have it, according to the Condition in which things ſhall be at the time of his Death. Thus altho it be true that the pawning of the thing may be followed by an Alienation of it, yet nevertheleſs if the thing that is pawned belong ſtill to the Teſtator at the time of his Death, it paſſes to the Legatee; and the Executor will be obliged to redeem it, as has been ſaid in another Place *b*. For it is a general Obligation upon him to acquit all the Debts of the Inheritance.

b See the ſeventeenth Article of the third Section.

Qui poſt teſtamentum factum prædia, quæ legavit, pignori vel hypothecæ dedit, mutaſſe voluntatem circa legatariorum perſonam non videtur. Et ideo etiam ſi in perſonam actio electa eſt. Recte placuit ab hærede prædia liberari. *l.* 3. *C. de leg.* §. 12. *inſt. de leg.*

XVI.

16. *Nor the Changes of the thing which reform and renew it.*

If after the making of the Teſtament ſome Changes are made in the thing that was bequeathed, altho they be ſuch that, if the Nature of the thing can bear it, all its Parts be renewed, yet all theſe Changes of the thing bequeathed make no change in the Legacy. Thus the Legacy of a Ship, or of a Houſe, or other Edifice, is not revoked, altho it be wholly repaired piecemeal and by degrees. Thus the Legacy of a Flock of Sheep is not revoked, altho there remain not one of the firſt that were bequeathed *c*. For theſe Changes being made on the thing itſelf, none of them changes it entirely; ſo that it remains the ſame after the laſt Change.

c Si navem legavero, & ſpecialiter meam adſcripſero, eamque per partes totam refecero, carina eadem manente, nihilominus recte a legatario vindicaretur. *l.* 24. §. *ult. ff. de leg.* 1.

Si domus fuerit legata, licet particulatim ita refecta ſit, ut nihil ex priſtina materia ſuperſit; tamen dicemus, utile manere legatum. *l.* 65. §. *ult. ff. de leg.* 1. See the following Article.

The Changes of the Parts that make up a Whole do not hinder the thing from being conſider'd as being always the ſame, altho there remain not one of the firſt Parts of which it conſiſted. Thus a Houſe that is often repaired is always the ſame. Thus a Court of Judicature, a Nation, a Regiment, and even the Bodies of Men and of Animals are always conſider'd as being the ſame, altho it may happen that after a long time there remain not one of the ſmall Parts that compoſed them. For theſe things are in one ſenſe always the ſame, for the Reaſon explained in the Article. V. l. 76. ff. de judiciis.

XVII.

17. *The Legacy of a Flock of Sheep ſubſiſts, altho there remain not one Head of thoſe that were in it at firſt.*

The Legacy of a Herd of Cattle may be augmented or diminiſhed by the Changes that may happen to it, and it paſſes to the Legatary ſuch as it is at the time that it falls due to him, whether it be encreaſed ſince the time of making the Teſtament or leſſen'd. And altho there ſhould be left one Mare only of a Stud, or one only Sheep of a Flock, altho it could not be ſaid that this one Sheep was a Flock, or that one Mare a Stud; yet ſeeing this Rem-

nant was a part of the Stud or Flock bequeathed, it was comprehended in the Legacy, and would remain as part of it, in the ſame manner as the Ground on which a Houſe ſtood that is burnt down would belong to the Legatary of that Houſe *d*.

d Grege legato, & quæ poſtea accedunt ad legatarium pertinent. *l.* 21. *ff. de legat.* 1.

Si grege legato, aliqua pecora, vivo teſtatore, mortua eſſent, in eorumque locum aliqua eſſent ſubſtituta, eundem gregem videri. Et ſi diminutum ex eo grege pecus eſſet, & vel unus bos ſupereſſet, eum vindicari poſſe, quamvis grex deſiſſet eſſe. Quemadmodum inſula legata, ſi combuſta eſſet, area poſſit vindicari. *l.* 22. *eod.*

XVIII.

18. *If the thing bequeathed changes its Nature, the Legacy is revoked.*

If the Changes of the thing bequeathed be ſuch as tho the Matter or Subſtance thereof may remain, yet the thing it ſelf becomes thereby of another Nature, or falls under another Condition, ſo as that it is not any longer comprehended under the Expreſſion of the thing that was bequeathed, the Legacy is revoked by this Change. Thus, for example, if a Teſtator who had bequeathed Woollen or Silk Stuffs, had afterwards made Clothes of them, he would have by that revoked the Legacy *e*. Thus, for another example, if a Teſtator having bequeathed ſome precious Stones, ſhould afterwards apply them to ſome other Uſe, ſuch as for the Ornament of the Hilt of a Sword, of the Caſe of a Watch, a Caſe of Inſtruments, or other Trinket, the Legacy would be revoked by this Change *f*. Thus, for another example, if a Teſtator having bequeathed Trees either felled or to be felled, had afterwards built a Ship, or done ſome other Work with the ſaid Trees, the Legacy would be uſeleſs *g*. And if on the contrary, a Teſtator having bequeathed a Ship, ſhould take it to pieces, the Legacy would alſo be revoked, ſo as that the Legatary could not lay claim to any of thoſe Pieces *h*: For it was only a Ship that was bequeathed. And it would be the ſame thing if the thing bequeathed ſhould chance to periſh, ſo as that what ſhould remain of it were of another nature than that which was bequeathed. Thus, for example, if a Herd of Cattle or Flock of Sheep being bequeathed, there ſhould not remain any one of them at the time of the Teſtator's Death, but only the Hides or the Wool, the Legatary would have no right at all to theſe Remains *i*.

e Lana legata, veſtem quæ ex ea facta ſit, deberi non placet. *l.* 88. *ff. de legat.* 3.

f Item quæro: ſi probari poſſit, Seiam uniones & hyacintos quoſdam in aliam ſpeciem ornamenti, quod poſtea pretioſius fecit additis aliis gemmis & margaritis convertiſſe: an hos uniones vel hyacintos petere poſſit, & hæres compellatur ornamento poſteriori eximere, & præſtare? Marcellus reſpondit, petere non poſſe. Nam quid fieri poteſt, ut legatum vel fideicommiſſum durare exiſtimetur, cum id quod teſtamento dabatur, in ſua ſpecie non permanſerit? nam quodammodo extinctum ſit. *l.* 6. §. 1. *ff. de aur. arg.*

g Sed & materia legata, navis, armariumve ex ea factum non vindicatur. *d. l.* 88. §. 1. *ff. de leg.* 3.

h Nave autem legata diſſoluta, neque materia, neque navis debetur. *d. l.* 88. §. 12.

i Mortuo bove qui legatus eſt, neque corium, neque caro debetur. *l.* 49. *ff. de legat.* 2. See the following Article.

We muſt underſtand the Rule explained in this Article, in the Senſe which is there given to it by the Examples which are there brought, in order to apply it to the other Caſes of the like nature.

It may be obſerved on the firſt of the Texts cited on this Article, that it is ſaid in another that the Clothes which have been made of Wool that was bequeathed were due to the Legatary, unleſs the Teſtator changed his Will. Si lana legetur & veſtimentum ex ea fiat, legatum conſiſtere; ſi modo non mutaverit teſtator voluntatem. l. 44. §. 2. ff. de leg. 2. *But ſeeing that firſt Text does not put that Condition, that the Teſtator in making thoſe Clothes had an Intention to revoke the Legacy, and that, as has been obſerved on the thirteenth Article, it is not agreeable to our Uſage to have recourſe to theſe ſorts of Proofs; it follows from thence that according to our Uſage, and that firſt Text, the Legacy ought to remain revoked by the ſaid Change, if there be nothing in the Expreſſion of the Teſtator which may make it to be preſumed that the Legacy does ſubſiſt.*

XIX.

19. *If there remains none of the thing bequeath'd beſides Acceſſories, the Legacy is annulled.*

If the thing happens to periſh, and there remain ſome Acceſſories of it, none of them will be due to the Legatary. For he was not to have theſe Acceſſories except with the Thing itſelf, which he cannot have. Thus, for example, if a Horſe thathad been bequeathed with his Harneſs ſhould chance to die, the Legatary would have none of the Harneſs *l*.

l Servo legato cum peculio, & alienato vel manumiſſo, vel mortuo, legatum etiam peculii extinguitur. Nam quæ acceſſionum locum obtinent extinguuntur, cum principales res peremptæ fuerint. *l.* 1, *& l.* 2. *ff. de pecul. leg.*

XX.

20. *Particular Expreſſions derogate from general ones. Example.*

If a Teſtator who had bequeathed his Houſe furniſhed, or his Houſe together with all the Furniture, had added to this Legacy a particular Clauſe by which he had bequeathed to the ſame Perſon his Hangings, this Addition would not diminiſh the Legacy of all the Furniture, and would not reduce it barely to the Hangings. But if, having

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ving bequeathed the Houſe furniſhed, or the Houſe with all its Furniture, he had added that he bequeathed likewiſe ſuch a particular Sute of Hangings, ſuch as thoſe which contain ſuch a Hiſtory, or that are in ſuch a Hall; the mentioning of theſe particular Hangings would exclude the others, and would ſhew that he did not think that the Legacy of the Furniture of the Houſe would take in the Hangings, and that he meant to give only thoſe Hangings which he had particularly mentioned. For in this Caſe, and others of the like nature, what is particularly ſpecified derogates from the general Expreſſion which comprehended the whole *m*.

m In toto jure generi per ſpeciem derogatur: & illud potiſſimum habetur, quod ad ſpeciem directum eſt. *l.* 80. *ff. de reg. jur.*

Si quis fundum, ita ut inſtructus eſt, legaverit, & adjecerit cum ſupellectili, vel mancipiis, vel una aliqua re quæ nominatim expreſſa non erat: utrum minuit legatum adjiciendo ſpeciem, an vero non, quæritur? & Papinianus reſpondit, non videri minutum, ſed potius ex abundanti adjectum. *l.* 12. §. 46. *ff. de inſtr. vel inſtrum. leg.*

Cui fundum inſtructum legaverat, nominatim mancipia legavit. Quæſitum eſt, an reliqua mancipia, quæ non nominaſſet, inſtrumento cederent? Caſſius ait, reſponſum eſſe, tametſi mancipia inſtructi fundi ſint, tamen videri eos ſolos legatos eſſe qui nominati eſſent: quod appareret, non intellexiſſe patremfamilias inſtrumento quoque ſervos adnumerandos eſſe. *l.* 18. §. 11. *eod.*

Legata ſupellectili cum ſpecies ex abundanti, per imperitiam enumerentur, generali legato non derogatur. Si tamen ſpecies certi numeri demonſtratæ fuerint, modus generi datus in his ſpeciebus intelligitur. *l.* 9. *ff. de ſupell. leg.*

XXI.

21. *Another Example of the Rule explained in the preceding Article.*

It follows from this Rule, which declares that the Expreſſion by which a particular Thing is ſpecified derogates from the general Expreſſion which beſides that Thing takes in others, that if a Teſtator had bequeathed to one of his Friends all the Horſes in his Stable that were come of his own Stud, and to another all his Saddle-Horſes; and that among theſe there were ſome that had been taken out of his own Stud; they would be excepted out of the Legacy of the Horſes come of the Stud, and comprehended in the Legacy of the Saddle-Horſes. For the Quality of Saddle-Horſes determines to this particular kind the general Expreſſion of Horſes come of the Stud, which may agree to other kinds of Horſes *n*. But if a Teſtator had bequeathed to one

n Si alii vernæ, alii curſores legati ſunt: ſi quidam vernæ & curſores ſint, curſoribus cedent. Semper enim ſpecies generi derogat. *l.* 99. §. *ult. ff. de legat.* 3. *v. l.* 15. *ff. de pec. leg.*

the Horſes, or other Things, of a certain kind, and to another thoſe of another kind, and it proved that ſome of them being of both kinds, were comprehended under both the Expreſſions, there being nothing to fix them to any one of them in particular; thoſe which ſhould be found to be only of one of the two kinds would belong to the Legatee of that kind; and thoſe which ſhould appear to be comprehended under both kinds would belong in common to the two Legatees. Thus, for example, if the Teſtator had bequeathed to one of them his Coach-Horſes, and to the other his Saddle-Horſes, and that there were ſome Horſes which ſerved both for the Coach and Saddle; all the other Horſes would be divided between the Legatees according to the Uſes for which the Horſes ſerved, and the Horſes common to both Uſes would be in common to both the Legataries *o*.

o Si in ſpecie aut in genere utrique ſint, plerumque communicabuntur. *d. l.* 99. *in f.*

XXII.

22. *The Legacy is diminiſhed by the Diminution of the Thing bequeathed.*

If he who had deviſed his Jewels, Pictures, or other Things, or even certain Lands, ſells a part of them; the Legacy ſubſiſts only for what remains. For as the Legacy would be augmented if the Teſtator had added to the Thing deviſed, ſo is it diminiſhed when he takes any thing from it *p*.

p Si ex toto fundo legato teſtator partem alienaſſet, reliquam duntaxat partem deberi placet. Quia etiamſi adjeciſſet aliquid ei fundo, augmentum legatario cederet. *l.* 8. *ff. de leg.* 1. See the fifth and ſixth Articles of the fourth Section.

XXIII.

23. *By ſeparating a part of the Land or Tenement deviſed, to join it to another.*

If without alienating the Land or Tenement deviſed, or any part thereof, the Teſtator ſeparates a Portion of it, in order to join it to another Land or Tenement; as, if in order to enlarge a Meadow, or an Orchard, he takes off a piece of a Ground which he had deviſed; ſuch a Separation would leſſen the Legacy. For what is taken away from it becomes part of another Land or Tenement, to which the Legatary will have no Right *q*.

q Quod ſi poſt teſtamentum factum ex fundo Titiano aliquid detraxit, & alii fundo adjecit: videndum eſt, utrumne eam quoque partem legatarius petiturus ſit, an hoc minus quaſi fundi Titiani eſſe deſierit; cum noſtra deſtinatione ſundorum nomina & domus, non natura conſtituerentur. Et magis eſt, ut quod alii deſtinatum eſt, ademptum eſſe videatur. *l.* 24. §. 3. *ff. de leg.* 1.

XXIV.

XXIV.

24. *The Legacy being transferred, it is taken away from the first Legatary.*

When a Teſtator by a ſecond Diſpoſition transfers to a ſecond Legatee the ſame Thing which he had before given to another Perſon, the Legacy of the firſt Legatary is ſo far annulled by this Legacy to a ſecond, that altho it ſhould happen that the ſecond Legatary ſhould die before the Teſtator, yet the firſt Legatary would have nothing of the Legacy. For the firſt Diſpoſition, which was in his favour, was revoked by the ſecond *r*. But if the Teſtator had impoſed any Charge or Condition on the Legacy which he transfers in this manner, it would paſs with the Legacy to the ſecond Legatary, unleſs it were annexed to the Perſon of the firſt Legatary, or that it was the Intention of the Teſtator not to charge the ſecond Legatee with that Burden *s*.

r Si vivo teſtatore mortuus fuerit, is in quem tranſlatum legatum fuerit: nihilomagis ad eum a quo tranſlatum fuerit pertinebit. *l.* 8. *ff. de adim. vel transf. legat.*

s Legatum ſub conditione relictum, & ad alium tranſlatum, ſi non conditio perſonæ cohæreat, ſub eadem conditione tranſlatum videtur. *l.* 95. *ff. de condit. & dem.*

XXV.

25. *A Revocation of one of two Legacies, which doth not annul any one of the two.*

If a Teſtator had left two Legacies to two Perſons of the ſame Name, and that by a ſecond Diſpoſition he had revoked the Legacy to one of them without diſtinguiſhing which of the two, ſo that it could not be known which of the two Legacies was revoked, both would ſubſiſt. For it would be more juſt and equitable that the Revocation which is obſcurely expreſſed ſhould be without effect, rather than to give it the effect of annulling two Legacies, one of which ought certainly to ſubſiſt according to the Intention of the Teſtator. But if on the contrary, the Teſtator had made only one Bequeſt to one of two Perſons bearing the ſame Name, ſo that it could not be known by the Circumſtances to which of the two he intended to leave the Legacy; the Legacy would be without any effect either to the one or the other. For the Executor would be anſwerable only for one Legacy, and neither of the two Perſons could prove that he was the Legatary *t*.

t Si duobus Titiis ſeparatim legaverit, & uni ademerit, nec appareat cui ademptum ſit; utrique legatum debetur. Quemadmodum & in dando, ſi non appareat, cui datum ſit dicemus neutri legatum. *l.* 3. §. 7. *ff. de adim. vel transf. legat.* See the twenty ſixth Article of the ſecond Section of Teſtaments, and the Remark which is there made on it, and which may be applied to the ſecond Caſe of the preſent Article.

XXVI.

26. *If the Legatary renders himſelf unworthy of the Legacy, it is revoked.*

A Legacy which was good, and made in due Form, might be annulled, altho the Teſtator ſhould make no manner of Diſpoſition, either expreſs or tacit, to revoke it; if it ſhould happen that the Legatary ſhould render himſelf unworthy of it by any of the Cauſes explained in their proper place *u*.

u See the ſaid Cauſes in the third Section of Heirs and Executors in general.

XXVII.

27. *Legacies are diminiſhed without the Deed of the Teſtator, by the Falcidian Portion.*

Altho the Teſtamentary Heir or Executor ſhould pretend that the Goods were not ſufficient to acquit the Legacies, yet he is nevertheleſs charged with them, if he accepts of the Quality of Heir or Executor, pure and ſimple. But if he takes upon him this Quality only with the Benefit of an Inventary, he will be accountable for the Legacies only to the Value of the Goods that ſhall remain after the Debts are paid, and moreover he may deduct from them the Defalcation which ſhall be ſpoken of under the following Title *x*.

x See the following Title, and that of Heirs or Executors with the Benefit of an Inventary.

TIT. III.

Of the Falcidian Portion.

BY the Falcidian Portion, which took its Name from the Author or Inventer thereof, is meant the fourth part of the Inheritance which the *Roman* Laws appropriated to the Teſtamentary Heirs or Executors, reducing the Legacies to three Fourths of the whole Eſtate; ſo that the Teſtamentary Heir or Executor was to have at leaſt one fourth Part entire, and the Legacies could no ways diminiſh it.

This Law was equally juſt both for the Intereſt of the Teſtators, of the Teſtamentary Heirs or Executors, and of the Legatees. For ſeeing the Teſtators might perhaps over-value their Eſtates, or believe that they had more Effects than really they had, and under this Perſuaſion exhauſt their whole Succeſſion with Legacies, and ſo oblige their Teſtamentary Heirs or Executors to renounce their Succeſſion, rather

than to acquit the Legacies without ſome Defalcation. The Intereſt which the Teſtamentary Heirs or Executors have therein, is altogether evident: And it is likewiſe the Intereſt of the Legatees rather to ſuffer a Defalcation of their Legacies than to loſe them entirely, if upon the Executor's relinquiſhing the Succeſſion, the Diſorder in the Affairs of the Succeſſion were to be attended with this Conſequence.

The Uſe of the Falcidian Portion relates only to the Diſpoſitions of ſuch Teſtators, whoſe Eſtates are ſituated in the Provinces which are governed by the written Law. For with reſpect to Eſtates ſituated in the Cuſtoms, ſeeing the ſaid Cuſtoms do regulate what Share of the Eſtate ought to remain to the Heirs at Law, and what is left to the Diſpoſition of the Teſtator, the Reduction of Legacies is differently regulated by the reſpective Bounds which each Cuſtom has ſet thereto.

[*As the Deduction of the Falcidian Portion out of Legacies is not received in thoſe Provinces of* France *which are governed by their peculiar Cuſtoms, ſo neither does it take place here in* England. *For the reaſon why it was introduced under the* Roman *Law ceaſes with us, ſeeing, according to our Uſage, a Teſtament ſubſiſts, and the Legacies are valid, whether the Executor accept or refuſe the Execution of the Teſtament. Whereas by the* Roman *Law, if the Teſtamentary Heir or Executor did refuſe to accept of the Succeſſion, the Teſtament was void, and none of the Legacies were due. And therefore to prevent this Inconvenience of having all the Diſpoſitions of the Teſtator fruſtrated by the refuſal of the Executor, when he thought the Succeſſion to be ſo incumber'd, that it would not be worth his while to accept of it, the Falcidian Law introduced this Expedient as an Encouragement to Executors to accept of the Office, becauſe by this Deduction of a fourth Part out of the Legacies, they would be ſure of having a certain Profit to recompenſe them for their Trouble in looking after the Affairs of the Succeſſion. And beſides, there is a further Reaſon why this Deduction of the Falcidian Portion does not take place in* England; *and that is, becauſe in* England *all Teſtamentary Diſpoſitions of perſonal Eſtates are upon the foot of Military Teſtaments, and Military Teſtaments, even by the* Roman *Law, are exempted from the Falcidian Portion.* l. 7. Cod. ad Leg. Falc. Cowel's Inſtitutes of the Laws of England, Lib. 3. tit. 22.]

SECT. I.

Of the Uſe of the Falcidian Portion, and wherein it conſiſts.

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15. *Goods diſcovered after ſettling the Falcidian Portion, diminiſh it.*
16. *If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Eſtimation.*

I.

THE Falcidian Portion is the fourth Part which the Executor may retain of the Goods of the Succeſſion, when the Legacies exceed the three fourth Parts *a*.

1. *The Legacies cannot exceed three fourth Parts of the Goods.*

a Quicumque civis Romanus poſt hanc legem rogatam teſtamentum faciet, is quantam cuique civi Romano pecuniam jure publico dare legare volet, jus poteſtaſque eſto: dum ita detur legatum, ne minus quam partem quartam hæreditatis eo teſtamento hæredes capiant. *l.* 1. *ff. ad leg. falc.*

II.

The fourth Part, which the Executor ought to have, is taken out of all the Goods in general; but the Goods are underſtood to be only ſuch as remain after the Debts are paid. Thus, the Executor retains in the firſt place the Fund that is neceſſary for paying the Debts, and in the next place his own fourth Part for the Falcidian Portion out

2. *All the Debts are to be paid before the Legacies, and even preferably to the Falcidian Portion due to the Executor.*

out of what remains clear *b*. And we must reckon in the number of Debts, that which appears to be due to the Executor, if he was a Creditor of the deceaſed, of what nature ſoever the Debt were, even altho it were a Legacy or a fiduciary Bequeſt which had been left to the Deceaſed in truſt for him. So that if, for example, a Father to whom a Legacy had been left in truſt for his Children, with liberty to him to chuſe which of them he would give it to, had left it to them all, inſtituting them Heirs or Executors in equal Portions, and had bequeathed ſo many Legacies as to give occaſion to deduct the Falcidian Portion, every one of his Children, in computing his own Falcidian Portion, might deduct his Share of the Legacy left in truſt to their Father for his Uſe, as a Debt due to him. For altho their Father had the liberty of chuſing any one of them to give it to, yet his failing to make the choice render'd him Debtor to them all for what he was obliged to reſtore *c*.

b Sicuti legata non debentur, niſi deducto ære alieno, aliquid ſuperſit: nec mortis cauſa donationes debebuntur, ſed infirmantur per æs alienum. *l.* 66. *ff. ad leg. falc.*

Bona intelliguntur cujuſque, quæ deducto ære alieno ſuperſunt. *l.* 39. §. 1. *ff. de verb. ſignif.*

c In imponenda ratione legis Falcidiæ, omne æs alienum deducitur, etiam quod ipſi hæredi mortis tempore debitum fuerit, quamvis aditione hæreditatis confuſæ ſint actiones. *l.* 6. *C. ad leg. falc.*

Pater filium ex quo habebat tres nepotes, hæredem inſtituit, fideique ejus commiſit, *ne fundum alienaret, & ut in familia eum relinqueret.* Filius decedens tres filios ſcripſit hæredes. Quærendum eſt an omnino quaſi creditores unuſquiſque in ratione legis falcidiæ aliquid poſſit deducere; quia in poteſtate ſua habuit pater cui ex his potius relinqueret. Sed hac ratione nemo in Falcidiæ ratione quicquam deducet: quod videndum ne dure conſtituatur. Utique enim in alieno ære habuit fundum: neceſſitate quippe obſtrictus fuiſſet filiis eum relinquendi. *l.* 54. *ff. ad leg. falc.*

III.

3. And likewiſe the Funeral Expences.

It is neceſſary alſo to deduct out of the Goods the Funeral Expences, which are preferred not only before Legacies, but even before the Debts, altho there ſhould not be Effects enough in the Succeſſion to ſatisfy all the Creditors. And this Expence ought to be moderated ſo as not to exceed what is neceſſary *d*.

d Item funeris impenſa. §. 3. *inſt. de leg. falc.*

Impenſa funeris ſemper ex hæreditate deducitur; quæ etiam omne creditum ſolet præcedere, cum bona ſolvendo non ſint. *l. penult. ff. de relig.*

Marcellus conſultus an funeris monumentique impenſa quam teſtator fieri juſſit, in ære alieno deduci debeat, reſpondit non amplius eo nomine, quam quod funeris cauſa conſumptum eſt, deducendum. *l.* 1. §. *ult. ff. ad leg. falc.* See the eleventh Section of Heirs and Executors in general.

IV.

4. The Executor has not the Falcidian Portion, unleſs he make an Inventary.

The Executor cannot demand the Falcidian Portion, if he has not claimed the Benefit of an Inventary, and does not make it appear by an Inventary made in due form, that the Goods are not ſufficient to ſatisfy all the Charges. But the Executor who takes upon him that Office, purely and ſimply, without claiming the benefit of an Inventary, cannot pretend to the Falcidian Portion, altho it were true that the Goods were not ſufficient to anſwer all the Charges *e*.

e Fiat inventarium ab hærede metuente ne forte non habeat poſt debita & legata falcidiam. *Nov.* 1. *c.* 2.

Si vero non fecerit inventarium, non retinebit falcidiam: ſed complebit legatarios & fideicommiſſarios, licet puræ ſubſtantiæ morientis tranſcendat menſuram legatorum datio. *d. c.* 2. §. 2. See the tenth Article.

V.

5. The Heir at Law has right to the Falcidian Portion.

Altho the Falcidian Portion ſeems only to belong to Executors or teſtamentary Heirs, yet ſeeing Legacies may be left by a Codicil without naming any Executor, and that in this Caſe the Heir at Law is bound to pay the Legacies; he has alſo Right to the Falcidian Portion. For the Succeſſion is as much due to him as to any other who might be inſtituted Heir or Executor by a Teſtament *f*.

f Lex falcidia inducta eſt a Divo Pio etiam inteſtatorum ſucceſſione propter fideicommiſſa. *l.* 18. *ff. ad leg. falc.*

VI.

6. All Diſpoſitions made in view of Death are ſubject to the Falcidian Portion.

All the kinds of Diſpoſitions that are made in view of Death, ſuch as Legacies, fiduciary Bequeſts, Gifts in conſideration of Death, whether they be made by a Teſtament or by other Acts, are ſubject to the Falcidian Portion *g*; unleſs they be excepted from it, purſuant to the Rules which ſhall be explained in the two laſt Sections of this Title.

g Eorum quibus mortis cauſa donatum eſt, fideicommitti quoquo tempore poteſt. Quod fideicommiſſum hæredes, ſalva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum locum habere placuit, præſtabunt. *l.* 77. §. 1. *ff. de legat.* 2.

VII.

7. The Falcidian Portion is taken out of the Goods which are found in the Succeſſion at the

The fourth Part, which the Heir or Executor ought to have for the Falcidian Portion, is computed according to the Value of the Goods of the Inheritance at the time of the Teſtator's Death. For as it is at that time that the Succeſſion is open, ſo the ſame conſiſts

time of the Teſtator's Death.

ſiſts in what Effects are found to belong to it at that time *h*; and the Fruits and Revenues of the time ſubſequent to the Teſtator's Death cannot augment the Fund for the Legacies, nor be reckoned to the Executor as a part of his Fourth which he ought to have for the Falcidian Portion, the Revenues or Income whereof ought to belong to him *i*.

h Mortis tempus in ratione legis Falcidiæ ineunda placuit obſervari. *l.* 56. *ff. ad leg. falc.* See the following Article.

i Ex die mortis fructus quadrantis apud hæredem relinqui neceſſe eſt. *l.* 15. §. 6. *in f. eod.*

VIII.

8. *The Goods are valued according to what they are worth at that time.*

Seeing the Falcidian Portion falls due to the Heir or Executor at the moment of the Teſtator's Death, and that it is taken out of all the Goods that are found at that time in the Inheritance, the Goods ought to be eſtimated on the foot of what they might be worth at that time, whether the Valuation be made by mutual conſent of the Executor and the Legataries, or by order of the Judge *l*. And in making the Eſtimate of the Lands regard ought to be had to what they may be worth the more, becauſe there were Fruits on the Ground ready to be cut down in Harveſt-time ſoon after the Teſtator's Death *m*.

l See the firſt of the Texts cited on the preceding Article, and that quoted on the tenth Article.

m In Falcidia placuit, ut fructus poſtea percepti, qui maturi mortis tempore fuerunt, augeant hæreditatis æſtimationem fundi nomine qui videtur illo in tempore fuiſſe pretioſior. *l.* 9. *ff. ad leg. falc.*

IX.

9. *The Loſſes of the Goods fall upon the Executor, if he accepts purely and ſimply.*

When the Executor accepts the Succeſſion purely and ſimply, all the Loſſes and Diminutions of the Goods of the Inheritance, and even thoſe which may happen by mere Caſualty, will fall upon him, and the Legataries will not thereby ſuffer any diminution of their Legacies; unleſs they had given occaſion to thoſe Loſſes by ſome Fault which might be laid to their charge *n*.

n In ratione legis Falcidiæ mortes ſervorum cæterorumque animalium, furta, rapinæ, incendia, ruinæ, naufragia, vis hoſtium, prædonum, latronum, debitorum facta pejora nomina, in ſumma quodcumque damnum, ſi modo culpa legatarii careant, hæredi pereunt. *l.* 30. *ff. ad leg. falc.* See the tenth Article of the firſt Section of Heirs and Executors in general.

X.

10. *Difference between the Heir or Executor with the Benefit of an Inventary, and him who hath not that Benefit.*

Altho the Heir or Executor does not accept the Inheritance ſimply, but with the Benefit of an Inventary, yet the Loſſes and Diminutions of the Goods will affect him in that Quality. For by the Goods of the Inheritance are underſtood thoſe that are found in it at the time of the Teſtator's Death, which lays the Succeſſion open, as has been ſaid in the ſeventh Article. But there is this Difference between the Heir or Executor, with the benefit of an Inventary, and him who has taken that Character purely and ſimply without the ſaid Benefit, that whereas this laſt has no way to defend himſelf againſt the Loſſes which fall upon him inevitably, the beneficiary Heir or Executor is ſtill at liberty to renounce the Inheritance, he giving an account of what he has received; and if he does renounce, the Changes that have happened ſince the Death of the Teſtator will affect only the Creditors and Legatees. But the Diſorder of Affairs that would enſue upon his Renunciation, may induce the Legataries to bear a part of the Loſſes, and to compound with the Heir or Executor; and in this Caſe the Diminution of the Legacies and the Falcidian Portion are regulated among them by common conſent, according as they can agree the Matter *o*.

o In quantitate patrimonii exquirenda viſum eſt, mortis tempus ſpectari. Qua de cauſa ſi qui centum in bonis habuerit, tota ea legaverit, nihil legatariis prodeſt, ſi ante aditam hæreditatem per ſervos hæreditarios, aut ex partu ancillarum hæreditariarum, aut ex fœtu pecorum tantum acceſſerit hæreditati, ut centum legatorum nomine erogatis, habiturus ſit hæres quartam partem: ſed neceſſe eſt, ut nihilominus quarta pars legatis detrahatur. Et ex diverſo, ſi ex centum, ſeptuaginta quinque legaverit, & ante aditam hæreditatem in tantum decreverint bona (incendiis forte, aut naufragiis, aut morte ſervorum) ut non plus quam ſeptuaginta quinque, vel etiam minus relinquatur: ſolida legata debentur. Nec ea res damnoſa eſt hæredi, cui liberum eſt non adire hæreditatem. Quæ res efficit, ut neceſſe ſit legatariis, ne deſtituto teſtamento nihil conſequantur, cum hærede in portionem legatorum paciſci. *l.* 73. *ff. ad leg. falc.* *As to what is ſaid in this Text concerning the Profits which augment the Goods of the Inheritance,* ſee the fifteenth Article.

XI.

11. *The Eſtimate made by the Teſtator does not regulate the Falcidian Portion.*

If the Teſtator had made an eſtimation either of all his Goods, or of a part of them, either in his Teſtament, or by ſome other Diſpoſition, the teſtamentary Heir on his part, nor the Legatees on their part, would not be obliged to regulate their Rights upon that foot, if the Eſtimate made by the Teſtator were either above or under the true Value of the things at the time of the Teſtator's Death. For as it is Juſtice that does aſſign to them their Por-

tions; ſo it is the Truth of the Value of the Goods that ought to regulate them *p*.

p Quarta quæ per legem Falcidiam retinetur, æſtimatione quam teſtator facit, non magis minui poteſt, quam auferri. *l.* 15. §. *ult. ff. ad leg. falc.*

Cörpora, ſi qua ſunt in bonis defuncti, ſecundum rei veritatem æſtimanda erunt, hoc eſt ſecundum præſens pretium. *l.* 62. §. *eod.*

XII.

12. *The Valuation of the Goods ought to be made with the knowledge of all the Legataries.*

If it be neceſſary to make an Eſtimate of the Goods in order to regulate the Falcidian Portion between the Executor and the Legatees; the Valuation ought to be made with the knowledge of all the Parties concerned, whether it be made by Order of Court, or by the mutual Conſent of Parties; and even at the inſtance of any one ſingle Legatary who ſhould demand it only for a ſmall Legacy. But if the Eſtimation were made only with the knowledge of ſome of them, it would be of no force to bind the others who ſhould refuſe to agree to it. And the Executor may likewiſe call the Creditors, in order to ſatisfy them how much the Goods are leſſened by the Debts owing to them, and alſo to ſettle with them the Value of the Goods, in caſe they are willing to take any of them in payment of what is due to them *q*.

q Cum dicitur lex Falcidia locum habere, arbiter dari ſolet ad ineundam quantitatem bonorum: tametſi unus aliquid modicum fideicommiſſum perſequatur. Quæ computatio præjudicare non debet cæteris qui ad arbitrum miſſi non ſunt. Solet tamen ab hærede etiam cæteris denunciari fideicommiſſariis, ut veniant ad arbitrum, ibique cauſam ſuam agant. Plerumque & creditoribus, ut de ære alieno probent. *l.* 1. §. 6. *ff. ſi cui pluſq. per leg. falc. lic. leg. eſſedic.*

XIII.

13. *Precaution for the Falcidian Portion with reſpect to Goods that are uncertain.*

If among the Goods of the Inheritance there were any of ſuch a nature as that it were uncertain whether they ought to be reckoned in ſettling the Falcidian Portion; as, for example, if there were a Law-Suit depending touching the Property of ſome Lands, or for a certain Debt, or if it ſhould depend on the Event of ſome Condition, whether a certain Land or Tenement, or a certain Right, ſhould or ſhould not be Part of the Inheritance; theſe ſorts of Goods would not be reckoned as preſent Goods, in order to regulate the Fund for the Legacies, and the Proportion of the Falcidian Portion; for theſe Pretenſions might prove vain and fruitleſs. But the Falcidian Portion would be ſettled on the foot of the preſent Goods. And as to thoſe Pretenſions, the Executor and the Legatees would adjuſt among themſelves the Security that might be found neceſſary for doing juſtice to each other, according as the Expectation of the Event and the Circumſtances might require. Thus, the Executor who would not be bound to comprehend theſe uncertain Goods in the Computation of thoſe of the Inheritance, would oblige himſelf, in caſe they ſhould remain in the Inheritance, to augment the Legacies proportionably. And if ſome particular Conſiderations had induced him to acquit all the Legacies, or ſome of them, on the foot of the Augmentation which theſe Goods in diſpute would make to the Legacies, if in the Event they ſhould be found to be part of the Inheritance, the Legataries would oblige themſelves to reſtore, in caſe theſe Goods ſhould appear not to belong to the Inheritance, what they may have received on that account. And they might likewiſe ſettle among themſelves, under ſome Penalty, an Eſtimation of the ſaid Rights, ſuch as they are, at a certain Price, balancing the Hazard of the Loſs or Profit which might accrue by the Event either to the Executor or to the Legatees *r*.

r Magna dubitatio fuit de his, quorum conditio mortis tempore pendet, id eſt, an quod ſub conditione debetur, in ſtipulatoris bonis adnumeretur, & promiſſoris bonis detrahatur. Sed hoc jure utimur, ut quanti ea ſpes obligationis venire poſſit, tantum ſtipulatoris quidem bonis accedere videatur, promiſſoris vero decedere. Aut cautionibus res explicari poteſt: ut duorum alterum fiat: aut ita ratio habeatur tanquam pure debeatur: aut ita tanquam nihil debeatur: deinde hæredes & legatarii inter ſe caveant: ut exiſtente conditione, aut hæres reddat quanto minus ſolverit: aut legatarii reſtituant quanto plus conſecuti ſint. *l.* 73. §. 1. *ff. ad leg. falc.*

Præpoſterum eſt ante nos locupletes dici quam acquiſierimus. *l.* 63. *eod.* See the fourth Article of the ſecond Section. See the latter end of the tenth Article of this Section.

XIV.

14. *The Diminutions of the Charges, and the new Funds, diminiſh the Falcidian Portion.*

If there were Charges of the Inheritance which ſhould happen to ceaſe, ſuch as Debts ſaid to be owing by the Deceaſed which ſhall appear to be paid, Legacies which are afterwards annulled, or that by the means of other Cauſes there were any Fund of Goods of the Inheritance which ſhould come to the Executor, at what time ſoever the ſame ſhould accrue to him, whether at the time of the Teſtator's Death, or a long time after; all theſe ſorts of Profits accruing to him by reaſon of his Quality of Executor, they would augment the Fund for the Legacies, and would diminiſh

miniſh the Share which he was to have had out of the Legacies for his Falcidian Portion *s*.

s In ratione legis falcidiæ retentiones omnis temporis hæredi in quadrantem imputantur. *l.* 11. *ff. ad leg. falcid.* See the following Article.

Non eſt dubium, quin ea legata a quibus hæres ſummovere exceptione petitorem poteſt, in quartam ei imputentur: nec cæterorum legata minuant. *l.* 50. *ff. ad leg. falc.*

Nec intereſt, utrum ab initio quaſi inutile fuerit, an ex accidenti poſtea in eum caſum perveniſſet legatum, ut actio ejus denegaretur. *l.* 51. *eod.*

Quacumque ex cauſa legata non præſtantur, imputantur hæredi in quartam partem, quæ propter legem falcidiam remanere apud eum debet. *l.* 52. §. 1. *eod.*

XV.

15. *Goods diſcovered after ſettling the Falcidian Portion diminiſh it.*

If after liquidating the Falcidian Portion, and paying off the Legatees, the Executor having retained in his hands what was to be deducted from the Legacies, there happened to be diſcover'd ſome Goods of the Inheritance which were unknown to the Legatees, as if there had fallen to the Teſtator in his Life-time an Inheritance of an abſent Perſon whoſe Death he knew nothing of; this Event which would augment the Goods, would likewiſe cauſe a proportionable Revocation to be made of what had been taken off from the Legacies; and the Legataries might demand from the Executor the Share that ought to come to them of theſe Goods which have been newly diſcovered. And this would undoubtedly be ſtill more reaſonable, if they were Goods which the Executor had induſtriouſly concealed from the knowledge of the Legatees *t*. But we ought not to reckon as an Augmentation of the Goods of the Inheritance, that which may ariſe from the Fruits and other Profits of the Goods of the Deceaſed; as if a Herd of Cattle had increaſed in number: For theſe Profits, and all the Fruits and Revenues belonging to the Executor *u*, except thoſe which may have proceeded from the things bequeathed, and which for the ſame reaſon would belong to the Legataries, according to the Rules explained in the eighth Section.

t This is a Conſequence of the preceding Article. For the Inheritance comprehends all the Goods that may accrue to the Executor in that Quality, at what time ſoever they come to be known, and at what time ſoever he accepts the Inheritance; becauſe his Acceptance of the Inheritance hath this effect, that it makes him to be conſidered as if he had ſucceeded from the moment of the Teſtator's Death, and as having had from that inſtant his Right to all the Goods of the Inheritance. See the fifteenth Article of the firſt Section, and the fifth Article of the ſecond Section of Heirs and Executors in general.

u See the Text cited on the tenth Article.

XVI.

16. *If the Thing bequeathed cannot be divided, the Falcidian Portion is regulated by Eſtimation.*

Altho the Falcidian Portion diminiſhes the Legacies, and takes off ſomething from every one of them, and that if they conſiſt in Sums of Money, Grain, Liquors, and other things, out of which it may be eaſy to take a part for the Falcidian Portion, one may retain it out of the Thing it ſelf; but if on the contrary, it be of ſuch a nature that it cannot be divided, as a Horſe, a Diamond, a Service, the building of ſome Edifice, and others of the like kind, the Falcidian Portion whereof cannot be taken out of the Things themſelves, the Matter is adjuſted by Eſtimation, whether it be that the Executor gives to the Legatary the Value of what his Legacy may amount to, or that the Legatary gives back to the Executor the Value of what he was to have out of the Legacy for his Falcidian Portion. And if ſeveral Executors were charged with a Legacy of a Thing that could not be divided, ſuch as that of ſome Work or Building, altho the nature of the Legacy would make every one of the Executors anſwerable for the whole Legacy, becauſe of its Indiviſibility; yet every one of them might acquit himſelf by offering his Share of the Price of the Work or Building, deducting only what he ought to retain for his Falcidian Portion *x*.

x Quædam legata diviſionem non recipiunt; ut ecce legatum viæ, itineris, actuſve. Ad nullum enim ea res pro parte poteſt pertinere. Sed etſi opus municipibus hæres facere juſſus eſt, individuum videtur legatum. Neque enim ullum balineum, aut (ullum) theatrum, aut ſtadium feciſſe intelligitur qui ei propriam formam, quæ ex conſummatione contingit, non dederit. Quorum omnium legatorum nomine & ſi plures hæredes ſint, ſinguli in ſolidum tenentur: hæc itaque legata quæ dividuitatem non recipiunt, tota ad legatarium pertinent. Sed poteſt hæredi hoc remedio ſuccurri, ut, æſtimatione facta legati, denuntiet legatario, ut partem æſtimationis inferat: ſi non inferat, utatur adverſus eum exceptione doli mali. *l.* 80. §. 1. *ff. ad leg. falcid.* See the ninth Section of Heirs and Executors in general.

SECT. II.

Of the Diſpoſitions that are ſubject to the Falcidian Portion.

The CONTENTS.

1. *The Falcidian Portion ceaſes in certain Caſes.*
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4. *A Legacy of a Service is ſubject to the Falcidian Portion.*
5. *The Legacy of the Payment before-hand of a Debt that is due at a certain Term, or on a certain Condition, is ſubject to the Falcidian Portion.*
6. *The Legacy of a Debt which the Debtor is not able to pay, is not reckoned in the Computation of the Falcidian Portion.*
7. *Three ſorts of Caſes to be regulated for the Falcidian Portion.*
8. *The Falcidian Portion is due out of a Legacy of an Uſufruct, and in what manner it is regulated.*

I.

1. The Falcidian Portion ceaſes in certain Caſes.

THE Falcidian Portion ceaſes in divers Caſes, whether it be on account of Obſtacles that are on the part of him who claims it, which ſhall be explained in the following Section; or by reaſon of other Cauſes which make it to ceaſe, which ſhall be treated of in the fourth Section. And there are ſome Diſpoſitions, of which it may be doubted whether the Falcidian Portion be due out of them, or not, which ſhall be the Subject-matter of the Rules that follow *a*.

a See the Places quoted in this Article.

II.

2. The Favour of the Legacy, or of the Legatee, does not hinder the Falcidian Portion.

The Favourableneſs of the Legacies doth not exempt them from being ſubject to the Falcidian Portion; whether it be that the Favour reſpects the Quality of the Legatary, even altho it were a Legacy left to the Prince *b*, or that it reſpects the Uſe of the Legacy it ſelf, as if it were a Legacy for Alimony *c*.

b Et in legatis principi datis legem falcidiam locum habere merito Divo Hadriano placuit. *l.* 4. *C. ad leg. falc.*

c Divi Severus & Antoninus reſcripſerunt, pecuniam relictam ad alimenta puerorum falcidiæ ſubjectam eſſe: & ut idoneis nominibus collocetur pecunia, ad curam ſuam revocaturum præſidem Provinciæ. *l.* 89. *ff. ad. leg. falcid.*

¶ We have not ſet down in this Rule the Exception that is made to it, by the greateſt part of the Interpreters, in favour of Legacies to pious Uſes, which they conceive to be exempted from the Falcidian Portion by the Diſpoſition of the hundred and thirty firſt Novel of *Juſtinian*, Chap. 12. for it does not ſeem to bear that Senſe. And the moſt learned of the Interpreters have been of this Mind; and their Judgment in this matter may be founded on two Conſiderations which reſult from the Words of this Novel. One is, that the Words ſeem to relate only to the Teſtamentary Heir who is backward in acquitting the Legacies left to pious Uſes: And the other is, that there is nothing in this Law which lays it down as a general Rule, that Legacies to pious Uſes are not ſubject to the Falcidian Portion, as it would have been neceſſary in order to aboliſh the antient Law which ſubjected this ſort of Legacies to it *a*; which *Juſtinian* himſelf ſeems to have preſuppoſed in a Law *b*, where ſpeaking of the Precaution uſed by ſome Teſtators, who in order to avoid the Deduction of the Falcidian Portion out of their Legacies to Captives, inſtituted them their Heirs or Executors, he explains himſelf in theſe Terms: *Si quis ad declinandam legem Falcidiam, cum deſiderat totam ſuam ſubſtantiam pro redemptione captivorum relinquere, eos ipſos captivos ſcripſerit hæredes .... ſi enim propter hoc à ſpeciali hærede receſſum eſt, ut non Falcidiæ ratio inducatur, &c.* If the Falcidian Portion had not been due out of Legacies to pious Uſes, it would have been no ways neceſſary to inſtitute the Captives Heirs or Executors, in order to avoid it. To which we may add, that the ſame Emperor, in his firſt Novel, at the end of the ſecond Chapter, ordaining that the

a Ad municipia quoque legata, vel etiam quæ Deo relinquuntur, lex falcidia pertinet. *l.* 1. §. 5. *ff. ad leg. falcid.*

One of the moſt learned Interpreters, who is of the Number of thoſe who underſtand this Novel of the Teſtamentary Heir who is backward in paying the Legacies to pious Uſes, has been of opinion, that in this firſt Law, §. 5. ad leg. Falcid. *inſtead of theſe Words,* vel etiam ea, *we ought to read,* non etiam ea. *It is on the third Section of the third Title of the fourth Book of the Sentences of* Paulus *that he hath made this Remark. But as to this Novel, this Author is of the Sentiment which we have juſt now explained.*

b l. 49. *C. de Epiſc. & Cler.*

Fal-

Falcidian Portion ſhall take place if the Teſtator hath not expreſly forbidden it, adds, for a Reaſon, that it may ſo happen that there be in his Teſtament Legacies to pious Uſes, which would make this Prohibition of the Teſtator's favourable; *Forſan etiam quædam juſte & pie relinquenti.* Which would not be a Reaſon for favouring the expreſs Prohibition of the Falcidian Portion, if it had not taken place in Legacies to pious Uſes, ſeeing in this Caſe this Prohibition would be ſuperfluous. But if in the hundred and thirty firſt Novel he had intended to eſtabliſh it as a Rule, that pious Legacies ſhould not be ſubject to the Falcidian Portion, he would have explained it in ſuch a manner as to make it to be underſtood, whereas his Expreſſion marks on the contrary that he reſtrains his Diſpoſition to the Caſe of a Teſtamentary Heir who refuſes to acquit the Legacies to pious Uſes, and who ſays that there are not Effects ſufficient to do it. *Si autem hæres quæ ad pias cauſas relicta ſunt non impleverit, dicens relictam ſibi ſubſtantiam non ſufficere ad iſta; præcipimus, omni Falcidia vacante quidquid invenitur in tali ſubſtantia proficere proviſione ſanctiſſimi locorum Epiſcopi ad cauſas quibus relictum eſt.* Theſe are the Words of this Novel, which ſeem to intimate, that the Motive of this Law was not to make a Rule of it for diſcharging pious Legacies from the Falcidian Portion, but only to repreſs the Infidelity or Delays of Executors; which would ſeem to have no manner of relation to the Caſes where nothing can be imputed to the Executor. It is true, that if theſe Words are not expreſs enough to gather from them, that *Juſtinian* had made a general Rule to exempt Legacies to pious Uſes from the Falcidian Portion; ſo neither are they clear enough, nor expreſs enough, to ſhew that his Intention was to take away the Benefit of the Falcidian Portion out of pious Legacies only from the Executor, who is backward in acquitting them; ſeeing he ſpeaks of an Heir or Executor, who alledges only for an Excuſe of his Delay, that there were not Goods ſufficient to ſatisfy them; which would be a lawful Excuſe enough, if the Heir or Executor could retain the Falcidian Portion out of Legacies to pious Uſes; and yet *Juſtinian* will not allow this Excuſe to be received. So that one might think that in his Judgment it was none; and that perhaps he intended, that notwithſtanding this Excuſe the Legacies to pious Uſes ſhould be acquitted without any Defalcation. It is without doubt the Obſcurity and Uncertainty that there is in theſe Words of this Novel, that has divided the Interpreters; and it is likewiſe that which hath obliged us to make here this Remark, in order to give a Reaſon why we have ſet down no Rule for the Falcidian Portion in Legacies to pious Uſes; becauſe we had no Right to determine a Difficulty of this nature, and that we ought not to give any thing for a Rule but that which hath the Character of a perfect Certainty, or the Authority of a preciſe Law. But it were to be wiſhed that ſome Regulation were made touching this Difficulty.

III.

3. How the Falcidian Portion is regulated when there are conditional Legacies.

If the Effect of a Legacy depends on a Condition, which is not come to paſs when the Executor and the Legatees ſettle the Falcidian Portion; it being then uncertain whether the Legacy will be due, or whether it will be void; this Uncertainty obliges the Executor, and the Legatees whoſe Legacies are pure and ſimple, to fall upon ſome expedient for doing mutual Juſtice to one another, according to the Event which the conditional Legacy ſhall have. And ſince if the Condition being accompliſhed the Legacy ſhould appear to be due, the other Legacies would be diminiſhed in proportion, and that it would not be juſt that before this Event theſe Legacies ſhould be either ſuſpended or diminiſhed; the proper Expedient to be taken is, that the Executor ſhould without delay acquit the Legacies that are pure and ſimple, and that the Legataries who receive Payment of their Legacies ſhould oblige themſelves, and give Security, if it is thought neceſſary, both to the Executor, and to the Legatee whoſe Legacy is conditional, that if the Condition ſhall come to paſs, they will reſtore what ought to be deducted out of their Legacies towards the Payment of this conditional Legacy *d*.

d Is cui fideicommiſſum ſolvitur, ſicut is cui legatum eſt, ſatisdare debet quod amplius ceperit quam per legem falcidiam ei licuerit, reddi: Veluti cum propter conditionem aliorum fideicommiſſorum vel legatorum legis falcidiæ cauſa pendebit. *l.* 31. *ff. ad. leg. falcid.*

Si propter ea quæ ſub conditione legata ſunt pendet legis falcidiæ ratio, præſenti die data non tota vindicabuntur. *l.* 53. *eod.*

Sed & ſi legata quædam pure, quædam ſub conditione relicta efficiant, ut, exiſtente conditione, lex falcidia locum habeat: pure legata cum cautione

tione redduntur. Quo caſu magis in uſu eſt, ſolvi quidem pure legata, perinde ac ſi nulla alia ſub conditione legata fuiſſent. Cavere autem legatarios debere ex eventu conditionis quod amplius accepiſſent redditum iri. *l.* 73. §. 2. *eod.*

Cautionibus ergo melius res temperabitur. *l.* 45. §. 1. *eod.*

Interdum omnimodo neceſſarium eſt ſolidum ſolvi legatario, interpoſita ſtipulatione, *quanto amplius quam per legem falcidiam ceperit reddi.* Veluti ſi quæ a pupillo legata ſint non excedant modum legis falcidiæ: veremur autem ne impubere eo mortuo alia legata inveniantur, quæ contributione facta excedant dodrantem. Idem dicitur, & ſi principali teſtamento quædam ſub conditione legata ſunt, quæ an debeantur incertum eſt: & ideo ſi hæres ſine judice ſolvere paratus ſit, proſpiciet ſibi per hanc ſtipulationem. *l.* 1. §. 12. *eod.* See the thirteenth Article of the firſt Section.

It may be remarked on the ſecond of the Texts cited on this Article, that inſtead of theſe words, non tota, *ſome Authors have thought that we ought to read* tamen tota; *and their Criticiſm or Conjecture ſeems to be pretty well grounded. For it would not be juſt that for a Legacy which may perhaps never be due the Legataries ſhould ſuffer a Defalcation of their Legacies: but if this is no Error of the Tranſcribers, and that there were really in the Original the words* non tota; *it would be neceſſary to underſtand this Rule of the Caſes in which the Condition could not admit of any long delay. For if it were but for a ſhort time that the Event was to be expected, the Executor might retain the Proportions of thoſe Legataries who would not wait for the Event, obliging himſelf to pay them their whole Legacies in caſe the conditional Legacies ſhould have no effect.*

IV.

4. A Legacy of a Service is ſubject to the Falcidian Portion.

The Legacy of a Service which the Teſtator had appointed to be taken either out of a Houſe, or ſome other Tenement, belonging to the Inheritance, or to the Executor, is ſubject to the Falcidian Portion. For the Service is an Inconvenience, which leſſens the Value of the Houſe or Tenement that is ſubjected to it, and which may be eſtimated at a certain Price. Thus, this Legacy contributes as well as other Legacies, according as it may be eſtimated: And the Legatary ought to reſtore to the Executor the Share of the ſaid Eſtimation that ſhall be neceſſary for making up the Falcidian Portion *e*.

e Lege falcidia interveniente legata ſervitus, quoniam dividi non poteſt, non aliter in ſolidum reſtituetur, niſi partis offeratur æſtimatio. *l.* 7. *ff. ad leg. falcid.*

V.

5. The Legacy of the Payment beforehand of a Debt that is due at a certain Term, or on a certain Condition, is ſubject to the Falcidian Portion.

If a Teſtator who owed a Sum of Money, or other Thing, the Payment or Delivery of which was to be made only ſome time after his Death, or which was due only upon a Condition that was not yet come to paſs, had ordered by his Teſtament that the ſaid Delivery or Payment ſhould be made after his Death to this Creditor, without waiting for the Term fixed for the Payment or Delivery, or the Event of the Condition; it would be a Legacy ſubject to the Falcidian Portion, according to the Eſtimation of the Advantage which would redound to the Legatary from this Legacy, whether it were on account of the paying beforehand a Debt that was due only at a certain Term, which would conſiſt in the Intereſt of the Money from the time of the Teſtator's Death to the time of the Term, or becauſe of the Certainty of a conditional Debt which might happen not to be due by the Event; and this would amount to the Value of the Debt, if the Condition on which it was due ſhould not come to paſs *f*.

f Si quis creditori ſuo quod debet legaverit: aut inutile legatum erit, ſi nullum commodum in eo verſabitur: aut ſi propter repreſentationis (puta) commodum utile erit, lex quoque falcidia in eo commodo locum habebit. *l.* 1. §. 10. *ff. ad leg. falc.*

VI.

6. The Legacy of a Debt which the Debtor is not able to pay, is not reckoned in the Computation of the Falcidian Portion.

If the Creditor of an inſolvent Debtor had bequeathed his Debt to a third Perſon, this Legacy would not be comprehended in the Number of thoſe which are ſubject to the Falcidian Portion. For as this deſperate Debt would not be reckoned as part of the Goods, ſo likewiſe this Legacy would be no Diminution of them. But if the Teſtator had bequeathed this Debt to the Debtor himſelf, ſeeing this Debtor might afterwards become ſolvent, one would take the Precautions explained in the third Article touching conditional Legacies *g*.

g Si debitori liberatio legata ſit, quamvis ſolvendo non ſit, totum legatum computetur: licet nomen hoc non augeat hæreditatem, niſi ex eventu: igitur ſi falcidia locum habeat, hoc plus videbitur legatum, quod huic legatum eſſet. Cætera quoque minuentur legata per hoc: & ipſum hoc per alia. Capere enim videtur, eo quod liberatur. Sed ſi alii hoc nomen legetur, nullum legatum erit: nec cæteris contribuetur. *l.* 22. §. *pen. & ult. ff. ad leg. falcid.*

¶ We have thought proper to give to this Text the Senſe that is explained in the Article. For as it would be unjuſt to reckon this Debt among the Goods of the Inheritance, ſo it would not be equitable that the other Legataries, who would reap no profit by it, ſhould ſuffer a Defalcation of their Legacies upon account of this Legacy, which would be no Diminution of the Goods with which the Executor would be

be chargeable for payment of their Legacies; and that the Executor reaping in this manner the Advantage of the Deduction from their Legacies, ſhould have more than his Falcidian Portion of the effective Goods with which he would be charged. And altho it be true that this Legacy would be uſeful to the Debtor himſelf, and that, as is mentioned in the Text, he would receive this effect of the Teſtator's Liberality that he would be acquitted of the Debt, and that thus it would be in reality a Legacy; yet the Falcidian Portion is not granted to the Executor in conſideration of the Profit which the Legataries make of their Legacies, but only becauſe of the Diminution which the Inheritance ſuffers by the Legacies.

VII.

7. Three ſorts of Caſes to be regulated for the Falcidian Portion.

From all the Rules which have been explained in the preceding Section, and in the preſent, it follows that there are two ways of regulating the Falcidian Portion, according to two ſorts of Caſes in which it may have place. The firſt is ſimple and common in all the Caſes where the Goods and the Legacies have their Value fixed: And the ſecond is for the Caſes where there are Goods in expectation which are uncertain, or where there are conditional Legacies, and where theſe Uncertainties oblige the Parties concerned to take the precaution of having Sureties, as has been ſaid in the third Article of this Section, and in the thirteenth of the preceding Section. But there is a third ſort of Legacies of a nature which requires a third manner of regulating the Falcidian Portion; which are the Legacies of Alimony, or of a Penſion, or of an Uſufruct; and this third manner depends on the Rule which follows *h*.

h See the following Article.

VIII.

8. The Falcidian Portion is due out of a Legacy of an Uſufruct, and in what manner it is regulated.

Seeing the Legacies of Alimony, of yearly Penſions, of Annuities, of an Uſufruct, and others of the like nature, conſiſt only in a Revenue which is to ceaſe by the Death of the Legatee, one cannot make a juſt and preciſe Eſtimation of the Value of theſe Legacies in the ſame manner as one may do of others. But ſeeing it is neceſſary to fix the Value of every Legacy, in order to regulate the foot of the Falcidian Portion with regard to all the Legacies, the Value of Legacies of an Uſufruct, or of a Penſion, or of Alimony, may be regulated at the Price which the Legatary might get for his Legacy, according to his Age, if he had a mind to ſell it. But this Eſtimation, which may ſerve to regulate the Falcidian Portion of all the Legacies, hath not this Effect with reſpect to this Legatary, as that he ought to pay on this foot, and from the time of the Teſtator's Death, the Falcidian Portion of the Price of his Legacy. For he might chance to die the firſt Year, and in that caſe, inſtead of being a Legatary, he might become a Debtor to the Inheritance. And likewiſe, on the other hand, the Diminution which this Legatary ought to bear of his Legacy on account of the Falcidian Portion ought not to be delayed, and put off to the end of the Years that the Uſufruct or Penſion may laſt. But this Falcidian Portion ought to be regulated, and taken yearly out of the Uſufruct or Penſion, in proportion to the Diminution that is ſettled for all the Legacies. And if, for example, the Falcidian Portion cuts off a ſixth part of all the Legacies, including the Legacy of the Uſufruct or Penſion, according to the Valuations that ſhall have been made of all theſe Legacies; the ſaid Legatary will owe every Year for the Falcidian Portion a ſixth part of what he enjoys; unleſs they ſhould agree by mutual Conſent to ſettle it on another foot *i*.

i Si uſusfructus legatus ſit, qui & dividi poteſt, non ſicut cæteræ ſervitutes individuæ ſunt: veteres quidem æſtimandum totum uſumfructum putabant, & ita conſtituendum quantum ſit in legato. Sed Ariſto à veterum opinione receſſit: Ait enim, poſſe quartam partem ex eo ſicut ex corporibus retineri. Idque Julianus recte probat, ſed operis ſervi legatis, cum neque uſus, neque uſusfructus in eo legato eſſe videatur, neceſſaria eſt veterum ſententia, ut ſciamus, quantum eſt in legato: quia neceſſario ex omnibus, quæ ſint facti pars decedere debet: nec pars operæ intelligi poteſt. Immo & in uſufructu, ſi quæratur quantum hic capiat, cui uſusfructus datus eſt, quantum ad cæterorum legatorum æſtimationem, aut etiam hujus ipſius, ne dodrantem excedat legatum, neceſſario ad veterum ſententiam revertendum eſt. *l.* 1. §. 9. *ff. ad leg. falc.*

Si in annos ſingulos legatum ſit Titio: quia multa legata & conditionalia ſunt; cautioni locus eſt quæ in edicto proponitur, *quanto amplius accipit reddi.* d. l. §. 16.

Lex falcidia, ſi interveniat, in omnibus penſionibus locum habet. Sed hoc ex poſt facto apparebit. Ut puta, in annos ſingulos legatum relictum eſt: quamdiu falcidia nondum locum habet, integræ penſiones annuæ dabuntur. Sed enim ſi annus venerit, quo fit ut contra legem falcidiam ultra dodrantem aliquid debeatur, eveniet ut retro omnia legata ſingulorum annorum imminuantur. *l.* 47. *eod.*

Cum Titio in annos ſingulos dena legata ſunt, et

et judex legis Falcidiæ rationem inter hæredem & alios legatarios habeat: vivo quidem Titio, tanti litem æstimare debeat, quanti venire id legatum potest, in incerto posito quamdiu victurus sit Titius; mortuo autem Titio, non aliud spectari debet, quam quid hæres ex ea causa debuerit. *l.* 55. *eod.*

Hæreditarium computationi in alimentis faciendæ hanc formam esse Ulpianus scribit: ut a prima ætate usque ad annum vicesimum, quantitas alimentorum triginta annorum computetur, ejusque quantitatis falcidia præstetur: ab annis vero viginti usque ad annum vicesimum quintum, annorum viginti octo: ab annis viginti quinque usque ad annos triginta, annorum viginti quinque: ab annis triginta usque ad annos triginta quinque, annorum viginti duo: ab annis triginta quinque usque ad annos quadraginta, annorum viginti: ab annis quadraginta usque ad annos quinquaginta, tot annorum computatio fit, quot ætati ejus ad annum sexagesimum deerit, remisso uno anno: ab anno vero quinquagesimo usque ad annum quinquagesimum quintum, annorum novem: ab annis quinquaginta quinque usque ad annum sexagesimum annorum septem: ab annis sexaginta cujuscunque ætatis sit, annorum quinque: eoque nos jure uti, Ulpianus ait, & circa computationem ususfructus faciendam. Solitum est tamen a prima ætate usque ad annum trigesimum computationem annorum triginta fieri: ab annis vero triginta, tot annorum computationem inire, quot ad annum sexagesimum deesse videntur. Nunquam ergo amplius quam triginta annorum computatio initur. *l.* 68. *eod.*

¶ Seeing it was not possible to reconcile all these Texts, and to reduce them to a fixed Sense that might agree to them all; we have endeavoured to form the Rule on what we have been able to gather from the Texts, by the Reflexions which we have been obliged to make on their different Dispositions.

It is said in the first Text, that to regulate the Falcidian Portion of a Legacy of an Usufruct, the Antients had been of opinion, that it was necessary to make an Estimation of the Right of the said Usufruct; but that this Opinion of the Antients is not approved, because one may take the fourth part of a Legacy of an Usufruct, as well as of other Legacies. And afterwards it is there said, that when the Falcidian Portion is to be regulated among all the Legatees, we must of necessity have recourse to this Opinion of the Antients, because that in this Case it is necessary to make an Estimate of all the Legacies: And also in the fourth of these Texts, *which is the fifty fifth Law of the Title of the Falcidian Portion*, it is said, That when the Falcidian Portion is to be regulated among several Legatees, it is necessary to estimate a Legacy of an Usufruct at the Price which the Legatee might get for it, if he had a mind to sell it.

In the second Text, *which is the sixteenth Section of the first Law*, it is said, that if the Question be about a Legacy of a yearly Pension, seeing this Legacy contains several, that is, one for every Year, and that they are all conditional, every one of them depending on the Life of the Legatary; it is necessary, for this Reason, to provide for the Falcidian Portion by a mutual Security to be given by the Executor and the Legatee, that they will do Justice to one another according as the Falcidian Portion shall afterwards take place; to which may be applied what has been said in the third Article in relation to conditional Legacies.

In the third Text, *which is the forty seventh Law*, it is said, that for a Legacy of a yearly Pension the Falcidian Portion takes place on the Pension of each Year, but that one cannot judge of it till some time after; that in the mean time whilst the Falcidian Portion doth not take place, the whole Pension must be paid, and when the Year shall come, in which the Falcidian Portion shall begin to take place, it will be necessary to diminish the Pension of all the preceding Years.

In the fifth and last Text, *which is the sixty eighth Law*, it is said, that the Falcidian Portion of a Legacy of Alimony, or of an Usufruct, is regulated differently according to the Age of the Legatary. That if he be no more than twenty Years old, one reckons as if he would live thirty Years longer. If he be between twenty and twenty five Years of Age, they reckon that he may yet live twenty eight Years more. Thus this Law runs over and regulates all the other Ages, and directs that in computing the Falcidian Portion one should sum up all the Years that it is reasonable to presume a Legatary may have to live according to his Age, and that the Legatary pay the Falcidian Portion of this Sum total. Thus, for example, if the Legatary of an Usufruct, or of a yearly Pension of a thousand Livres for Alimony, is not as yet twenty Years old, how much soever he wants of it, we must reckon as if he had yet thirty Years to live, which will make thirty thousand Livres; and it is of this Sum that he will owe the Falcidian Portion. *Quantitas alimentorum triginta annorum computetur, ejusque quantitatis Falcidia præstetur.* And after having enumerated the Computations of these several Ages, it is said afterwards, that it was then the Usage to reckon thirty Years of Life, not only for those who were but twenty Years old or under, but also for those who did not exceed thirty Years of Age; and that as for those who were

upwards

upwards of thirty, the Uſage was to reckon the number of Years which they wanted of ſixty. Thus it was, for example, twenty five Years for a Legatary who was thirty five Years old, and ten for a Legatary who was fifty Years old; ſo that they never reckoned more than thirty Years.

It is eaſy to judge by the different Diſpoſitions of all theſe Laws, what are the Difficulties which reſult from them, and the Inconveniencies of theſe ſeveral ways of regulating the Falcidian Portion which are there explained. But I cannot forbear remarking on this ſixty eighth Law, which is generally looked upon to be the principal Rule of this Matter, that the Years of the Ages are ſettled there on two different Bottoms, none of which would be taken now for a Rule in eſtimating an Uſufruct, or an Annuity, after the Computations that have been made upon Obſervation of the number of Perſons which die at every Age. For according to theſe Computations there are but few Children that attain to the Age of thirty Years; few Perſons that are paſt twenty Years, and arrive at fifty. Thus, if a Legatary of an Uſufruct were only four or five Years old, one would not eſtimate his Uſufruct at the rate as if he were to live thirty Years; and for this Age, and all others, one would rather follow the Method now uſed for valuing of Annuities. But even altho it were certain that a Legatary of an Uſufruct would live thirty Years, or even altho an Annuity had been given to one and his Succeſſors for the ſpace of thirty Years, this Uſufruct or this Annuity would not be worth the Sum to which theſe thirty Years would amount, ſeeing a Rent for Perpetuity would not be worth ſo much. Thus it would be very unjuſt to regulate the Falcidian Portion upon the foot of ſuch an Eſtimation, which would make a Legacy of an Uſufruct, or of an Annuity of a 1000 Livres a Year, to be eſtimated at a higher Rate for the Falcidian Portion than a Legacy of a Rent for Perpetuity of the like Sum, which would not be worth above 20000 Livres. But at what time ſhould this Falcidian Portion be taken? Should it be at the time of the Teſtator's Death, or after the Death of the Legatary; the one would be very ſoon, and the other very late: and every one of theſe Ways would be attended with ſtrange Inconveniencies. Should it be every Year that a part of the Total of this Falcidian Portion ſhould be taken? But upon what foot could every Year's Share be regulated? And if it were, for example, a Legatary of a Penſion of 1000 Livres, which were computed to laſt thirty Years, and that a ſixth part were to be taken off from it for the Falcidian Portion, which would amount to 5000 Livres, how could one divide this Sum ſo as not to take more of it one Year than another, ſince it could not be known how long this Legatary had to live, and that if he ſhould live only five Years, all his Uſufruct would be conſumed by the Falcidian Portion?

We may add on the Subject of this ſixty eighth Law, that it is taken out of a Book which *Æmilius Macer*, who is the Author of this Law, had compoſed in relation to the Right to the *twentieth Penny* which the Exchequer claimed out of all Succeſſions and Legacies; ſo that it ſeems that the Computations, which we ſee in this Law for the reſpective Ages, have been made as it were a Tariff for ſettling this Right; and altho mention be there made of the Falcidian Portion, as if theſe Computations had been made to regulate it, yet an able Interpreter has conjectured that in all probability it was *Tribonian* who made that Application of it to the Falcidian Portion: Which would be to ſuppoſe that he had made no manner of Reflection on the infinite Difference that was to be made between the Uſe of the Computations explained in this Law for the ſeveral Ages with reſpect to this Right of the *twentieth Penny*, and the Uſe of the ſame Computations with reſpect to the Falcidian Portion. For as to this Right of the *twentieth Penny*, as it was neceſſary to pay it out of every Legacy once for all, ſo it was neceſſary to fix the Value of a Legacy of an Uſufruct in order to know what ſhare of it the Exchequer was to have. And it was for this reaſon that the ſaid Law fixed by that Regulation the Manner of eſtimating the Value of the *twentieth Penny*, altho at too high a rate, for the Reaſons which have been remarked on the Computations of the ſeveral Ages. But for regulating the Falcidian Portion of a Legacy of an Annuity for Life, or of an Uſufruct, it would not be juſt to have recourſe to the manner of Computation laid down in that Law, and to take the number of Years which it gives to the Duration of the Uſufruct, or of the Annuity, according to the Age of the Legatary, in order

to make the Legatary pay the Falcidian Portion of that Sum total. This Computation, even altho it were made upon a much lower foot, would be ſtill unjuſt between the Executor and a Legatee, who not being able to aſcertain to himſelf two Years of Life, ought not to be obliged to pay the Falcidian Portion of the value of thirty Years, nay not even of ten. So that the Manner of eſtimating a Legacy of an Uſufruct by the Age of the Legatary, ſeems to be of uſe only between the Executor and all the Legatees, for regulating the common Rate for the Falcidian Portion of all the Legacies; becauſe it is neceſſary to make an Eſtimate of them all from the time of the Teſtator's Death, and that there would be too great Inconveniencies in deferring the Regulation of the Falcidian Portion to another time; whereas without doing wrong either to the Legatary of the Uſufruct, or to the other Legatees, or to the Executor, they may all of them by this Method agree among themſelves about the Value of a Legacy of an Uſufruct, according to the Age of the Legatary, as it were by a kind of Bargain by the great, which it would be a hazard whether the ſame ſhould prove advantageous to the Executor or to the Legatees. But as to the particular Falcidian Portion of a Legacy of an Uſufruct, it ſeems an eaſy matter to regulate it upon the ſame foot with the other Legacies. And if, for example, the Falcidian Portion were fixed at a ſixth part of all the Legacies, including that of the Uſufruct, there does not ſeem to be any Injuſtice or Inconvenience, if the Executor ſhould retain a ſixth part every Year of the Uſufruct; ſince this Defalcation would do the ſame juſtice to this Legatary, and to the Executor, as a like Defalcation out of a Rent for Perpetuity; with this only Difference, which would be very juſt, that as to the Rent for Perpetuity, the Capital Stock would likewiſe be diminiſhed in as much; whereas in the Uſufruct, or Annuity for Life, which has no Capital as a perpetual Fund, the Diminution would be limited to the Years of the Life of the Legatee.

SECT. III.

Of thoſe to whom the Falcidian Portion may be due, or not.

The CONTENTS.

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4. *The Heir at Law, or next of Kin, doth not loſe the Falcidian Portion for offering to renounce the Right he has by Teſtament.*
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6. *Legataries who are charged with Legacies, have not the Falcidian Portion.*
7. *Unleſs it be that their Legacies ſuffer this Diminution on account of the Executor.*

I.

1. The Executor who takes that Character upon him purely and ſimply, hath no right to the Falcidian Portion.

SEEING the Executor who takes that Quality upon him purely and ſimply, accepts the Inheritance without the Benefit of an Inventary, he cannot pretend to the Falcidian Portion: For this Quality engages him to all the Charges without diſtinction, and that even beyond the Effects of the Inheritance *a*. And it is only the beneficiary Heir or Executor, who having made an Inventary of the Goods, is no farther accountable for the Legacies, and other Charges, than as there are Goods in the Succeſſion ſufficient to acquit them, he deducting out of the Legacies the fourth part of the Goods for the Falcidian Portion.

a See the fourth Article of the firſt Section of this Title, and the ſecond Article of the firſt Section of Heirs and Executors in general.

II.

2. The beneficiary Heir or Executor who defrauds, loſes the Falcidian Portion of

Altho the Heir or Executor have made an Inventary, yet if it be found that he has defrauded the Legatees, by withdrawing or concealing ſome Effects of the Inheritance, he will be deprived of the Falcidian Portion of thoſe Effects which he had attempted fraudulently

the Goods which he attempted to conceal.

lently to withdraw or conceal *b*. But we muſt not reckon in the number of Heirs or Executors who have withdrawn or concealed the Effects, him who ſhould pretend that a thing which he claims as his own, ought not to be comprehended among the Goods of the Inheritance, altho it ſhould afterwards appear that the ſame thing was a part of the Inheritance. For it was a Pretenſion which he might have had without any knaviſh Deſign, and which, altho it ſhould appear to be unjuſt, yet being intimated to the Legataries, it would not have the Character of a fraudulent diverting the Effects of the Succeſſion *c*.

b Reſcriptum eſt a principe *hæredem rei quam amoviſſet quartam non retinere.* l. 6. ff. de his quæ ut ind. v. l. 24. ff. ad leg. Falcid. l. 48. ff. ad Senat. Trebell. *See the following Article.*

c Si quis ex hæredibus rem propriam eſſe contendat, deinde hæreditariam eſſe, convincatur; quidam putant, ejus quoque Falcidiam non poſſe retineri, quia nihil Interſit ſubtraxerit an hæreditariam eſſe negaverit. Quod Ulpianus recte improbat. *l.* 68. §. 1. *ff. ad leg. Falc.*

III.

3. And alſo of the Legacy which he attempted to ſuppreſs.

If the Executor has been guilty of any Fraud in endeavouring to make the Legacies or fiduciary Bequeſts to periſh, as if he has ſuppreſſed a Codicil which contained them, or by any other way, he will be obliged to acquit thoſe Legacies or fiduciary Bequeſts whole and entire, without deduction of the Falcidian Portion *d*.

d Beneficio legis Falcidiæ indignus eſſe videtur, qui id egerit ut fideicommiſſum intercidat. *l.* 59. *ff. ad leg. Falc.*

IV.

4. The Heir at Law, or next of kin, doth not loſe the Falcidian Portion, for offering to renounce the right he has by Teſtament.

If the Heir at Law or next of Kin, being inſtituted Executor by a Teſtament, ſhould pretend to renounce his teſtamentary Inſtitution, that he might ſucceed to the Deceaſed as dying inteſtate, and ſo free himſelf from the Burden of the Legacies, ſeeing he would not be deprived of the Inheritance, as has been ſaid in another Place, and that he would remain under the Obligation of acquitting the Legacies, he would not be deprived of the Falcidian Portion *e*.

e Admonendi ſumus huic, in quem ex hac parte edicti legatorum actio datur, beneficium legis Falcidiæ concedendum. *l.* 18. §. 1. *ff. ſi quis om. cauſ. teſt.* See the ſeventeenth Article of the fifth Section of Teſtaments.

V.

5. When ſeveral Executors are charged with different Legacies, every one retains his own Falcidian Portion out of the Legacy he is charged with.

If there be ſeveral Heirs or Executors inſtituted in divers Portions of the Inheritance, and the Portions of ſome of them be charged with Legacies from which the others are exempted, every one will retain his own Falcidian Portion out of the Legacies with which he is charged; and muſt not ſupply the ſame out of the Portions of the Inheritance which belong to the other Heirs or Executors *f*. Every one likewiſe will deduct out of his own Portion of the Inheritance the Debts and other Charges which the Teſtator ſhall have impoſed upon it *g*.

f In ſingulis hæredibus rationem legis Falcidiæ componendam eſſe non dubitatur. Et ideo ſi Titio & Seio hæredibus inſtitutis, ſemis hæreditatis Titii exhauſtus eſt, Seio autem quadrans totorum bonorum relictus ſit: competit Titio beneficium legis Falcidiæ. *l.* 77. *ff. ad leg. Falc.*

See the ſeventh and following Articles of the fourth Section.

g In legem Falcidiam æris alieni rationem in hæreditate relicti quod unus ex hæredibus ſolvere damnatus ſit, ipſe ſolus habebit. *l.* 8. *f. ad leg. Falc.*

VI.

6. Legataries who are charg'd with Legacies, have not the Falcidian Portion.

If a Legatary had his Legacy burdened with ſome Diſpoſition in favour of a third Perſon, ſuch as a Sum of Money, or other Charge which ſhould diminiſh his Legacy, or quite exhauſt it, he would not for all that have a right to the Falcidian Portion; but he would be bound either to acquit the whole Charge, or to renounce the Legacy. For the Falcidian Portion is granted only to Heirs or Executors, and the Legataries cannot claim this Benefit in their own Right *h*.

h Nunquam legatarius vel fideicommiſſarius licet ex Trebelliano Senatuſ-conſulto reſtituitur ei hæreditas, utitur legis Falcidiæ beneficio. *l.* 47. §. 1. *ff. ad leg. Falcid.* See the following Article.

The Reaſons for eſtabliſhing the Falcidian Portion, which have been explained in the Preamble of this Title, agree only to Heirs or Executors.

VII.

7. Unleſs it be that their Legacies ſuffer this Diminution on account of the Executor.

If in the Caſe of the preceding Article the Executor, being overcharged with all the Legacies, the Falcidian Portion were to take place in them, the Abatement which a Legatary who is burdened with other Legacies would ſuſtain thereby of his own Legacy, the ſame being taken out of his entire Legacy, would diminiſh proportionably this particular Legacy with which he was charged by the Teſtator: For it would be on account of the Executor that the ſaid Diminution had happened *i*.

i Si Titio viginti legatis portio per legem Falcidiam detracta eſſet, cum ipſe quoque quinque Seio rogatus eſſet reſtituere. Vindius noſter tantum

Seio pro portione ex quinque detrahendum ait, quantum Titio ex viginti detractum esset. Quæ sententia & æquitatem & rationem magis habet: quia exemplo hæredis legatarius ad fideicommissa præstanda obligabitur. Nec quia ex sua persona legatarius inducere legem Falcidiam non possit, idcirco, quod passus esset, non imputaturum: nisi forte testator ita fidei ejus commisisset, ut totum quidquid ex testamento cœpisset restitueret. *l.* 32. §. 4. *ff. ad leg. falc.* See the fifth Article of the following Section.

SECT. IV.

Of the Causes which make the Falcidian Portion to cease, or which diminish it.

The CONTENTS.

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I.

1. *The Testator may forbid taking the Falcidian Portion.*

ALTHO the Falcidian Portion be a Right which by Law accrues to the Executor who is willing to make use of it, and that a Testator cannot hinder his Dispositions from being subject to the Laws *a*; yet it is nevertheless permitted to a Testator to oblige his Executor to acquit the Legacies without deducting the Falcidian Portion. And if he orders it so in expres Terms, the Falcidian Portion will not take place. For this is an Exception made by the Law itself, and the Executor is at liberty either to accept the Inheritance on this condition, or to renounce it *b*.

a See the twenty eighth Article of the second Section of the Rules of Law.

b Si debitor, creditore hærede instituto, petisset, ne in ratione legis Falcidiæ ponenda creditum suum legatariis reputaret: sine dubio ratione doli mali exceptionis apud arbitrum Falcidiæ defuncti voluntas servatur. *l.* 12. *ff. ad leg. Falc.*

Si in testamento ita scriptum sit: *Hæres meus Lucio Titio decem dare damnas esto: Et quanto quidem minus per legem Falcidiam capere poterit, tanto amplius ei dare damnas esto*: sententiæ testatoris standum est. *l.* 64. *eod.*

*It would seem by these Texts and some others, that by the antient Law the Testator might forbid the Falcidian Portion, and the contrary seems to be established by other Laws *.; which has divided the Interpreters. But this Difficulty hath been removed by the first Novel of* Justinian, *who has permitted the Prohibition of the Falcidian Portion in the manner as it is explained in the Article.* Si vero expressim designaverit (*testator*) non velle hæredem retinere Falcidiam, necessarium est testatoris valere sententiam: et aut volentem eum pa-

* *L.* 27. *ff. ad leg. Falc.*

rere

rere teſtatori forſan etiam quædam juſte et pie relinquenti, lucrum non in percipiendo, ſed ſolummodo pie agendo habentem : & non videri ſine lucro hujuſmodi eſſe hæreditatem : aut ſi parere noluerit, eum quidem recedere ab hujuſmodi inſtitutione. *Nov.* 1. *c.* 2. *in fine.*

II.

2. The Legacy of an Immoveable, with a Prohibition to alienate it, is not ſubject to the Falcidian Portion.

If a Teſtator had deviſed ſome immoveable Thing, whether it were to ſome one of his own Family, or to ſome other Perſon, and had directed that the ſaid Immoveable ſhould not be alienated, it being his Intention that the ſame ſhould always remain with the Legatary and his Succeſſors ; the Executor of this Teſtator could not pretend to have the Falcidian Portion of an Immoveable deviſed after this manner. For the Prohibition to alienate it implies the Will of the Teſtator that the ſame ſhould remain without any Diminution to the Legatary and to his Succeſſors *c*.

c Si quando autem aliquis teſtamentum faciat, & aliquam rem immobilem ſuæ familiæ, aut alteri cuicunque perſonæ nomine legati reliquerit, & ſpecialiter dixerit, nullo tempore hanc rem alienari : ſed aut apud heredes, aut apud ſucceſſores illius cui relicta eſt permanere : in hoc legato jubemus Falcidiam legem locum penitus non habere : quoniam alienationem ejus teſtator ipſe prohibuit. *Nov.* 119. *c. ult.*

III.

3. The Teſtator who is Debtor to his Executor, may forbid him to reckon his own Debt for the Falcidian Portion.

If the Perſon who is inſtituted Executor being a Creditor to the Teſtator, it were ordained by the Teſtament, that the ſaid Executor ſhould not reckon his own Debt for diminiſhing the Goods of the Inheritance ; this Diſpoſition would hinder the Diminution of the Legacies which the ſaid Debt might have occaſioned for the Falcidian Portion *d*.

d See the firſt of the Texts quoted on the firſt Article.

IV.

4. The Falcidian Portion doth not take place in Military Teſtaments.

The Diſpoſitions of military Teſtaments are not ſubject to the Falcidian Portion *e*.

e In teſtamento militis jus legis Falcidiæ ceſſat. *l.* 7. *C. ad leg. Falc. leg.* 12. *C. de teſt. mil. l.* 92. *& l.* 17. *l. ult. ff. eod.*

¶ Is it a great favour to him who by a military Teſtament names an Heir or Executor, and gives ſeveral Legacies, to take away the right of the Falcidian Portion from his Heir or Executor, who might by this means come to have nothing at all, if the Inheritance ſhould be exhauſted with Legacies ? And will not this Privilege in this Caſe turn againſt the Intention of the Teſtator, who, if he had foreſeen this Event, would have without doubt moderated the Legacies in favour of his teſtamentary Heir, whom he had a greater value for than for the Legatees ? Or ſhall this Rule be reduced to the Caſe, where the Diſpoſition of the Soldier or Officer of War would amount only to a Codicil, which would reſpect only the Heir at Law or next of Kin, in favour of whom he had made no manner of Diſpoſition ? We have however ſet down this Rule without any diſtinction, the Laws relating to it being preciſe. But it ſeems that if the Caſe ſhould happen that there were nothing at all left, or but a ſmall matter for the Heir, whether he ſucceed as Heir at Law or by Teſtament, it would be equitable to mitigate the Rigour of the Law ; ſeeing it was not the intention of the Teſtator to ſtrip him of all the Goods.

V.

5. The Deviſee of a Land or Tenement, charged with a Penſion to be taken out of the Fruits of the ſaid Land or Tenement, doth not retain the Falcidian Portion, altho he himſelf bears it.

If a Legatary were charged with a yearly Penſion for Alimony to ſome Perſon, and that his Legacy were diminiſhed by the Falcidian Portion, but only ſo far as that there would remain ſtill enough for the ſaid Alimony, this Legatary would nevertheleſs bear the ſaid Charge intire, without any Deduction. For it would be preſumed of ſuch a Diſpoſition, that it was the Teſtator's pleaſure that a Legacy of this nature ſhould not ſuffer any abatement, and that the Legatary ſhould content himſelf with what might remain clear after the ſaid Charge were acquitted, unleſs it ſhould appear that this was not the intention of the Teſtator ; as if, for example, the Legacy charged with the ſaid Alimony were of the ſame nature, and as favourable as the other.

f A liberto, cui fundum legaverat ferentem annua ſexaginta, per fideicommiſſum dederat Pamphilæ annua dena. Quæſitum eſt, ſi lex Falcidia liberto legatum minuerit, an Pamphilæ quoque annuum fideicommiſſum minutum videatur cum ex reditu legata ſint, qui largitur etiam ſi Falcidia partem dimidiam fundi abſtulerit, annuam Pamphilæ præſtationem ? Reſpondit, ſecundum ea quæ proponerentur, non videri minutum : niſi ſi alia mens teſtatoris probaretur. *l.* 21. §. 1. *ff. de ann. leg. l.* 25. §. 1. *eod.*

Si pars donationis fideicommiſſo teneatur, fideicommiſſum quoque munere Falcidiæ fungetur. Si tamen alimenta præſtari voluit, collationis totum onus in reſiduo donationis eſſe reſpondendum erit ex defuncti voluntate, qui de majori pecunia præſtari non dubie voluit integrâ. *l.* 77. §. 1. *ff. de leg.* 2.

¶ It is to be obſerved on this Article, that it is an Exception to the Rule explained in the ſeventh Article of the preceding Section : So that it is an Exception

ception from another Exception. For the Rule explained in that ſeventh Article declares, that the Legatees may retain the Falcidian Portion when they themſelves bear it; which made an exception to the general Rule explained in the ſixth Article of the ſame preceding Section, which ſays that the Legatees cannot retain the Falcidian Portion out of their Legacies, becauſe it was eſtabliſhed only for the Benefit of Heirs or Executors. Thus the Rule explained in this preſent Article is founded on two Principles which it joins together; one whereof is general, that Legatees have no right to the Falcidian Portion; and the other particular, in favour of a Legacy of Alimony ſpecially aſſigned on the Fund of a Legacy, which the Teſtator had given to the Legatee only upon this condition. For altho Legacies of Alimony be ſubject to the Falcidian Portion, when it is the Executor that is charged with them, as has been ſaid in the ſecond Article of the ſecond Section; yet the Laws diſtinguiſh the Condition of the Legatee from that of the Executor, and favour the Executor more than the Legatee, as has been ſaid in the ſixth Article of the ſeventh Section of Teſtaments. Thus they retrench the Legacies of Alimony, when they diminiſh the Portion of the Inheritance which ought to remain with the Heir or Executor; and they do not retrench a Legacy of that kind when it is only a Legatary that is charged with it, altho his Legacy be thereby diminiſhed, or reduced to nothing.

VI.

6. What augments the Inheritance diminiſhes the Falcidian Portion.

The Diminution of Legacies on account of the Falcidian Portion may ceaſe altogether or be leſſen'd, if it happens that the Executor reaps the Benefit of ſome Diſpoſition of the Teſtator's, which accrues to him as Heir or Executor; for he may reap Advantage by other Diſpoſitions which would not have the ſame effect: and this depends on the Rules which follow *g*.

g See the following Articles.

VII.

7. Whatever comes to the Executor in that quality, diminiſhes the Falcidian Portion.

If a Teſtator having inſtituted two Heirs or Executors, ſubſtitutes them mutually to one another in that manner which is called vulgar Subſtitution, which ſhall be treated of in its place *h*, ordaining that if one of them either will not or cannot take part in the Succeſſion, the other may have it entire; and that one of the ſaid Executors having his Share of the Inheritance charged with Legacies ſubject to Diminution on account of the Falcidian Portion, the Caſe of the Subſtitution ſhould come to paſs, ſo as that the ſaid Heir or Executor ſhould reap the benefit of the other's Portion coming to him by virtue of the ſaid Subſtitution; this Profit would diminiſh the Falcidian Portion which he might have retained out of the Legacies with which his Share of the Inheritance was burdened. For this other Portion of the Inheritance would be Goods that came to him in the quality of Heir or Executor: and one might conſider him as being a pure and ſimple Heir or Executor for his own Portion, and a conditional Heir or Executor for that Portion which the Caſe of the Subſtitution was to procure him *i*.

h See the firſt Title of the fifth Book.

i Id quod ex ſubſtitutione cohæredis ad cohæredem pervenit proficit legatariis. Is enim ſimilis eſt hæres ex parte pure, ex parte ſub conditione hæredi inſtituto. *l.* 1. §. 13. *ff. ad leg. Falc.*

Quod ſi alterutro eorum deficiente, alter hæres ſolus exiſteret: utrum perinde ratio legis Falcidiæ habenda ſit, ac ſi ſtatim ab initio is ſolus hæres inſtitutus eſſet: an ſingularum portionum ſeparatim cauſæ ſpectandæ ſunt? Et placet ſi ejus pars legatis exhauſta ſit, qui hæres extiterit, adjuvari legatarios per deficientem partem, quia ea non eſt legatis exonerata; quia & legata, quæ apud hæredem remanent, efficiunt ut cæteris legatariis aut nihil, aut minus detrahatur. Si vero defecta pars fuerit exhauſta, perinde in ea ponendam rationem legis Falcidiæ, atque ſi ad eum ipſum pertineret, a quo defecta fieret. *l.* 78. *eod.*

See the latter part of this Text in the following Article.

VIII.

8. The Fund of the Legataries, whoſe Legacies are aſſigned them on a Portion of the Inheritance that accrues to the other Heir or Executor, is not augmented by the Portion of the other Heir or Executor.

If in the Caſe of the preceding Article one of the Coheirs or Coexecutors ſubſtituted to one another, does not ſucceed, as if he died before the Teſtator, or was incapable of ſucceeding, or that he renounced the Inheritance, and that his Portion of the Inheritance, being overcharged with Legacies, that of the other Heir or Executor who ſhould remain alone were not burden'd at all with any Legacies; this Heir or Executor who remains alone would contribute nothing out of his Portion of the Inheritance to the Legatees who have their Aſſignments on the Portion of the other Heir or Executor: For with regard to them, it would be the ſame thing as if the Heir or Executor whoſe Portion is charged with their Legacies had ſucceeded; in which caſe theſe Legataries would be nothing the better

better for what the other Heir or Executor ſhould have clear of his own Portion: and this Event would not make their Condition the better. For the Teſtator had limited their Right to that Portion of the Inheritance which was to go to the Heir or Executor who was charged with their Legacies, without burdening the other Heir or Executor with their Legacies *l*.

l See the ſecond of the Texts quoted on the preceding Article.

IX.

9. The ſame in the Caſe of a Pupillary Subſtitution.

If in the Caſe of a Pupillary Subſtitution, which ſhall be treated of under the ſecond Title of the fifth Book, a Teſtator had inſtituted his Son under fourteen Years of Age for one Portion, and another Heir or Executor for the reſt of the Inheritance, ſubſtituting him to his Son who was under the Age of fourteen, by that Subſtitution which is called Pupillary, and that the Teſtator had charged both the Heirs or Executors with Legacies, in ſuch a manner as that the Falcidian Portion ought to take place either only in the Legacies aſſigned upon one Portion of the Inheritance, or in the Legacies both of the one and the other; the Son in this Caſe happening to die before his Father, and the Perſon ſubſtituted having in that Caſe in his own Right the two Portions confounded together in one only Inheritance, in the ſame manner as if he had been inſtituted ſole univerſal Heir or Executor; all the Legataries would have the advantage thereof, for the reaſon explained in the ſeventh Article. But if the Son having ſucceeded to his Father, and dying before he arrived at the Age of fourteen Years, the Perſon ſubſtituted to him did after his Death enter to the Succeſſion, the Legatees who had their Aſſignments on the Son, and whoſe Legacies might be ſubject to the Falcidian Portion, would not reap any Profit from the Portion of the Inheritance which the ſubſtituted Perſon had in his own right. For as has been ſaid in the eighth Article, their Legacies were aſſigned only on the Portion of the Inheritance which the Teſtator had appropriated for the Payment of them, and not on the Portion which was left originally to the ſubſtituted Heir or Executor in his own right *m*.

m Qui filium ſuum impuberem & Titium æquis partibus hæredes inſtituerat, a filio totum ſemiſſem legaverat, a Titio nihil: & Titium filio ſubſtituerat. Quæſitum eſt, cum Titius ex inſtitutione adiiſſet, & impubere filio mortuo, ex ſubſtitutione hæres extitiſſet, quantum legatorum nomine præſtare deberet. Et placuit, ſolida eum legata præſtare debere. Nam confuſi duo ſemiſſes efficerent, ut circa legem Falcidiam totius aſſis ratio haberetur, & ſolida legata præſtarentur. Sed hoc ita verum eſt, ſi filius antequam hæres patri exiſteret, deceſſiſſet: ſi vero patri hæres fuit, non ampliora legata debet ſubſtitutus, quam quibus pupillus obligatus fuerat: quia non ſuo nomine obligatur, ſed defuncti pupilli, qui nihil amplius, quam ſemiſſis dodrantem præſtare neceſſe habuit. *l.* 87. §. 4. *ff. ad leg. Falc.*

But if in the Caſe of the ſame Teſtament, the Portion of the Heir or Executor who was ſubſtituted to the Son under fourteen Years of Age, being overburdened with Legacies, ſo as that the Falcidian Portion ought to take place in it, the ſaid Heir or Executor happened to ſucceed the Son who died under the Age of fourteen, his Falcidian Portion would be diminiſhed; and the Legataries who had their Aſſignments on him would reap the Benefit of that which ſhould come to him by virtue of the Subſtitution. For it would be in the Quality of Heir or Executor that he would ſucceed to it *n*.

n Quod ſi extranei hæredis ſemis totus legatus fuerit, iſque pupillo a quo nihil legatum erat ex ſubſtitutione hæres exſtiterit: poterit dici augeri legata, & perinde agendum ac ſi quilibet cohæredi ſubſtitutus fuiſſet, eoque omittente hæreditatem, ex aſſe hæres extitiſſet. Quia ſemper ſubſtitutus rationem legis Falcidiæ ex quantitate bonorum quæ pater reliquerit, ponet. *d. l.* §. 5.

X.

10. A Rule that reſults from the four preceding Articles.

It follows from the Rules explained in the four preceding Articles, that if Legacies aſſigned on the Share of the Inheritance left to one of two teſtamentary Heirs be ſubject to the Falcidian Portion, it is not diminiſhed by the Change which makes that Share of the Inheritance to paſs to the other Heir. For he acquires it ſuch as it is, and with its Charges, and it doth not augment the Charges of his own Share. But if the teſtamentary Heir whoſe Share is charged with Legacies acquires another Share of the Inheritance by the effect of a Right of Accretion, or of a Subſtituion; the Legatees who have their Aſſignments on his Share of the Inheritance will reap the Benefit of what ſhall come to him of the Share of the other Heir. For whereas in the firſt Caſe the Legataries whoſe Legacies are ſubject to the Falcidian Defalcation, cannot ſay to the Heir who acquires the Share which is charged with their Legacies, that he profits to their preſudice, ſeeing their Condition remains the ſame as if there had been no change, and ſuch as it was regulated by the Teſtator; in the ſecond Caſe, the Heir who reaps the Benefit of the Share

Share of the other, cannot ſay to the Legatees who had their Aſſignments on his Portion of the Inheritance that their Legacies were limited to his Portion. For ſeeing they have their Aſſignment on him, they reap the Benefit of whatſoever part of the Inheritance comes to him, as has been ſaid in the ſeventh Article *o*.

o This is a Conſequence of the preceding Articles.

XI.

11. What is bequeathed to one of the Executors to be taken out of the Share of the Inheritance that is left to the other, does not diminiſh the Falcidian Portion.

If one of the Coheirs or Coexecutors has his Share of the Inheritance charged with a Legacy to the other, and that the ſaid Executor who is alſo a Legatee, be on his part charged with Legacies to be paid out of his Share of the Inheritance, ſo that the Falcidian Portion ought to take place in them, the Legacy which he receives out of the Share of the other Executor will not diminiſh the Falcidian Portion that is due from thoſe Legacies which he is charged with. For it is not as Executor that he receives this Legacy; and we do not reckon among the Goods which are liable to ſatisfy the Legacies, any other beſides thoſe that come to the Executor in that quality, and by virtue of his Right to the Inheritance, and not that which may accrue to him by any other Title. Thus, this Legacy coming to him in the ſame manner that it would to another Legatary, he does not reckon it as part of the Falcidian Portion that is due to him *p*.

p Quod autem dicitur, ſi ex judicio defuncti quartam habeat hæres, ſolida præſtanda eſſe legata: ita accipere debemus ſi hæreditario jure habeat, itaque quod quis legatorum nomine a cohærede accepit, in quadrantem ei non imputatur. *l.* 74. *ff. ad leg. Falc.*

In quartam hæreditatis, quam per legem Falcidiam hæres habere debet, imputantur res quas jure hæreditario capit, non quas jure legati vel fideicommiſſi vel implendæ conditionis cauſa accipit. Nam in quartam non imputantur. *l.* 91. *eod. l.* 22. *eod.* See the following Article.

XII.

12. Falcidian Portion between Coexecutors who are Legatees.

If in the Caſe of the preceding Article an Executor being charged with a Legacy to his Coexecutor, the Falcidian Portion ought to take place; this Legacy would be ſubject to it as well as all the other Legacies: for it would diminiſh in the ſame manner the fourth part of the Goods. But if both one and the other Executor were charged with reciprocal Legacies, and that they were in the Caſe that the Falcidian Portion ought to take place, whether on the part of one of them only, or on the part of both; that which one of the ſaid Executors would have to receive of the Legacy which the other were to pay him, would be compenſated with the Falcidian Portion due out of the Legacy which he owed him reciprocally. And ſeeing this Compenſation would make up a part of the Falcidian Portion of the total of the Legacies; he would retain out of the Legacies due to the other Legatees only what ſhould be wanting to make up the Falcidian Portion of all the Legacies in general, Deduction being made of ſo much of it as would be ſatisfy'd by the ſaid Compenſation *q*.

q Neſennius Apollinaris Julio Paulo. Ex facto, *Domine*, ſpecies ejuſmodi incidit, Titia filias ſuas tres numero æquis ex partibus ſcripſit hæredes: & a ſingulis legata invicem dedit: ab una tamen ita legavit tam cohæredibus ejus, quam extraneis, ut Falcidiæ ſit locus. Quæro an adverſus cohæredes ſuas a quibus legata & ipſa accepit, uti poſſit Falcidia, & ſi non poſſit, vel doli exceptione ſummovenda eſt, quemadmodum adverſus extraneos computatio Falcidiæ iniri poſſit? Reſpondi, id quidem quod a cohærede legatorum nomine percipitur, non ſolet legatariis proficere, quominus Falcidiam patiantur. Sed cum is qui legatum præſtaturus eſt ab eodem aliquid ex teſtamento petit, non eſt audiendus deſiderans uti adverſus eum Falcidiæ beneficio, ſi id quod percepturus eſt ex voluntate teſtatoris ſuppleat quod deducere deſiderat. Plane cæteris legatariis non univerſum quod cohæredi præſtat imputabit, ſed quantum daturus eſſet, ſi nihil ab eo perciperet. *l.* 22. *ff. ad leg. Falc. v. l.* 78. *ff. de hared. inſtit. l.* 15. *ff. de his quæ ut ind.*

XIII.

13. An Executor inſtituted for ſeveral Shares of the Inheritance ought to confound them together, in order to make up the Falcidian Portion of the Legacies that are aſſigned on all the Shares.

It follows alſo from the ſame Rules, that if an Executor were inſtituted for two different Shares of the Inheritance, as for a fourth part by way of preference over and above his equal Share with his Coexecutor, and for a Moiety of the three other fourths, and that each of theſe Shares, or only one of them, ſhould chance to be ſo overcharged with Legacies, that there would be room for the Falcidian Portion to take place therein; it would be neceſſary to confound the Shares together, and the Total would be ſubject to all the Legacies that are to be paid out of both Shares. For it would be in quality of Executor that he would reap the Profit both of the one and the other *r*.

r Aliam cauſam eſſe ejus qui ex variis portionibus hæres ſcriberetur. Ibi enim legatorum confundi rationem non minus, quam ſi ſemel fuiſſet nuncupatus ex ea portione quæ conficeretur ex pluribus. *l.* 11. §. 7. *in f. ff. ad leg. Falc.*

Vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jur. delib.*

XIV.

14. If the Legatary of a

If an Executor who is charged with a conditional Legacy, had inſtituted the

conditional Legacy ſucceeds to the Executor, if the Legacy takes effect, it will not diminiſh the Falcidian Portion of the Legacies left by the ſaid Executor.

the Legatary for his Executor, and that the Condition on which the ſaid Legacy depended did afterwards come to paſs; ſince the Benefit which this Legatary would have by the ſaid Legacy would accrue to him by the Title of Legatary, and not by that of Succeſſor to the Executor who was charged with the Legacy, what he gets by it would not augment the Fund for Payment of the Legacies with which he had been charged by the Executor to whom he ſucceeds, and would not diminiſh the Falcidian Portion, if it took place *s*.

s Fundo mihi legato ſub conditione, pendente legati conditione, hæres me hæredem inſtituit, ac poſtea legati conditio extitit: in Falcidiæ ratione fundus non jure hæreditario, ſed legati, meus eſſe intelligitur. *l.* 4. *ff. ad leg. Falc.*

XV.

15. The Charge impoſed on one of the Executors, concerns him alone for the Falcidian Portion.

If a Teſtator had charged one of his Executors to acquit out of his Share of the Inheritance a Debt owing by the Deceaſed, the Diminution of the Goods which the Payment of the ſaid Debt would occaſion, would, in the Computation of the Falcidian Portion regard only that Share of the Inheritance which belongs to that Executor who is charged with the Payment of the Debt *t*, and would augment his Falcidian Portion in proportion.

t In legem Falcidiam æris alieni rationem in hæreditate relicti, quod unus ex hæredibus ſolvere damnatus ſit ipſe ſolus habebit. *l.* 8. *ff. ad leg. Falc.*

XVI.

16. The Legacy of which the Delivery or Payment is deferred, is of leſs Eſtimation for the Falcidian Portion.

If there were a Deviſe of ſome Land or Tenement which were not to be delivered to the Deviſee till after a certain Time, the Profits thereof in the mean while accruing to the Executor; or a Legacy of a Sum of Money, which was not to be paid till after ſome Time; it would be neceſſary to deduct out of the Eſtimation of the ſaid Legacies for the Falcidian Portion, ſo much as the Delay of the Delivery or Payment would take off from what the Legacies would have been worth, had they been immediately due at the Time that the Succeſſion fell; at which Time an Eſtimate ought to be made of the Goods of the Succeſſion, and of the Legacies *u*.

u In lege Falcidia non habetur pro puro quod in diem relictum eſt: medii enim temporis commodum computatur. *l.* 45. *ff. ad leg. Falc.*

Tanto minus erogari ex bonis intelligendum eſt, quantum interea donec dies obtingit, hæres lucraturus eſt ex fructibus & uſuris. *l.* 73. §. 4. *eod.* See the fourth Article of the ſecond Section of the Trebellianick Portion. See the ſixth Article of the ſecond Section.

XVII.

17. The Executor who has paid, or promiſed to pay, the whole Legacy, has no Claim to the Falcidian Portion.

The Executor who, without retaining the Falcidian Portion, had voluntarily obliged himſelf to acquit a Legacy entirely, without any Abatement, or had actually paid it, could not afterwards pretend to deduct the Falcidian Portion; for he would have renounced his Pretenſions to it by paying in this manner, or by engaging to pay the whole Legacy. And it would be preſumed that he had done ſo with no other view but to ſatisfy fully and amply the Diſpoſitions of his Benefactor: which Preſumption would be ſufficient to make the Payment or Delivery of the Thing bequeathed to ſubſiſt *x*.

x Scire debes omiſſa Falcidia, quo pleniorem fidem reſtituendæ portionis exhiberes, non videri plus debito ſolutum eſſe. *l.* 1. *C. ad leg. Falc.*

Sive ſolverit, ſive ſuper hoc cautionem fecerit, æquitatis ratio ſimilia ſuadere videtur. *l. ult. in f. C. eod.* See the ſecond Article of the ſecond Section of the Trebellianick Portion.

XVIII.

18. Unleſs he paid, or had promiſed to pay, by an Error in Fact, and not in Law.

If it was thro ſome Error in Fact that the Executor had acquitted an entire Legacy without Deduction of the Falcidian Portion; as, if he had paid it before he knew of a Codicil containing other Legacies which gave occaſion to a Defalcation; he might recover what he had paid more than he ought. But if it was thro an Error in Law that he had paid too much, as if he had acquitted a Legacy which he thought was not ſubject to the Falcidian Portion; or that he was ignorant that he had a Right to retain it; he could not afterwards pretend to make any Defalcation *y*.

y Error facti quartæ ex cauſa fideicommiſſi non retentæ repetitionem non impedit. Is autem qui ſciens ſe poſſe retinere, (univerſum reſtituit) condictionem non habet. Quin etiam ſi jus ignoraverit, ceſſat repetitio. *l.* 9. *C. ad leg. Falc.* See the ſecond Article of the ſecond Section of the Trebellianick Portion. See the firſt Section of the Vices of Covenants.

XIX.

19. The Falcidian Portion is not loſt by the bare Effect of Time.

The Executor is not deprived of the Falcidian Portion by the effect of Time, whilſt Things are ſtill entire, that is to ſay, that he has done nothing by which he is deprived of it; as he would be if he had voluntarily acquitted, or obliged himſelf to acquit the Legacy. But whilſt he remains Debtor of the Legacy, he preſerves his Right of retaining the Falcidian Portion; or if

if having acquitted the Legacy, he had compounded and taken Security for preſerving the Falcidian Portion, he could not loſe it but by the Time of Preſcription, which would ſet aſide a Debt of another nature *z*.

z Legis Falcidiæ beneficium hæres etiam poſt longum tempus mortis teſtatoris implorare non prohibetur. *l.* 58. *ff. ad leg. Falc.*

XX.

20. The Falcidian Portion of ſeveral Legacies due to one and the ſame Legatary, may be retained out of that which is laſt paid.

If an Executor who is charged with divers Legacies to one and the ſame Legatary, had acquitted ſome of them without retaining the Falcidian Portion out of them, he might retain it for all the Legacies out of thoſe which he had not as yet paid: And it would be the ſame thing, with much more Reaſon, if in the Caſe of a Legacy of a Sum of Money, or other Thing, he had paid one part of it without deducting the Falcidian Portion of that part which he had paid. For in all theſe Caſes it would be preſumed, that having in his hands Stock enough for the total Sum of the Falcidian Portion, he had reſerved the Deduction of it to be made out of what remained to be acquitted either of one ſole Legacy, or of many. So that this Remainder would be anſwerable to him for it, unleſs the Payments which he had made, ſhould imply ſome Engagement that ought to deprive him of the Falcidian Portion *a*.

a Si ex pluribus rebus legatis hæres quaſdam ſolverit, ex reliquis Falcidiam plenam per doli exceptionem retinere poteſt, etiam pro his quæ jam data ſunt. Sed etſi una res ſit legata, cujus pars ſoluta ſit, ex reliquo poteſt plena Falcidia retineri. *l.* 16. *ff. ad leg. Falc. d. l.* §. 1.

XXI.

21. The Executor who, under pretext of the Falcidian Portion, delays to acquit the Legacies, will be liable for Intereſt, if the Falcidian Portion is not due.

The Executor who, under pretext of the Falcidian Portion which he had no Right to pretend to, had deferred to acquit the Legacies, would be obliged to pay Intereſt for the Time of this Delay, which would have no other Cauſe than his own knaviſh Dealing *b*.

b Divi Severus & Antoninus generaliter reſcripſerunt Bononio maximo, uſuras præſtaturum eum qui fruſtrationis cauſa beneficium legis Falcidiæ imploravit. *l.* 89. §. 1. *ff. ad leg. Falc. V. l.* 2. *C. de uſur. & fruct. legat.*

THE CIVIL LAW, IN ITS NATURAL ORDER.

BOOK V.

Of Subſtitutions and Fiduciary Bequeſts.

THE word *Subſtitution*, in general, hath two Significations, which it is neceſſary to diſtinguiſh: The one comprehends the Diſpoſitions of Teſtators, who having inſtituted an Executor, and fearing leſt he ſhould be either incapable of the Office, or not willing to accept it, name another Perſon to be their Executor in default of the former. The other comprehends the Diſpoſitions of Teſtators, who have a mind that their Goods ſhould paſs from one Succeſſor to another, ſo as that he who is called in the firſt place having ſucceeded to the Eſtate, may tranſmit it after his Death to the ſecond; and if there be ſeveral called to the Succeſſion, that the Eſtate may paſs from the one to the other ſucceſſively and gradually.

The firſt of theſe two ſorts of Subſtitutions, is that which is called Vulgar, from the Name which it had in the *Roman* Law, becauſe the Uſe of it was frequent, in order to prevent the Caſes where it might happen that the Executor inſtituted in the firſt place might not ſucceed; as, if he ſhould chance to die before the Teſtator; if he ſhould renounce the Inheritance; if he was incapable of ſucceeding; if he render'd himſelf unworthy of it. And becauſe in theſe two laſt Caſes, and in many others, the Exchequer ſeized upon what the Executor or Legatee were incapable of acquiring, the Fear of this Event obliged the Teſtators to make Vulgar Subſtitutions *a*. And even the Fear of the Executor's renouncing the Inheritance, might likewiſe induce many Teſtators to make uſe of this kind of Subſtitution. For before that *Juſtinian* had eſtabliſhed the Benefit of an

a Ipſis teſtamentorum conditoribus ſic graviſſima caducorum obſervatio viſa eſt, ut & ſubſtitutiones introducerent, ne fiant caduca. *l. un. in pr. C. de cad. toll. V. Ulp. tit.* 17. *l.* 1. *ff. de jur. fiſc.*

Inventary, the Executor having no Medium between accepting the Inheritance purely and ſimply, and renouncing it, the Difficulty of knowing exactly the State of the Goods, which made it neceſſary to give to the Executors whole Years to deliberate in, and which was attended with the Inconveniencies that have been remarked in the Preamble of the third Title of the firſt Book, might oblige many Executors to renounce the Succeſſions.

The other kind of Subſtitution, which makes the Goods to paſs from one Succeſſor to another, is that which was properly called *Fideicommiſſum* in the *Roman* Law, a Fiduciary Bequeſt, becauſe the Uſe of it was frequent by Diſpoſitions in Terms of Intreaty, by which the Teſtator requeſted his Executor to reſtore either the whole Inheritance, or ſome particular Thing, to the Perſon whom he named, leaving it wholly to the Conſcience of his Executor whether he would fulfil his Will, or not. Theſe Fiduciary Bequeſts did at firſt depend on the Integrity of the Executors *b*; but afterwards they had the ſame Force and Efficacy as the other Diſpoſitions of the Teſtators *c*: And the Uſe of them was very frequent, as well as that of Vulgar Subſtitutions. But the word Subſtitution, in the *Roman* Law, is more particularly applied to Vulgar Subſtitutions; and the Fiduciary Subſtitutions are hardly known there, except under the Name of *Fideicommiſſum*, or Fiduciary Bequeſt: for one could not ſubſtitute in this manner ſo as to make the Eſtate to paſs from one Succeſſor to another, unleſs by Expreſſions conceived in Terms of Intreaty, or others of the like nature; of which mention has been made in the fourth Section of Teſtaments, and not in Terms direct and imperative *d*, of which we have alſo ſpoke in the ſame place, and which it is not neceſſary to repeat here. It ſufficeth to remark on this Subject, that by the *Roman* Law it was only Fathers that could ſubſtitute in this manner in direct Terms to their Children, who were under the Age required by Law for the making of a Teſtament, and were under their Father's Authority; which was done by that Subſtitution which is called Pupillary, of which we ſhall have occaſion to ſpeak hereafter: And Soldiers, who could moreover ſubſtitute in the ſame manner to their Children who were of Age ſufficient to make a Will *e*, as alſo to other Executors beſides their Children *f*. And theſe Subſtitutions had in theſe Caſes the Effect of Fiduciary Bequeſts. But by our Uſage, it is indifferent whether the Teſtator expreſs himſelf in direct and imperative Terms, or in Terms of Intreaty; and in what manner ſoever a Subſtitution is conceived, which makes the Eſtate to paſs from one Succeſſor to another, it hath its Effect if the Intention of the Teſtator is fully explained. And theſe ſorts of Diſpoſitions are called either by the Name of Fiduciary Subſtitutions, becauſe of the Origin which they had in the *Roman* Law by the Uſe of Fiduciary Bequeſts, or by the Name of Gradual Subſtitutions, becauſe they make the Eſtate to paſs to the ſubſtituted Perſons one after another in ſeveral Degrees. And they are likewiſe called purely and ſimply Subſtitutions; ſo that in our common Uſage the bare Word of Subſtitutions is underſtood of thoſe of this laſt kind, becauſe they are much more frequent than either the Vulgar or Pupillary Subſtitution; and that in what manner ſoever they be conceived, whether in Terms of Intreaty, or in Terms direct and imperative, they have, as we have juſt now ſaid, the ſame Effect.

It is to be obſerved in relation to theſe Subſtitutions or Fiduciary Bequeſts, that they may be impoſed not only on the Executor, if the Subſtitution be of the whole Inheritance, or of a part of it, or of a certain Land or Tenement that is left to him, but alſo on a Legatary, if the Teſtator intends that the Thing bequeathed ſhould paſs to another Succeſſor, as ſhall be explained in its place *g*.

We ſee that there is this Difference between theſe Fiduciary Bequeſts and Vulgar Subſtitutions, that in theſe there is only one Succeſſor who ſucceeds immediately to the Teſtator; for if he who is inſtituted Executor may and will ſucceed, the Subſtitution will be without effect: And if the Executor who is called in the firſt place do not ſucceed, the Perſon ſubſtituted will be the firſt Executor, who will ſucceed immediately to the Teſtator; and altho there had been ſeveral called and ſubſti-

b §. 1. *inſt. de fideicom. hered.*
c d. §. 1. *inſt. de fideicom. hered.*
d l. 7. *ff. de vulg. & pupill. ſubſt.* §. *ult. inſt. de pupill. ſubſt.*
e l. 15. *ff. de vulg. & pupill. ſubſt. l.* 6. *C. de teſtam. mil.*
f l. 41. *ff. de teſtam. milit.*
g See the ſecond Section of the third Title of this fifth Book.

tuted,

tuted, the one in default of the others, yet the firſt to whom the Succeſſion does accrue, excludes all the others, and the Subſtitution is annulled from the Moment that one of them has been Executor. But in the Fiduciary Bequeſts, he who is ſubſtituted ſucceeds after the Executor: And if there be ſeveral of them called ſucceſſively, every one of them has the Right to ſucceed after the other; and the Goods which are ſubject to the Fiduciary Subſtitution paſs from the one to the other by degrees, according as the Perſons are called to the ſaid Subſtitution. And ſeeing this ſort of Subſtitution hath the Effect to preſerve the Eſtates in the Families, the Uſage of it is frequent in the Provinces of *France* which are governed by the written Law, not only in Families of Quality, but likewiſe among the inferior ſort of People.

We muſt alſo take notice of another ſort of Subſtitution which is likewiſe in Uſe in the Provinces of *France* which are governed by the written Law, which is called Pupillary Subſtitution, becauſe it is made by a Father, who having a Child under the Age required for making a Will, and under his Authority, ordains, that if the ſaid Child does not ſucceed as Executor to him, or if he does ſucceed, and happens to die before he arrives at the Age neceſſary for making a Will, the Perſon ſubſtituted ſhould ſucceed in his place. Thus this Subſtitution implies the two others; for it hath theſe two Effects: The firſt of the Vulgar Subſtitution, which is to call the ſubſtituted Executor to the Succeſſion of the Teſtator, in caſe his Son ſhould not be his Executor: and the ſecond of the Subſtitution which makes the Eſtate to paſs from the one Degree to the other, ſeeing it makes the Eſtate to paſs from the Perſon of the Son to that of the Subſtitute. And the *Roman* Law hath likewiſe given to this Pupillary Subſtitution a third Effect, which is to make not only the Goods of the Father's Succeſſion to paſs to him who is ſubſtituted Executor, but alſo the Goods of the Son to whom the Father has ſubſtituted, if it ſhould happen that he had left other Goods beſides thoſe that came to him from his Father. Thus the Teſtament of the Father, which contains a Pupillary Subſtitution, is conſidered as containing two Teſtaments, that of the Father, and that of his Child; the Law permitting the Father who makes his own Teſtament, to make at the ſame time one for his Son, who is incapable of making a Will before he attains the Age of Puberty. Which is the Reaſon why this Subſtitution is annulled as ſoon as he to whom his Father hath ſubſtituted in this manner hath attained the Age of Puberty.

It is theſe ſeveral kinds of Subſtitutions that ſhall be the Subject-matter of the four Titles of this fifth Book: In the firſt of which we ſhall treat of the Vulgar Subſtitution; in the ſecond, of the Pupillary; in the third, of Subſtitutions direct and fiduciary; and in the fourth, of a Right which is called the Trebellianick Portion, which is to Excutors who are charged with a Subſtitution, the ſame thing as the Falcidian Portion is to Executors who are overburdened with Legacies.

TIT. I.

Of Vulgar Subſtitutions.

IN this Title we ſhall treat only of the Subſtitution that is purely Vulgar, and which is not joined to the Pupillary Subſtitution; and we reſerve to the following Title that which relates to theſe two Subſtitutions when they are joined together.

[*This kind of Subſtitution, which is called Ordinary or Vulgar, is of no ſmall Uſe with us in* England; *and we do therein, for the moſt part, follow the Precepts and Rules of the Civil Law. And it is nothing elſe but the adding of a Condition, which we commonly call Tail in the Caſe of Lands, namely, a Limitation of Heirs to whom we intend to have the Lands to deſcend from the Teſtator.* Cowel's Inſtitutes of the Laws of England, Book 2. Tit. 15.]

SECT. I.

Of the Nature and Uſe of Vulgar Subſtitution.

The CONTENTS.

1. *Definition of Vulgar Subſtitution.*
2. *As ſoon as the Executor accepts, the Vulgar Subſtitution ceaſes.*
3. *One may make ſeveral Degrees of a Vulgar Subſtitution.*
4. *One may ſubſtitute either many to one, or one to many, and the Co-executors to one another.*
5. *One may ſubſtitute to a Legatary.*

I.

I.

1. *Definition of Vulgar Subſtitution.*

VUlgar Subſtitution is an Inſtitution of an Executor who is called in default of another, who either cannot or will not take upon him that Quality *a*.

a Lucius Titius hæres eſto, ſi mihi Lucius Titius hæres non erit, tunc Seius hæres mihi eſto. *l.* 1. §. 1. *ff. de vulg. & pup. ſubſt.*

II.

2. *As ſoon as the Executor accepts, the Vulgar Subſtitution ceaſes.*

If the Perſon who is inſtituted Executor, and is called in the firſt place to ſucceed to the Teſtator, enters to the Succeſſion, the Vulgar Subſtitution is annulled. For it ought not to take place, except in the Caſe where the firſt Executor does not ſucceed. Thus, the Right of the ſubſtituted Executor becomes uſeleſs from the Moment that the Perſon who is inſtituted Executor makes uſe of his Right *b*.

b This is a Conſequence of the Definition of this Subſtitution.

III.

3. *One may make ſeveral Degrees of a Vulgar Subſtitution.*

One may ſubſtitute not only a ſecond Executor in default of a firſt, but a third in default of a ſecond, and likewiſe others in ſeveral Degrees *c*. And he is ſaid to be inſtituted Executor who is called in the firſt place, and the others are the ſubſtituted Executors, one in default of the other, every one in his Degree *d*.

c Poteſt quis in teſtamento plures gradus hæredum facere, puta ſi ille hæres non erit, ille hæres eſto & deinceps plures. *l.* 36. *ff. de vulg. & pup. ſubſt.*

d Hæredes aut inſtituti dicuntur, aut ſubſtituti. Inſtituti primo gradu: ſubſtituti ſecundo, vel tertio. *l.* 1. *ff. de vulg. & pup. ſubſt.*

Altho the Rule explained in this Article, which was of frequent Uſe in the Roman *Law for the Reaſon remarked in the Preamble of this Book, may ſeem not to agree with our Uſage, it being neither neceſſary nor uſual with us to make ſuch a Proviſion of Executors; yet it might happen that a Teſtator who ſhould chance to have for his Next of Kin only Strangers that were not naturaliz'd, might inſtitute them Executors in this manner, that the Succeſſion might go to which ſoever of them ſhould happen to be naturalized, and capable of ſucceeding him at the time of his Death.*

IV.

4. *One may ſubſtitute either many to one, or one to many, and the Co-executors to one another.*

As one may inſtitute ſeveral Executors, ſo likewiſe one may ſubſtitute to them in one or more Degrees, and differently, naming either to every one of them a particular Subſtitute, or one only Subſtitute to them all, or many Subſtitutes to one, and diverſify the Number of the Degrees, and of the Perſons of the Subſtitues. And one may alſo ſubſtitute the Co-executors reciprocally to one another *e*.

e Et vel plures in unius locum poſſunt inſtitui, vel unus in plurium, vel ſingulis ſinguli, vel invicem ipſi qui hæredes inſtituti ſunt. *l.* 36. §. 1. *ff. de vulg. & pup. ſubſt.*

The ſame Remark may be made on this Article which has been made on the preceding, that it is a difficult matter in our Uſage for one to have occaſion for making ſuch like Diſpoſitions.

V.

5. *One may ſubſtitute to a Legatary.*

One may ſubſtitute not only to an Executor, but alſo to a Legatary, ſo as that if he either cannot or will not acquire the Legacy, the ſame may go to him whom the Teſtator ſhall have ſubſtituted in his place *f*.

f Ut hæredibus ſubſtitui poteſt, ita etiam legatariis. *l.* 50. *ff. de legat.* 2.

SECT. II.

Rules peculiar to ſome Caſes of Vulgar Subſtitutions.

The CONTENTS.

1. *Among Co-executors mutually ſubſtituted to one another, the Shares of the Subſtitution are the ſame with thoſe of the Inſtitution.*
2. *The Reciprocal Subſtitution among Co-executors is reſtrained to the Survivors, when the Caſe happens.*
3. *He who is ſubſtituted to the Subſtitute, is ſubſtituted likewiſe to him who is inſtituted.*
4. *The Inſtitution of one of two, which ſoever of them ſhall ſurvive, implies the Subſtitution of the Survivor to the Perſon who dies firſt.*
5. *If the Subſtitute dies before the Caſe of the Subſtitution, he does not tranſmit his Right to his Heir or Executor.*
6. *He who is ſubſtituted to one of the Co-executors, is preferred before the Co-executor whoh as the Right of Survivorſhip.*
7. *Among Co-executors, he who has accepted one Share of the Inheritance, cannot renounce the Shares which fall void.*
8. *An Executor ſubſtituted to himſelf.*

1. *Among Co-executors mutually ſubſtituted to one another, the Shares of*

IF a Teſtator, having inſtituted ſeveral Executors in unequal Portions or Shares of the Inheritance, ſubſtitutes them reciprocally to one another, every one of the Subſtitutes, if the Caſe does happen, will have ſuch part in

the Subſtitution are the ſame with thoſe of the Inſtitution.

in the Subſtitution as is proportionable to the Share which he had in the Inſtitution, unleſs the Teſtator regulates it otherwiſe. Thus, for example, if an Executor is inſtituted for a Moiety of the Inheritance, another for a third, and another for a ſixth Part, and that the Executor who was to have the Moiety does not ſucceed, he who was to have the third, having the double of what he who had only a ſixth Part was to have, this laſt Executor will have only a third Part of the Inheritance, and the other will have the two Thirds *a*.

a Si plures ſint inſtituti ex diverſis partibus, & omnes invicem ſubſtituti: plerumque credendum & ex iiſdem partibus ſubſtitutos, ex quibus inſtituti ſint: ut ſi forte unus ex uncia, ſecundus ex octo, tertius ex quadrante ſit inſtitutus: repudiante tertio in novem partes dividatur quadrans, feratque octo partes qui ex beſſe inſtitutus fuerat; unam partem qui ex uncia ſcriptus eſt, niſi forte alia mens fuerit teſtatoris, quod vix credendum eſt niſi evidenter fuerit expreſſum. *l.* 24. *ff. de vulg. & pup. ſubſt.*

Partes eædem ad ſubſtitutos pertinent, quas in ipſius patriſfamiliæ habuerunt hæreditate. *l.* 8. *in f. eod. l.* 5. *eod. l.* 1. *C. de impub. & al. ſubſt.*

II.

2. The reciprocal Subſtitution among Co-executors is reſtrained to the Survivors, when the Caſe happens.

If in the Caſe of ſeveral Executors inſtituted, and reciprocally ſubſtituted to one another, ſome of them renounce the Inheritance, they will by that means be excluded from the Subſtitution; and if the Caſe of the Subſtitution does happen, it will be only for the Benefit of thoſe who ſhall have accepted the Executorſhip. But if it ſhould happen that in the Caſe of ſeveral Executors ſubſtituted to one another, ſome of them having accepted the Succeſſion, one of the Number dies before that another, who renounces the Succeſſion, declares his Intention ſo to do, his Renunciation, which would make way for the Subſtitution for the Share of the Inheritance that he was to have, would make it go only to the ſurviving Executors. And thoſe who ſhould happen to be dead before the ſaid Renunciation, having had no part in the Subſtitution, which was not open till after their Death, would tranſmit nothing thereof to their Heirs or Executors *b*.

b Qui plures hæredes inſtituit, ita ſcripſit, *eoſque omnes invicem ſubſtituo:* poſt aditam a quibuſdam ex his hæreditatem, uno eorum defuncto, ſi conditio ſubſtitutionis extitit alio hærede partem ſuam repudiante, ad ſuperſtites tota portio pertinebit. Quoniam invicem in omnem cauſam ſinguli ſubſtituti videbuntur. Ubi enim quis hæredes inſtituit. Et ita ſcribit, *eoſque invicem ſubſtituo:* hi ſubſtitui videbuntur qui hæredes extiterunt. *l.* 23. *ff. de vulg. & pup.*

Paulus reſpondit, ſi omnes inſtituti hæredes omnibus invicem ſubſtituti eſſent, ejus portionem qui quibuſdam defunctis poſtea portionem ſuam repudiavit, ad eum ſolum qui eo tempore ſupervixit ex ſubſtitutione pertinere. *l.* 45. §. 1. *eod.*

Sed ſi plures ita ſint ſubſtituti, *quiſquis mihi ex ſupraſcriptis hæres erit:* deinde quidam ex illis poſteaquam hæredes extiterint patri, obierunt: ſoli ſuperſtites ex ſubſtitutione hæredes exiſtent pro rata partium, ex quibus inſtituti ſint. Nec quicquam valebit ex perſona defunctorum. *l.* 10. *eod.*

We have put down no Example in the Article; it being eaſy for every Perſon to frame one to himſelf, and the Rule may be eaſily underſtood without any Example.

III.

3. He who is ſubſtituted to the Subſtitute, is ſubſtituted likewiſe to him who is inſtituted.

If a Teſtator inſtitutes two Executors in the firſt Degree, and ſubſtitutes them reciprocally to one another, or only one of them to the other, and that he ſubſtitutes a third Perſon to the Co-executor who is ſubſtituted; the Subſtitution of this third Perſon will have this Effect, That he will be ſubſtituted for the whole, if the Caſe happens that neither of the two Co-executors ſucceeds *c*.

c Si Titius cohæredi ſuo ſubſtitutus fuerit, deinde ei Sempronius: verius puto, in utramque partem Sempronium ſubſtitutum eſſe. *l.* 27. *ff. de vulg. & pup.* See the ſixth Article of the ninth Section of Teſtaments.

IV.

4. The Inſtitution of one of two which ſoever of them ſhall ſurvive, implies the Subſtitution of the Survivor to the Perſon who dies firſt.

An Inſtitution of two Executors may be conceived in Terms which imply a reciprocal Subſtitution to one another, altho the Teſtator have not expreſſed the Subſtitution, nor made any Diſtinction of firſt or ſecond Degree; as if he had named two of his Friends, calling to his Inheritance which ſoever of the two ſhould ſurvive him. For as both the one and the other would ſucceed if they ſhould happen to be both alive at the time of the Death of this Teſtator; ſo the Death of one of them leaves the Succeſſion entire to the other, in the ſame manner as if he had been expreſly ſubſtituted. And it would be the ſame thing between two Legataries, called to a Legacy by a Diſpoſition of the like nature *d*.

d Titius & Seius, uterve eorum vivet, hæres mihi eſto. Exiſtimo, ſi uterque vivat, ambo hæredes eſſe, altero mortuo eum qui ſupererit ex aſſe hæredem fore: quia tacita ſubſtitutio ineſſe videatur inſtitutioni. Idque & in legato eodem modo relicto Senatus cenſuit. *l.* 24, 25, & 26. *ff. de hæred. inſt.*

V.

5. If the Subſtitute dies before the Caſe of the Subſtitution, he does not

Since the ſubſtituted Executor has no Right to the Inheritance, except in the Caſe where he who is inſtituted in the firſt place does not ſucceed; if it therefore ſo falls out that the Subſtitute dies before

transmit his Right to his Heir or Executor.

before the first Executor has declared his mind, whether he will accept the Executorship, or refuse it, he dies without any Right to the Inheritance, and consequently transmits no Right to his Heirs or Executors *e*.

e Toties videtur hæres institutus, etiam in causa substitutionis, adisse quoties adquirere sibi possit. Nam si mortuus esset, ad hæredem non transferret substitutionem. *l.* 81. *ff. de acq. vel omitt. hared.*

VI.

6. He who is substituted to one of the Co-executors, is preferr'd before the Co-executor who has the Right of Survivorship.

If in the Case of two or more Executors, there were one of them to whom the Testator had substituted another Person, and he who had a Substitute died without succeeding, his Right would go to the Substitute. For altho the Co-executors have the Right of Accretion or Survivorship, yet this Right gives place to the Substitution, which, by the Choice of the Testator, prefers before them the Person who is substituted *f*.

f Si duo sint hæredes instituti, primus & secundus, secundo tertius substitutus: omittente secundo bonorum possessionem, tertius succedit. Quod si tertius noluerit hæreditatem adire, vel bonorum possessionem accipere: recedit bonorum possessio ad primum: nec erit (ei) necesse petere bonorum possessionem, sed ipso jure ei adcrescet. Hæredi enim scripto, sicut portio hæreditatis ita & bonorum possessio adcrescit. *l.* 2. §. 8. *ff. de bonor. poss. sec. tab.*

VII.

7. Among Co-executors, he who has accepted one Share of the Inheritance, cannot renounce the Shares which fall void.

If several Executors being substituted one to another, some of them accept their Portions of the Inheritance, they will have also the Shares of those who shall renounce; and they cannot refuse them *g*. For the Inheritance cannot be divided, and it passes whole and entire to whosoever has any Portion of it, if he be left all alone *h*.

g Testamento jure facto, multis institutis hæredibus, & invicem substitutis: adeuntibus suam portionem etiam invitis cohæredum repudiantium accrescit portio. *l.* 6. *C. de impub. & al. substit.*

h *See the twelfth Article of the first Section of Heirs and Executors in general, and the sixth Article of the ninth Section of Testaments.*

VIII.

8. An Executor substituted to himself.

It might so happen that an Executor might be substituted to himself, if in case of his not being able to succeed by a first Institution, he were called to the Succession by a second Institution, which might have effect. Thus, for example, if a Testator had instituted an Executor, in case he were of Age at the time of the Testator's Death, and that he had added, that if this Institution should be without effect because the Condition thereof was not accomplished; the same Executor should succeed to him, provided he were at that time free from the Paternal Authority; this Executor might succeed by this second Institution, if the Condition of the first Institution failing it should happen that at time he was free from the Paternal Authority, altho he were a Minor *i*.

i In plerisque quæritur, an ipse sibi substitui possit: & respondetur, causa institutionis mutata substitui posse. *l. ult.* §. 1. *ff. de vulg. & pup. subst.*

Si sub conditione quis hæres scriptus sit, pure autem substitutus, est causa immutatur. *d.* §.

¶ It was in doubt whether a Decision, which seems to be of so little Use as that which is explained in this Article, ought to be placed among the others; seeing it is in a Case which seems hardly possible to fall out, in the manner as it is explained in the Text cited on this Article. For it is supposed in this Text, that a Testator having instituted an Executor under a Condition, adds afterwards, that he substitutes him purely and simply without a Condition. It would seem that such a Disposition could be nothing else than the Effect of some strange fantastical Humour. For it would be more simple and more natural not to impose on the Executor a Condition with which he dispenses at the same time, than to impose this Condition by a first Clause, and to discharge him of it by a second. This Consideration has induced us to put down in the Article a Case that is different, and that gives the same View as was intended to be given in this Text of a Case where a Person is substituted to himself, that is to say, of a Case where one is called to the Inheritance in two manners, one of which failing, the other may have effect; which may give an Idea of the Distinctions which ought to be made in certain Cases of different Rights which one may have to one and the same thing by divers Views, or by divers Titles, which it may be necessary to distinguish. And it is because of the Use of these sorts of Distinctions that we resolved to add this Article to the others.

It may be remarked on these sorts of Cases, where a Person is, as it were, substituted to himself, that an Institution of this kind implies, as it were,

two

two alternative Conditions, that in default of the firſt Condition the ſecond may make the Inſtitution to have effect.

TITLE II.

Of Pupillary Subſtitution.

IT is not neceſſary to repeat here what has been ſaid of Pupillary Subſtitution in the Preamble of this fifth Book.

If any one ſhould find fault that we have not inſerted in this Title the Rule of the *Roman* Law, which ſays that the Pupillary Subſtitution tranſmits to the Subſtitute all the Goods of the Child to whom he is ſubſtituted, even to the excluſion of the Mother of the ſaid Child from her Legitime or Legal Portion of the ſame *a*; he may ſee what has been ſaid on this Subject in the Treatiſe of Laws, *chap.* 11. *n.* 24. and the Remark on the eleventh Article of the firſt Section of this Title.

We were of opinion, for the reaſons there explained, that the Hardſhip of that Law was inconſiſtent with Equity, which is the Spirit of ours; ſeeing in order to favour the Liberty of Teſtaments, it gives, in the Caſe of this Subſtitution, ſuch a Latitude to them as makes the firſt Sentiments of the Law of Nature give place to a mere Nicety. For it is agreeable to the Law of Nature, that the Mother who ſurvives her Son, ſhould have a Share of his Goods; and it is inhuman to ſtrip her of them in order to make them go to a Stranger, and that upon no other ground but becauſe it is not the Child himſelf who does this injuſtice to his Mother, but that it is his Father, whom the Law hath impower'd to make the Teſtament of his Child, who is not of Age ſufficient to make one for himſelf: as if the Power of making the Teſtament of a Child implied a Right to make it ſuch as an Enemy to the Mother of the ſaid Child would make it, and that the Father making a Teſtament for his Son, might make for him ſuch a Diſpoſition as would have been reckoned inhuman had it been made by the Son himſelf. Juſtice may ſurely be adminiſtred without the help of ſuch Rules. However, theſe ſorts of Subtleties were accounted ſo good Reaſons in the Spirit of the *Roman* Law, that they were called *benign Interpretations*; an Example whereof we ſee in another Caſe, and againſt a Mother. It is in the Caſe likewiſe of a Pupillary Subſtitution made by a Father in a Codicil: The Perſon who was ſubſtituted demanded the Goods in oppoſition to the Mother, who alledged that the Subſtitution was null, and it was ſo in Fact; for the Father could not ſubſtitute by a Codicil. But the *benign Interpretation* was againſt the Mother; and this Diſpoſition which could not be valid as a Subſtitution in a Codicil, was confirmed as a Fiduciary Bequeſt *b*, by a Nicety which has been explained in the fourth Section of Teſtaments. One might imagine in theſe two Caſes, that it was as juſt to prefer in them the Mother to the Subſtitute, and the Law of Nature to Niceties, as in another Caſe where the Authors of thoſe very Niceties made them give way to this Natural Law, which ought to give the preference to the Mother before the Subſtitute. It was in a Caſe where a Teſtator leaving his Wife big with child, had inſtituted her his Executrix for one Moiety of his Eſtate, and his poſthumous Child for the other Moiety; and appointed, in caſe the poſthumous Child ſhould not be born alive, that another Perſon whom he named ſhould be his Executor. The poſthumous Child was born, and died before he was of Age ſufficient to make a Will: this Event called the ſaid Subſtitute by the Terms of the Subſtitution; but becauſe the Father had inſtituted his Wife together with this Child, the ſame Lawyer who had decided that the Pupillary Subſtitution excludes the Mother from her Legitime or Legal Portion, determined in this Caſe that the Father having inſtituted the Mother jointly with his Child, it was to be preſumed that it was much more his Intention that the Mother ſhould ſucceed to the Child. And *Juſtinian* adds to this Reaſon, that the Mother having ſurvived her Child, the Subſtitution ought not to take place, and that the Mother ought to exclude the Subſtitute *c*. This Reaſon might very

a l. 8. §. 5. *ff. de inoff. teſtam.*

b Benigna interpretatione placet, ut mater quæ ab inteſtato pupillo ſucceſſit, ſubſtitutis fideicommiſſo obligetur. *l.* 76. *ff. ad Senat. Trebell.*

c Cum quidam prægnantem habens conjugem, ſcripſit hæredem ipſam quidem ſuam uxorem ex parte, ventrem vero ex alia parte, & adjecit, ſi non poſtumus natus fuerit, alium ſibi hæredem eſſe: poſtumus autem natus impubes deceſſit: dubitabatur quid juris ſit, tam Ulpiano quam Papiniano viris diſertiſſimis voluntatis eſſe quæſtionem ſcribentibus, cum opinabatur Papinianus eundem teſtatorem voluiſſe poſtumo nato, & impubere defuncto, matrem ma-

very well have induced them to decide the Caſe in queſtion in the ſame manner; and the ſame Juſtice required not only that the Mother ſhould not be deprived of her Legitime or Legal Portion, but that ſhe ſhould even be prefer'd for the whole Succeſſion to the Subſtitute, upon this preſumption, which is ſo natural, that the Father who ſubſtituted a Stranger to his Son that was an Infant, preſuppoſed that the Mother would die firſt, and that if he had foreſeen that ſhe would have outlived her Son, he would not have made ſuch a Subſtitution.

gis ad ejus venire ſucceſſionem, quam ſubſtitutum. Si enim ſuæ ſubſtantiæ partem uxori dereliquit, multo magis & luctuoſam hæreditatem ad matrem venire curavit. Nos itaque in hac ſpecie Papiniani dubitationem reſecantes, ſubſtitutionem quidem in hujuſmodi caſu ubi poſtumus natus adhuc impubes viva matre deceſſerit, reſpuendam eſſe cenſemus. Tunc autem tantummodo ſubſtitutionem admittimus, cum poſtumus minime editus fuerit, vel poſt ejus partum mater prior deceſſerit. *l. ult. C. de inſtit. & ſubſtit.*

[*Pupillary Subſtitution, in ſo far as it agrees with the Ordinary or Vulgar Subſtitution, is uſed in* England; *ſo that a Teſtator may make a Pupillary Subſtitution either to his own Children or to Strangers who are under Age, with reſpect to the Goods which he himſelf leaves to them. But that part of the Pupillary Subſtitution, whereby a Father was impower'd under the* Roman *Law to make a Teſtament for his Son, and thereby to diſpoſe not only of the Goods which he left to his Son, but of whatever Effects the Son had belonging to him any other manner of way, in caſe the Son ſhould die before he was of Age ſufficient to make a Will for himſelf, is not received in* England, *our Law not allowing ſo large an Extent to the Paternal Authority, as to enable Fathers to make Teſtaments for their Children under Age.* See *Cowel's* Inſtitutes, Book 2. Tit. 16.]

SECT. I.

Of the Nature and Uſe of Pupillary Subſtitution, and of thoſe Subſtitutions which are commonly called Exemplary, Compendious, and Reciprocal.

The CONTENTS.

1. *Definition of Pupillary Subſtitution.*
2. *One may ſubſtitute to a poſthumous Child.*
3. *The Pupillary Subſtitution comprehends the Vulgar.*
4. *The Pupillary Subſtitution comprehends the Goods of the Child.*
5. *So that it contains two Teſtaments, that of the Father, and that of the Child.*
6. *One cannot ſubſtitute after the Pupillary manner to a Child that is not in his power.*
7. *This Subſtitution ends when the Infant attains the Age of Puberty.*
8. *Subſtitution to a Child in a State of Madneſs, which is called Exemplary.*
9. *None are called to this Subſtitution beſides the Children or Brothers of the Heir or Executor who is mad.*
10. *If the Madneſs ceaſes, the Subſtitution is at an end.*
11. *A Mother and other Aſcendants may make this ſort of Subſtitution.*
12. *Compendious Subſtitution.*
13. *Effect of the three Subſtitutions in the compendious one.*
14. *Difference of the Effects of theſe three Subſtitutions.*
15. *Reciprocal Subſtitution.*

I.

1. *Definition of Pupillary Subſtitution.*

PUpillary Subſtitution is a Diſpoſition made by a Father, who having a Child under Age, and ſubject to his Authority, inſtitutes him his Executor, and ſubſtitutes to him another Perſon to ſucceed to him in default of the ſaid Child, in caſe he ſhould not be Executor to his Father; or if he were to ſucceed alſo to the ſaid Child, in caſe he ſhould die before he were of Age ſufficient to make a Will *a*.

a Liberis ſuis impuberibus, quos in poteſtate quis habet, non ſolum ita ut ſupra diximus, ſubſtituere poteſt: id eſt ut, ſi ei hæredes non extiterint, alius ſit ei hæres: ſed eo amplius ut ſi hæredes ei extiterint, & adhuc impuberes mortui fuerint, ſit eis aliquis hæres. *Inſt. de pupill. ſubſt.*

See the Text quoted on the following Article.

II.

2. *One may ſubſtitute to a poſthumous Child.*

One may ſubſtitute in this manner not only to a Child who is already born, but alſo to a poſthumous Child, who ſhould be under the power of the Teſtator if he were born *b*.

b Quod ſic erit accipiendum ſi ſint in poteſtate, cæterum emancipatis non poſſumus, poſtumis plane poſſumus. *l. 2. ff. de vulg. & pupill. ſubſt.*

III.

3. *The Pupillary Subſtitution comprehends the Vulgar.*

The Pupillary Subſtitution implies two different Subſtitutions, and for that reaſon it is ſaid to be twofold. The firſt calls the Subſtitute in caſe the Child does not ſucceed to his Father, which is the Caſe of the Vulgar Subſtitution. And the ſecond calls the Subſtitute in caſe that the Child having ſucceeded to his Father, he chances to die before he attains the Age of Puberty; which is the Caſe like to a fiduciary Bequeſt, which makes the Succeſſion to paſs from one Executor to the other. And when a Father makes a Pupillary Subſtitution,

it

it comprehends both the one and the other Caſe *c*.

c Hæredis ſubſtitutio duplex eſt, aut ſimplex, veluti: *Lucius Titius hæres eſto. Si mihi Lucius Titius hæres non erit, tunc Seius hæres (mihi) eſto; ſi hæres non erit, ſive erit & intra pubertatem deceſſerit, tunc Gaius Seius mihi hæres eſto.* l. 1. §. 1. ff. de vulg. & pup.

Jam hoc jure utimur ex divi Marci & Veri conſtitutione, *ut cum pater impuberi filio in alterum caſum ſubſtituiſſet, in utrumque caſum ſubſtituiſſe intelligatur*: ſive filius hæres non extiterit, ſive extiterit & impubes deceſſerit. *l.* 4. *eod.*

¶ The Rule explained in this Article is not founded on the Nature of theſe two ſorts of Subſtitutions; for their Characters and their Uſe are wholly different; and there is no eſſential Connexion between the one and the other. But what occaſioned in the *Roman* Law that the Expreſſion of the one comprehended both, as is ſaid in the ſecond of theſe Texts, was the frequent Uſe of theſe two ſorts of Subſtitutions that were joined together. And the Conſtitution of thoſe Emperors, of which mention was made in the ſecond Text, and which was in all probability a Conſequence of that Uſage, eſtabliſhed the ſame into a fixed Rule.

It may be remarked on this Article, that it is not there ſaid that the Expreſſion of one of theſe Subſtitutions comprehends likewiſe the other, as it is ſaid in the ſecond of the Texts cited on this Article, but only that the Pupillary Subſtitution comprehends both. For if, for Example, a Teſtator having inſtituted his Son that was under fourteen Years of Age, had added that in caſe the ſaid Child ſhould die before him, ſuch a one ſhould be his Heir or Executor, it would ſeem that according to Equity one might queſtion whether this Subſtitution ought to have the Effect of calling this Subſtitute, in caſe that the ſaid Child having outlived and ſucceeded his Father, had died before he arrived at the Age of Puberty, and whether it would not be a ſlaviſh Obſervance of the Niceties of the *Roman* Law, if we ſhould give to the ſaid Subſtitution this Effect in the like Caſe. For this Teſtator having clearly explained himſelf as to the Caſe where the Child ſhould die before him, his Expreſſion would ſeem to have no other Extent than to that ſingle Caſe which he had expreſſed, eſpecially if we ſuppoſe, as it is natural to ſuppoſe almoſt of all Teſtators, that he who made ſuch a Diſpoſition was ignorant of the Connexion which the *Roman* Law made between the Vulgar Subſtitution and the Pupillary. And we ſee even in a Law, that altho the Vulgar Subſtitution to a Son under Age comprehends the Pupillary; yet that is to be underſtood only of the Caſes where it does not appear that the Intention of the Teſtator is contrary. *Si modo non contrariam defuncti voluntatem extitiſſe probetur* *. But if a Teſtator had ſubſtituted after the Pupillary manner to his Son under Age, without explaining himſelf any other way, one might think that having made uſe of that indefinite Expreſſion, his Intention was that it ſhould be taken in the Senſe which the Laws give it.

* *L.* 4. *c. de imp. & al. ſubſt.*

IV.

Of theſe two Subſtitutions, the firſt, which is the ſame with the Vulgar, makes the Perſon who is ſubſtituted to be immediate Heir or Executor of the Father, if the Child does not ſucceed; and the ſecond tranſmits to the Subſtitute, not only the Goods of the Father if the Child has ſucceeded to him, but alſo all the Goods that may accrue to the Child any other manner of way *d*.

4. *The Pupillary Subſtitution comprehends the Goods of the Child.*

d Quo caſu ſi quidem non extiterit hæres filius, tunc ſubſtitutus patri ſit hæres: ſi vero extiterit hæres filius, & ante pubertatem deceſſerit, ipſi filio ſit hæres ſubſtitutus. Nam moribus inſtitutum eſt, ut cum ejus ætatis filii ſint in qua ipſi ſibi teſtamentum facere non poſſunt, parentes eis faciant. *Inſtit. de pupill. ſubſt.*

¶ This Effect of the Pupillary Subſtitution, to tranſmit to the Subſtitute the proper Goods of the Child, was a Conſequence of the Extent which was given by the *Roman* Law to the Paternal Authority, and of the Rule which, as is mentioned in the following Article, makes the Father's Teſtament to be conſidered as the Teſtament of the Son. It may be ſaid of this Rule, that it derives its Authority only from a mere poſitive Law, which has no eſſential Connexion with natural Equity, and is even in ſome meaſure oppoſite to the Principle of Equity which calls the Heirs of Blood to Succeſſions, and makes their Condition more favourable than that of the Teſtamentary Heirs, as hath been remarked in other Places *. So that it ſeems not to agree with the Spirit of the general Law of this Kingdom, which is far from countenancing theſe Niceties. And altho the ſame be obſerved in many Places, yet we have

* *See the eighth Article of the Preface to this Book.*

thought proper to make this Reflection here for the uſe of other Provinces which are governed by the written Law, but where theſe ſorts of Diſpoſitions of the *Roman* Law are not obſerved in ſo literal a Senſe, becauſe of the mixture they have in the ſaid Provinces of their own Cuſtoms and the written Law together. And I may venture to ſay that there would ariſe no manner of inconvenience from the Non-Obſervance of this Rule, which ſtrips the Heirs of the Child who dies before he is of Age to make a Will, not only of the Goods which he had by Deſcent from his Father, but of the Child's own proper Goods, to make them go to the Subſtitute, and eſpecially in the Caſes where a Teſtator was ignorant of this Effect of a Subſtitution which he had made to his Son under Age, without any other view than that which he would have had in ſubſtituting to a Child that had attained the Age of Puberty.

V.

5. So that it contains two Teſtaments, that of the Father and that of the Child.

It follows from theſe Rules, that the Teſtament of the Father, who makes therein a Pupillary Subſtitution, diſpoſes of two different Succeſſions, and contains as it were two Teſtaments, that of the Father, who diſpoſes thereby of all his own Goods, and that of the Child. For the Pupillary Subſtitution tranſmitting to the Subſtitute both the Goods which the Child has had of his Father, and likewiſe thoſe which he has acquired otherwiſe, it has the ſame effect as an Inſtitution would have which the ſaid Child ſhould have made in favour of this Subſtitute, if he had been capable of making a Teſtament *e*.

e Duo quodammodo ſunt teſtamenta, alterum patris, alterum filii: tamquam ſi ipſe filius hæredem ſibi inſtituiſſet: aut certe unum teſtamentum eſt duarum cauſarum, id eſt, duarum hæreditatum. §. 2. *inſt. de pup. ſubſt. l.* 2. *ff. de vulg. & pup. ſubſt.* See the Remark on the preceding Article.

VI.

6. One cannot ſubſtitute after the Pupillary manner to a Child that is not in his power.

If the Child under Age were out from under the Juriſdiction of his Father, as if he was emancipated, the Father could not ſubſtitute to him after the Pupillary manner *f*. For the Right of making ſuch a Subſtitution is granted only to the Paternal Authority, and is not a bare Effect of the Incapacity of making a Teſtament, under which the Child labours who is not arrived at the Age of Puberty.

f See the Text cited on the ſecond Article.

VII.

7. This Subſtitution ends when the Infant attains the Age of Puberty.

The Pupillary Subſtitution remains in ſuſpence until the Infant has attained the Age of Puberty, or dies before he arrives at it. But as ſoon as he attains the Age of Puberty, this Subſtitution is annulled; ſo that altho he ſhould die immediately after, even without making a Will, yet the Subſtitute would have no ſhare in his Goods, nor in thoſe of the Father *g*.

g Maſculo igitur uſque ad quatuordecim annos ſubſtitui poteſt, fœminæ uſque ad duodecim annos: & ſi hoc tempus exceſſerint, ſubſtitutio evaneſcit. §. 8. *inſt. de pupill. ſubſt.*

VIII.

8. Subſtitution to a Child in a State of Madneſs, which is called Exemplary.

Thoſe who have Children or Grand-Children that are mad, may ſubſtitute to them as to Children under Age, altho they be of Age ſufficient to make a Will. And it is this Subſtitution that is commonly called Exemplary, becauſe it has been invented after the Example of the Pupillary, which it imitates in this, that Madneſs putting the Children into a Condition like to that of Children under Age, as to what relates to the Incapacity of diſpoſing of their Eſtates, the Law gives to Fathers the Power of making a Will for them, and of diſpoſing in favour of a Subſtitute, even of the Legitime or Child's part of their own Inheritance, which they are obliged to leave to thoſe Children who are in a State of Madneſs, as well as to their other Children *h*.

h Humanitatis intuitu parentibus indulgemus, ut ſi filium, nepotem vel pronepotem cujuſcumque ſexus habeant, nec alia proles deſcendentium eis ſit, iſte tamen filius vel filia, nepos vel neptis, pronepos vel proneptis mente captus vel mente capta perpetuo ſit: vel ſi duo vel plures iſti fuerint, nullus vero eorum ſapiat: liceat hiſdem parentibus legitima portione ei vel eis relicta, quos voluerint his ſubſtituere: ut occaſione hujuſmodi ſubſtitutionis, ad exemplum pupillaris, querela nulla contra teſtamentum eorum oriatur. *l.* 9. *C. de imp. & al. ſubſt.*

IX.

9. None are called to this Subſtitution beſides the Children or Brothers of the Heir or Executor who is mad.

If thoſe Children who are in a State of Madneſs had Children who did not labour under the ſame Infirmity, one could not ſubſtitute to them other Perſons beſides their own Children *i*. And if having no Children they had Brothers, the Subſtitution could not be made in

i Vel ſi alii deſcendentes ex hujuſmodi mente capta perſona ſapientes ſint, non liceat parenti qui vel quæ teſtatur, alios quam ex eo deſcendentes, unum, vel certos vel omnes ſubſtituere. *l.* 9. *C. de impl. & al. ſubſt.*

favour

favour of other Perſons than thoſe very Brothers, or ſome of them *l*.

l Sin vero etiam liberi teſtatori vel teſtatrici ſint ſapientes, ex his vero perſonis quæ mente captæ ſunt, nullus deſcendat, ad fratres eorum unum, vel certos, vel omnes eandem fieri ſubſtitutionem oportet. *d. l. 9. in f.*

X.

10. *If the Madneſs ceaſes, the Subſtitution is at an end.*

If the Madneſs ſhould chance to ceaſe, this Subſtitution which had no other Foundation would ceaſe alſo, even altho he to whom the Father had ſubſtituted in this manner had made no Teſtament, but by the bare effect of his Recovery of his Senſes. For it would be juſtly preſumed that not having been willing to make a Teſtament when he could, his Intention was to have no other Heirs but thoſe of his Blood; and it could not be preſumed that he had a mind to approve the Teſtament of his Father which preſerved the Memory of his Madneſs. And much more would the Subſtitution be annulled, if he had made a Teſtament in a lucid Interval, altho his Madneſs did afterwards return upon him *m*.

m Ita tamen ut ſi poſtea reſipuerit, [vel reſipuerint] talis Subſtitutio ceſſet. *l. 9. C. de impub. & al. ſubſt.* See the fourth Article of the ſecond Section of Teſtaments.

XI.

11. *A Mother and other Aſcendants may make this ſort of Subſtitution.*

Seeing Subſtitutions to Children who are in a State of Madneſs, are not only a bare Effect of the Authority which the Paternal Power gives, but an Office of Humanity which Parents may exerciſe towards their Children; all the Aſcendants, and even Mothers, may ſubſtitute in this manner *n*.

n Humanitatis intuitu parentibus indulgemus, *&c. l. 9. C. de impub. & aliis ſubſt. This Word* parentibus *takes in the Father and the Mother; and theſe other Words of the ſame Law,* parenti qui vel quæ teſtatur, *comprehend expreſly the Mother.*

We do not put down here among the Rules of theſe ſeveral ſorts of Subſtitutions that of the Roman *Law, which we ſee in the forty third Law;* ff. de vulg. & pup. ſubſt. *touching a Subſtitution, which one could make by Permiſſion from the Prince, to a Child who was dumb. For theſe ſorts of Permiſſions are not in uſe with us.*

¶ We have endeavour'd to diſtinguiſh and to explain in theſe eighth, ninth, tenth and eleventh Articles, all that there is in the ninth Law of the Code *de impub. & al. ſubſt.* relating to this Exemplary Subſtitution, without touching on a Difficulty which has divided ſome Interpreters, and of which we ſhall take notice here. It is ſaid in this Law, as it is put down in the Article, that all Aſcendants, and even the Mother, may ſubſtitute to their Children which are in a State of Madneſs: And it does not appear that in this Law any Diſtinction is made between the Effect of ſuch a Subſtitution made by a Mother, or other Aſcendant, who have not under their power the Child to whom they ſubſtitute, and that which is made by a Father who has the ſaid Child under his power. This has induced ſome Interpreters to be of opinion, that as the Subſtitution made by the Father hath its Effect in both the Caſes explained in the third Article, that is to ſay, in the firſt if the Child does not ſucceed, and in the ſecond, if having ſucceeded it dies before it arrives at the Age of Puberty; ſo likewiſe the Subſtitution of the Mother to her Child which is mad, ought alſo to have its Effect both in the one and the other of theſe two Caſes. And this Opinion ſeems on one part to be founded on the Letter of the ſaid Law, which permits all Aſcendants, and even the Mother, to make this Subſtitution after the example of the Pupillary; and on the other part, becauſe it was not neceſſary to grant them a Permiſſion to make a Subſtitution in the firſt of theſe two Caſes, which is a Vulgar Subſtitution permitted to every Body. So that this Law granting unto them without diſtinction, in the ſame manner as to a Father, leave to make this Exemplary Subſtitution, this Permiſſion would be uſeleſs if it reſpected only the firſt Caſe. However, theſe Interpreters have been cenſured by another, who charges them with having invented of their own head this Permiſſion for the ſecond Caſe, to the Mother and to the Aſcendants who have not the Child under their power. But we may ſay that if they have erred, it is the Law itſelf that has led them into the Error: And there would perhaps be as much reaſon to find fault with *Juſtinian*, or thoſe who compoſed this Law of his, that they have not conceived it in ſuch Terms as might diſtinguiſh the Subſtitution of the Mother from that of the Father, if it had been their Intention ſo to do; ſeeing this Diſtinction was very eaſy and very neceſſary to be made. We may add in favour of theſe Interpreters, that a certain Author has obſerved that he who has cenſured them on this occaſion has been himſelf of their opinion in other Places *. But we may do them all that

* *Fabrot. in* §. 1. *inſt. de pup. ſubſt.*

juſtice,

juſtice, to own that their Difference in opinion has been a natural Conſequence enough of the little Exactneſs that we ſee in many of the Laws of *Juſtinian*. And it may be ſaid of this Law in particular, that it would ſeem that according to the Views which thoſe Perſons ought to have had who were imployed to compoſe it, they have not clearly enough explained their Meaning therein. The Matter in queſtion was, to give to Mothers, and other Aſcendants, who have not their Children under their Juriſdiction, a new Power to ſubſtitute to their Children who were mad, and to whom even Fathers could not before this Law ſubſtitute in this ſecond Caſe without the Permiſſion of the Prince. So that in order to frame this Law, the Compilers thereof were to give to Fathers the Power of ſubſtituting to their Children in a State of Madneſs without this Permiſſion from the Prince, and to regulate with reſpect to Mothers, and all other Aſcendants, wherein ſhould conſiſt the new Power that was to be given them over and above that of the Subſtitution for the firſt Caſe, which they had already, as all other Perſons have. Thus the Matter was to know, firſt whether this Power ſhould not extend to the Subſtitution for the ſecond Caſe as well as for the firſt. In the ſecond place it was to be conſidered, whether by granting them this Power of ſubſtituting for the ſecond Caſe, the ſaid Power would comprehend not only the Goods which the Child ſhould inherit of the Perſon who did ſubſtitute, but alſo the proper Goods of the Child, in the ſame manner as the Pupillary Subſtitution made by the Father did, and which ſerved as an Example for the Subſtitution to Children in a State of Madneſs. And in a word, ſeeing this Subſtitution was permitted to the Mother, and to all the Aſcendants, in imitation of the Pupillary Subſtitution; if it was not the Intention of the Compilers of the Law, that this Imitation ſhould be intire, and that they had a mind to ſet bounds to it; it had been proper to have expreſſed them, and not to have left Obſcurities and Ambiguities which divide the moſt able Interpreters.

XII.

12. *Compendious Subſtitution.*

As one ſingle Expreſſion comprehends two Subſtitutions, the Vulgar and the Pupillary, as has been mentioned in the third Article, ſo we may by one and ſame Expreſſion add to theſe two a third ſort of Subſtitution, which is the Fiduciary, of which we ſhall treat in the following Title. And it is this manner of Subſtituting that is called Compendious, the ſame being conceived in Terms which comprehend theſe three different ſorts of Subſtitution; as if a Teſtator inſtituting his Son who is under fourteen Years of Age, ſubſtitutes to him another Perſon in caſe he ſhould die before the Age of twenty five Years *o*. And theſe three Subſtitutions have their Effect, as ſhall be ſhewn in the Article which follows.

o Centurio filiis, *ſi intra quintum & viceſimum annum ætatis ſine liberis vita deceſſerint*, directo ſubſtituit. Intra quatuordecim annos etiam propria bona filio ſubſtitutus jure communi capiet. Poſt eam autem ætatem, ex privilegio militum patris duntaxat, cum fructibus inventis in hæreditate. *l.* 15. *ff. de vulg. & pup. ſubſt.*

Precibus tuis manifeſtius exprimere debueras, maritus quondam tuus miles defunctus, quem teſtamento facto hæredem communem filium veſtrum inſtituiſſe proponis, & ſecundum hæredem ſcripſiſſe: utrumne in primum caſum, an in ſecundum filio ſuo, quem habuit in poteſtate mortis tempore, ſi intra decimum quartum ſuæ ætatis annum, aut poſtea deceſſerit, ſubſtituerit. Nam non eſt incerti juris quod ſiquidem in patris militis poſitus poteſtate, primo tantum caſu habuit ſubſtitutum, & patri hæres extitit: eo defuncto ad te omnimodo ejus pertineat ſucceſſio. Si vero ſubſtitutio in ſecundum caſum, vel expreſſa, vel *compendio*, non uſque ad certam ætatem facta reperiatur, ſiquidem intra pubertatem deceſſerit, eos habeat hæredes, quos pater ei conſtituit, & adierint hæreditatem. Si vero poſt pubertatem (tunc) ejus te ſucceſſionem obtinente, veluti ex cauſa fideicommiſſi bona, quæ cum moreretur, patris ejus fuerint, a te peti poſſunt. *l.* 8. *C. de impub. & al. ſubſt.*

Altho theſe Laws ſpeak only of a Compendious Subſtitution made by a Soldier in direct Terms, and that therefore the Compendious Subſtitution in the Senſe of theſe Laws be properly a Military Subſtitution founded upon the Privilege of Soldiers, of which notice has been taken in the Preamble of the fifth Book, which impowered them to make a Subſtitution in direct Terms to their adult Children; yet we have nevertheleſs conceived the Rule in Terms which take in all Perſons without diſtinction. For beſides that according to our Uſage all Perſons may in their Diſpoſitions make uſe of direct Terms or others, as has been remarked in the ſame Place, and in the Preamble of the fourth Section of Teſtaments, and that we ought only to conſider in the Expreſſions of Teſtators the Intention which is explained by the Words they make uſe of, whatever they be; we give commonly the Name of Compendious Subſtitutions to ſuch as comprehend the three ſorts, whatever Terms they be conceived in; whether the Teſtator was a Soldier or not, and whether the Fiduciary Subſtitution were to determine after the Child had attained a certain Age, or that it ought to take place at what Age ſoever the Child ſhould happen to die.

XIII.

13. *Effect of the three Subſtitutions*

Of theſe three Subſtitutions comprehended in the ſaid Expreſſion or Compendious Subſtitution, the firſt, which is

ſtitutions in the Compendious one.

is the Vulgar, hath its effect only in caſe that the Child be not Heir or Executor, and it ends as ſoon as he has ſucceeded to the Deceaſed. The ſecond, which is the Pupillary, hath its effect only in caſe the Child dies before he arrives at the Age of Puberty, and it ends ſo ſoon as he attains that Age. And the third, which is the Fiduciary, begins only to have its uſe after that the Son being arrived at the Age of Puberty, dies within the time regulated by the ſaid Subſtitution *p*.

p See the Texts cited on the foregoing Article.

XIV.

14. Difference of the Effects of theſe three Subſtitutions.

We muſt obſerve this Difference between theſe three Subſtitutions, that the Vulgar Subſtitution tranſmits to the Subſtitute the Goods of the Teſtator, if his Son does not ſucceed to him; that by virtue of the Pupillary the Subſtitute acquires both the Goods of the Teſtator and thoſe of his Son, if he has ſucceeded to him; and that the Fiduciary Subſtitution is limited to the Goods which the Son by ſucceeding to his Father inherited of him *q*: which is to be underſtood according to the Rules which ſhall be explained in the following Title.

q See the Texts cited on the twelfth Article, and the Remark on the fourth Article.

XV.

15. Reciprocal Subſtitution.

That is called Reciprocal Subſtitution whereby two or more Heirs or Executors are ſubſtituted reciprocally to one another. Thus a Teſtator may ſubſtitute his Heirs or Executors one to another, either by a ſimple Vulgar Subſtitution, whether it be that he inſtitutes his Children that are adult, or under Age, or other Perſons; or by a Pupillary Subſtitution, if he inſtitutes his Children who are under the Age of Puberty; or by a fiduciary Subſtitution, if he inſtitutes two or more Heirs or Executors, whether they be his Children or others, to ſucceed to him, and ordains that their Shares of the Inheritance ſhould go to thoſe who are ſubſtituted, if the Caſes of the Subſtitution fall out. And one may alſo make a reciprocal Subſtitution among Legatees *r*.

r Quod jus ad tertium quoque genus ſubſtitutionis tractum eſſe videtur. Nam ſi pater duos filios impuberes hæredes inſtituat, eoſque invicem ſubſtituat, in utrumque caſum reciprocam ſubſtitutionem factam videri Divus Pius conſtituit. *l.* 4. §. 1. *ff. de vulg. & pup. ſubſt.*

Hæc verba, *Publius, Marcus, Gaius invicem ſubſtituti hæredes mihi ſunto*, ſic interpretanda ſunt, ut breviter videretur teſtator tres inſtituiſſe hæredes, & invicem ſubſtituiſſe. *l.* 37. §. 1. *ff. de hared. inſt.*

Altho theſe Texts have not relation to the three kinds of Subſtitution mentioned in the twelfth Article, but only to the Vulgar and the Pupillary, yet nothing can hinder a Teſtator from making a reciprocal Fiduciary Bequeſt among his teſtamentary Heirs or Legatees. But ſeeing every reciprocal Subſtitution is only the ſame with reſpect to an Executor or Legatee as with reſpect to other Perſons, and that with reſpect to every Perſon it is at leaſt of one of the three kinds, the reciprocal Subſtitution is not ſo much a kind of Subſtitution diſtinguiſhed from the others, as a manner proper to render common to two or more Subſtitutes the ſame Subſtitution, or Subſtitutions if there be more than one.

SECT. II.

Particular Rules concerning ſome Caſes of Pupillary Subſtitution.

The CONTENTS.

1. *He who is ſubſtituted to an Infant cannot accept one Succeſſion without the other.*
2. *Not even altho he were Coheir or Coexecutor with the Infant.*
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4. *The reciprocal Subſtitution between an Infant under the Age of Puberty, and an adult Perſon, is only Vulgar.*
5. *He who is ſubſtituted to an Infant under the Age of Puberty, and to another Executor, is ſubſtituted to both only in the Caſe of the Vulgar Subſtitution.*
6. *He who is ſubſtituted to two Infants under the Age of Puberty, ſucceeds only to him who dies laſt.*
7. *He who is ſubſtituted to him who dies laſt, ſucceeds to both if they die together.*
8. *The Vulgar Subſtitution to an Infant under the Age of Puberty, is not ended by his Entry to the Inheritance, if he renounces afterwards.*

I.

1. He who is ſubſtituted to an Infant cannot accept one Succeſſion without the other.

IF in the Caſe of a Pupillary Subſtitution, the Son who is under the Age of Puberty having ſucceeded to his Father, happens to die before he attains the Age of Puberty, leaving behind him other Goods beſides thoſe of the Succeſſion of his Father, he who is ſubſtituted to the Son cannot divide his Right, and accept one of the two Succeſſions, and renounce the other; but he muſt either accept both together, or renounce both the one and the other. For the Teſtator's Intention was, that he ſhould ſucceed both to his Son and to him, and he has made only one Succeſſion of the two. And altho they be in

in effect two Succeſſions, yet the Teſtament being the ſole Title both for the one and the other, the Subſtitute, who cannot divide his Title, cannot likewiſe take one of the Succeſſions without taking alſo the other *a*.

a Filio impuberi hærede ex aſſe inſtituto ſubſtitutus quis eſt. Extitit patri filius hæres: an poſſit ſubſtitutus ſeparare hæreditates, ut filii habeat, patris non habeat? Non poteſt: ſed aut utriuſque debet hæreditatem habere, aut neutrius. Juncta enim hæreditas cæpit eſſe. *l.* 10. §. 2. *ff. de vulg. & pup. ſubſt.*

Placuit etenim nobis ſive in inſtitutione, ſive in pupillari ſubſtitutione, ut vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jur. delib.* See the fourth Article of the firſt Section, and the Remark that is there made on it.

II.

2. Not even altho he were Coheir or Coexecutor with the Infant.

If he who is ſubſtituted to an Infant was likewiſe inſtituted Heir or Executor with him for ſome Portion of the Inheritance, and that both the one and the other had entred to the Succeſſion; the Caſe of the Pupillary Subſtitution happening afterwards by the Death of the Son who died under the Age of Puberty, the Subſtitute could not renounce the Portion of the Inheritance of the Father which had been acquired by the ſaid Son, and which the Subſtitution would tranſmit to him *b*.

b Similique modo dubitabatur, ſi impuberem quis filium ſuum hæredem ex parte inſtituit, & quemdam extraneum in aliam partem, quem pupillariter ſubſtituit: & poſtquam teſtator deceſſit, pupillus quidem patri (ejus) hæres extitit, extraneus autem hæreditatem adiit: & poſtea adhuc in prima ætate pupillus conſtitutus ab hac luce ſubtractus eſt, & pupillaris ſubſtitutio locum ſibi vindicavit: cumque ſubſtitutus eandem partem admittere noluit, quæſitum eſt, ſi poteſt jam hæres ex principali teſtamento factus, pupillarum ſubſtitutionem repudiare..... Placuit etenim nobis ſive in inſtitutione, ſive in pupillari ſubſtitutione, ut vel omnia admittantur, vel omnia repudientur. *l.* 20. *C. de jure delib.*

III.

3. The reciprocal Subſtitution between two Infants comprehends both the Caſes.

If a Father who had two infant Children, both under the Age of Puberty, ſubſtitutes them one to another by a reciprocal Subſtitution, without ſpecifying either the Caſe of Vulgar Subſtitution, or that of the Pupillary, this Subſtitution would comprehend both *c*.

c Quod jus ad tertium quoque genus ſubſtitutionis tractum eſſe videtur. Nam ſi pater duos filios impuberes hæredes inſtituat, eoſque invicem ſubſtituat: in utrumque caſum reciprocam ſubſtitutionem factam videri Divus Pius conſtituit. *l.* 4. §. 1. *ff. de vulg. & pup. ſubſt.*

IV.

4. The reciprocal

If the Reciprocal Subſtitution was made by a Father between two Children, one of whom was paſt the Age of Puberty, and the other under it, it would be limited to the Caſe of the Vulgar Subſtitution; for there would be only this Caſe common to the two Brothers. And ſeeing the Pupillary Subſtitution could not take place with reſpect to the Succeſſion of him who ſhould be adult, and that their Condition ought to be equal, the Pupillary Subſtitution, which is fruitleſs for the one, would likewiſe be ſo for the other *d*; unleſs it were that the Teſtator had diſtinguiſhed them by ſubſtituting the adult Perſon to his infant Brother, who was under the Age of Puberty, for both the Caſes, and the infant Brother to the adult Brother for the firſt Caſe, or by expreſſing otherways the Intention which he might have therein *e*.

Subſtitution between an Infant under the Age of Puberty, and an adult Perſon, is only Vulgar.

d Sed ſi alter pubes, alter impubes hoc communi verbo, *eoſque invicem ſubſtituo*, ſibi fuerint ſubſtituti: in vulgarem tantummodo caſum factam videri ſubſtitutionem Severus & Antoninus conſtituit. Incongruens enim videbatur ut in altero duplex eſſet ſubſtitutio, in altero ſola vulgaris. *l.* 4. §. 2. *ff. de vulg. & pup. ſubſt.*

e Hoc itaque caſu ſingulis ſeparatim pater ſubſtituere debebit: ut ſi pubes hæres non extiterit, impubes ei ſubſtituatur: ſi autem impubes hæres extiterit, & intra pubertatem deceſſerit, pubes frater in portionem cohæredis ſubſtituatur. Quo caſu in utrumque eventum ſubſtitutus videbitur: ne, ſi ſingulari modo impuberi quoque ſubſtituat, voluntatis quæſtionem relinquat, utrum de una vulgari tantummodo ſubſtitutione in utriuſque perſona ſenſiſſe intelligatur. Ita enim in altero utraque ſubſtitutio intelligitur, ſi voluntas parentis non refragetur: vel certe evitandæ quæſtionis gratia ſpecialiter in utrumque caſum impuberi ſubſtituat fratrem: *ſive hæres non erit, ſive erit, & intra pubertatis annos deceſſerit.* d. §.

V.

5. He who is ſubſtituted to an Infant under the Age of Puberty, and to another Executor, is ſubſtituted to both only in the Caſe of the Vulgar Subſtitution.

If a Teſtator inſtituting another Executor with his infant Son, who is under the Age of Puberty, ſuch as his Relict, who is Mother to his Son, ſubſtitutes to both of them another Executor, in caſe it ſhould happen that neither the one nor the other ſhould ſucceed to him; this Subſtitute could not pretend that the ſaid Subſtitution were Pupillary with regard to the Son: For ſeeing it could not with reſpect to the Mother have any other Effect than that of a Vulgar Subſtitution, and it being only the ſame with reſpect to both, it would be only Vulgar with regard to the Son *f*.

f Quamvis placuerit ſubſtitutionem impuberi qui in poteſtate teſtatoris fuerit a parente factam ita, *ſi hæres non erit*, porrigi ad eum caſum, quo poſtea quam hæres extitit, impubes deceſſit, ſi modo non contrariam defuncti voluntatem extitiſſe probetur: cum tamen proponas ſubſtitutionem ita factam eſſe, *ſi*

ſi mihi Firmianus filius & Ælia uxor mea (quod abominor) hæredes non erunt, in locum eorum Publius Firmianus hæres eſto: Manifeſtum eſt, in eum caſum factam ſubſtitutionem quo utrique hæredum ſubſtitui potuit. *l.* 4. *C. de impub. & al. ſubſt.*

We muſt not look upon the Rule explained in this Article to be an Exception to that which has been explained in the third Article of the firſt Section: For that of the ſaid third Article is naturally confined to the Caſe of a Diſpoſition which ſubſtitutes only to an Heir or Executor who is under the Age of Puberty, and does not extend to a Subſtitution which would call another Heir or Executor in conjunction with him who is under the Age of Puberty. Thus the conjunction of another Heir or Executor with one who is under the Age of Puberty, makes that the Subſtitution, which is only one and the ſame with reſpect to both, and is only Vulgar with regard to the other Heir or Executor, cannot be Pupillary with reſpect to him who is under the Age of Puberty.

VI.

6. He who is ſubſtituted to two Infants under the Age of Puberty, ſucceeds only to him who dies laſt.

If a Father of two Children, who are under the Age of Puberty, having inſtituted them his Executors, ſubſtitutes to them another Perſon, in caſe that both the one and the other ſhould die before they attain the Age of Puberty; this Subſtitution will not have its Effect, except in the Caſe that they both die under the Age of Puberty; and the Subſtitute will have no ſhare in the Succeſſion of him that dies firſt. For the Intention of the Father has been, that each of his Children ſhould ſucceed to the other, and that the Subſtitute ſhould not be called to the Succeſſion, but in the Caſe where the two Brothers ſhould chance to die before they attained the Age of Puberty *g*.

g Cum quidam, duobus impuberibus filiis ſuis hæredibus inſtitutis, adjecit, ſi uterque impubes deceſſerit, illum ſibi hæredem eſſe, dubitabatur apud antiquos legum auctores, utrumne tunc voluerit ſubſtitutum admitti, cum uterque filius ejus in prima ætate deceſſerit: an alterutro decedente, illico ſubſtitutum in ejus partem ſuccedere. (Et) placuit Sabino, ſubſtitutionem tunc locum habere cum uterque deceſſerit. Cogitaſſe enim patrem primo (filio) decedente, fratrem ſuum in ejus portionem ſuccedere. Nos ejuſdem Sabini veriorem ſententiam exiſtimantes, non aliter ſubſtitutionem admittendam eſſe cenſemus, niſi uterque eorum in prima ætate deceſſerit. *l.* 10. *C. de impub. & al. Subſt.*

VII.

7. He who is ſubſtituted to him w o dies l t, ſucceeds to oth, if hey die toether.

If in a like Caſe of two infant Children, under the Age of Puberty, the Teſtator had ſubſtituted another Perſon to ſuch of the two as ſhould die laſt; and that they both happened to die together, as in a Fire, or in a Shipwreck, ſo that it could not be certainly known which of the two died laſt, or that, in reality, they both died at the ſame inſtant; this Subſtitute would ſucceed both to the one and to the other. For beſides that we may look upon him to have died laſt whom the other did not ſurvive, the Intention of the Father, in calling this Subſtitute to the Succeſſion of him who ſhould die laſt, and who ought to ſucceed to the other, was that the two Succeſſions ſhould go to him *h*.

h Ex duobus impuberibus ei, qui ſupremus moreretur, hæredem ſubſtituit. Si ſimul morerentur, utrique hæredem eſſe, reſpondit: quia ſupremus, non is demum qui poſt aliquem, ſed etiam poſt quem nemo ſit, intelligatur. *l.* 34. *ff. de vulg. & pup. ſubſt. l.* 11. *ff. de bon. poſſ. ſec. tab.*

Qui duos impuberes filios habebat ei, qui ſupremus moritur, Titium ſubſtituit. Duo impuberes ſimul in nave perierunt. Quæſitum eſt an ſubſtituto, & cujus hæreditas deferatur. Dixi, ſi ordine vita deceſſiſſent, priori mortuo frater abinteſtato hæres erit; poſteriori ſubſtitutus: in ea tamen hæreditate etiam ante defuncti filii habebit hæreditatem: in propoſita autem quæſtione, ubi ſimul perierunt: quia cum neutri frater ſuperſtes fuit, quaſi utrique ultimi deceſſiſſe (ſibi) videantur, an vero neutri, quia comparatio poſterioris decedentis ex facto prioris mortui ſumitur? Sed ſuperior ſententia magis admittenda eſt, ut utrique hæres ſit, nam & qui unicum filium habet, ſi ſupremum morienti ſubſtituit, non videtur inutiliter ſubſtituiſſe. Et proximus adgnatus intelligitur etiam, qui ſolus eſt, quique neminem antecedit. Et hic utrique, quia neutri eorum alter ſuperſtes fuit, ultimi primique obierunt. *l.* 9. *ff. de reb. dub.*

See the eighteenth Article of the firſt Section of the following Title, and the Remark on the twelfth Article of the ſecond Section, How Children ſucceed.

VIII.

8. The Vulgar Subſtitution to an Infant under the Age of Puberty, is not ended by his Entry to the Inheritance, if he renounces afterwards.

If a Son under the Age of fourteen Years, to whom his Father had ſubſtituted another Perſon, having enter'd to the Succeſſion, does afterwards renounce it, either he himſelf by his own Act, or his Tutor for him, the Vulgar Subſtitution will have its effect. For altho the Son having once taken upon him the Quality of Executor, this Subſtitution ſeems to have ceaſed, yet his Renunciation of the Inheritance puts the Things in the ſame State and Condition as if he had renounced from the time of his Father's Death *i*.

i Ex contractu paterno actum eſt cum pupilla tutore auctore: & condemnata eſt, poſtea tutores abſtinuerunt eam bonis paternis, & ita bona defuncti ad ſubſtitutum, vel ad cohæredes pervenerunt, &c. *l.* 44. *ff. de re judic.*

¶ Altho it be a difficult thing for this Caſe to fall out, that a Subſtitute ſhould be willing to accept of a Succeſſion which the Son refuſes, yet it is not altogether impoſſible: And beſides, the Rule ſhews that the Right of the Subſtitute, which ſeemed to be extinguiſhed by the Infant's entring to the Inheritance, is not ſo in reality, and is only in ſuſpence, to revive again in caſe

caſe the Son ſhould happen to renounce the Inheritance; ſeeing this Caſe opens the way for the Vulgar Subſtitution. Thus this Rule ſeems to decide in expreſs terms a Queſtion which ſome Interpreters ſay is one of the moſt difficult, that is, whether the Subſtitution revives, when the Infant, who is under the Age of Puberty, having accepted the Succeſſion, gets himſelf relieved from the ſaid Act, and renounces the Inheritance. And it ſeems likewiſe to decide another Queſtion which they propoſe concerning Pupillary Subſtitution, which is, whether a Son under the Age of fourteen Years, to whom his Father had made a Pupillary Subſtitution, having outlived his Father, and happening to die before he accepted the Succeſſion; the ſame would go to the Subſtitute, or to the Heir at Law, or next of Kin of the ſaid infant Son; who would pretend that the Caſe of the Subſtitution had not happened, becauſe the Son having ſurvived the Father, he would be his Heir, *ſuus hæres*, and have a Right to the Eſtate actually veſted in him, altho he was ignorant of his Right; and that by this means he would have excluded the Subſtitute, and tranſmitted the Inheritance to his Heir. But ſince by the Rule explained in this Article, the Subſtitute ſucceeds, even notwithſtanding the Son's Entry to the Inheritance, when he is afterwards relieved from the ſaid Act, and renounces the Inheritance, and that by conſequence the Subſtitute is not abſolutely excluded by the Son's Entry; ſo it may be ſaid, that neither is he excluded by the Son's ſurviving the Father, when the Son does not enter to the Inheritance, ſince that before he accepts the Inheritance, his Quality of Son and Heir at Law does not hinder it from being uncertain whether he will be Teſtamentary Heir, or not, ſeeing he may renounce his Right; and that moreover, it is certain that when he does renounce, things will be in the ſame State and Condition as if he had never been Teſtamentary Heir, for the ſame Reaſon which makes the Heir or Executor, who accepts the Succeſſion only a long time after it has been open, to be nevertheleſs conſidered as being Heir or Executor from the moment that the Succeſſion was open, as has been ſaid in its place *a*. From whence it follows, that the Renunciation of the Infant, who is under the Age of Puberty, makes the Subſtitute who accepts the Succeſſion to be reputed Heir or Executor, in the ſame manner as if the Subſtitution had been open at the moment of the Teſtator's Death.

We ought likewiſe to examine here a third Queſtion which is ſtarted by the ſame Interpreters, which is to know, if the Executor, to whom the Teſtator hath made a Vulgar Subſtitution, happening to die whilſt he deliberates whether he will accept or not, will tranſmit the Right of deliberating to his Succeſſor, or if the Inheritance will go to the Subſtitute. Thoſe who will have the Subſtitution to take place, found their Opinion on this, That the Law which impowers the Perſon who deliberates to tranſmit his Right to his Succeſſor *b*, is a new Law which ought not to be extended to the Caſe where there is a Subſtitute. But altho this be a new Law, yet it is a natural and juſt one; and the Teſtator did not intend that the Subſtitution ſhould deprive his Teſtamentary Heir of the Benefit of this Law, and take from him the Right of deliberating; for if his Intention had been ſuch, he ought to have explained it. Thus it would ſeem that the Teſtamentary Heir dying while he was deliberating, it could not be ſaid that the Subſtitute were called to the Succeſſion in this Caſe. And it may be ſaid on the contrary, that when the Teſtamentary Heir dies whilſt it is uncertain whether he would accept the Inheritance, or not; this Uncertainty did not ſtrip him of the Succeſſion which he had a Right to take; but having only ſuſpended his Right, and tranſmitted the Right of deliberating to his Succeſſor, when the Succeſſor accepts the Inheritance, it is the ſame thing as if his Author had done it; for it is only from him that he derives his Right of ſucceeding. Thus, whether we conſider the Intention of the Teſtator, who did not deſign to hinder his Teſtamentary Heir from tranſmitting his Right to his Heirs, or the Equity of the Law, which gives unto Heirs the Right of deliberating; it would ſeem that the Heir who dies whilſt he is deliberating ought to tranſmit his Right to his Heirs, who by conſequence ought to exclude the Subſtitute. From whence it will follow, that every Teſtamentary Heir who, having a a Subſtitute, ſhall die before he has known that he was inſtituted Heir, or

a See the fifteenth Article of the firſt Section of Heirs and Executors in general.

b See the eighth Article of the tenth Section of Teſtaments.

only without renouncing the Inheritance, altho he has done nothing which ſhews that he was deliberating whether he ſhould accept or refuſe, will tranſmit his Right to his Heirs, who conſequently will exclude the Subſtitute, provided only that the firſt Heir dies without renouncing the Inheritance. For the ſame Law of *Juſtinian* which enables every Teſtamentary Heir, even altho he be a Stranger to the Deceaſed, who dies whilſt he is deliberating, to tranſmit his Right to his Heirs, does likewiſe declare that every Heir who dies within the Year which was allowed for deliberating, ſhould be preſumed to have died whilſt he was deliberating *c*, although in reality he had no Thoughts of it: which would reduce the Caſes which make way for the Vulgar Subſtitution to two only; one of the Death of the Perſon who is inſtituted Heir before that of the Teſtator; and the other, the Renunciation of the Inheritance by the Perſon who is inſtituted. And this would occaſion no great Inconvenience in a Matter that is not of a very frequent uſe, and eſpecially conſidering that this Rule hath nothing in it that can be ſaid to be odious or unjuſt.

c V. l. 19. *C. de jure delib.*

TIT. III.

Of Direct and Fiduciary Subſtitutions.

THE Subſtitutions of which we are to treat under this Title, are but little known under this Name in the *Roman* Law, where the word *Subſtitution* ſignifies in its genuine and common Acceptation, as has been remarked in the Preamble of this Book, only the Vulgar and the Pupillary Subſtitution. And as for the Subſtitutions treated of here, that is, thoſe which tranſmit the Goods from the firſt Succeſſor, whether it be Executor or Legatary, to a ſecond who ſucceeds after the firſt, they were called Fiduciary Bequeſts, as has likewiſe been obſerved in the ſame place.

It is not neceſſary to repeat here what has been ſaid in the Preamble of this Book, concerning the Difference between all theſe ſeveral ſorts of Subſtitutions, and conerning the Diſtinction that was made in the *Roman* Law between direct and imperative Terms, and Terms of Intreaty and Requeſt to the Teſtamentary Heir, as to what relates to theſe Subſtitutions or Fiduciary Bequeſts. We preſume that the Reader has not forgot the Remarks that have been made in the ſaid Preamble, and in the fourth Section of Teſtaments. And it remains only in relation to the Subject of this Diſtinction, that we ſhould give an Account why in this Title we have confounded theſe Terms of Direct and Fiduciary Subſtitutions; which depends on the Remark that hath been made in the ſame Preamble, that according to our Uſage all Expreſſions both direct and others, are indifferent for all ſorts of Subſtitutions, and that with reſpect to theſe which are the Subject-matter of this Title, we call them indifferently either Fiduciary Bequeſts, or Fiduciary Subſtitutions, or Gradual Subſtitutions, or barely Subſtitutions; and that when we mean to ſpeak of Vulgar and Pupillary Subſtitutions, we diſtinguiſh them by theſe proper Names. So that in our Uſage, when we mention barely Subſtitutions, we mean thoſe which tranſmit the Goods from one Succeſſor to another; for the Uſe of theſe is much more frequent, and more known than that of Vulgar and Pupillary Subſtitutions. And whether theſe Gradual or Fiduciary Subſtitutions be conceived in direct Terms, as if the Teſtator ſubſtitutes ſuch a one, or in Terms of Bequeſt and Intreaty to his Teſtamentary Heir, or to a Legatee whom he has a mind to charge with it, they have the ſame Effect that was given by the *Roman* Law to Terms of Fiduciary Bequeſts, and of Prayer and Intreaty, in all ſorts of Teſtaments, and to direct Terms in the Teſtaments of Soldiers, who had the Privilege to make uſe of theſe Terms in ſubſtituting, as the Father had alſo in a Pupillary Subſtitution, when he ſubſtituted to his infant Son, who was under the Age of fourteen, and not emancipated from the Paternal Authority. So that theſe two Words of Direct and Fiduciary Subſtitutions have in *France* the ſame Senſe, and ſignify that ſort of Subſtitution which transfers from one Succeſſor to another the Goods which the Teſtator has made ſubject to the Subſtitution. And we have had the more reaſon to uſe theſe two Expreſſions without diſtinction, becauſe under the *Roman* Law, as has been obſerved in the fourth Section of Teſtaments, the uſe of di-

rect Expreſſions, and of Expreſſions by way of Prayer and Intreaty, was confounded, and this Difference aboliſhed for the Inſtitution of an Heir, and for Legacies and particular Fiduciary Bequeſts, by two different Laws, the one of the Emperor *Conſtantine a*, and the other of *Juſtinian b*; which led naturally to the confounding in the ſame manner the Uſe of theſe different Expreſſions in the Subſtitutions of an Inheritance, or of a part of an Inheritance, and generally in all ſorts of Diſpoſitions; ſeeing there is nothing more true than what is added at the end of that Law of *Juſtinian*'s, That Laws regard Things, and not Words: *Nos enim non verbis, ſed ipſis rebus legem imponimus.*

Seeing a Teſtator may ſubſtitute either to all his Eſtate, or a part of it, or only to particular Things, ſuch as a Houſe, a Fief, or other Thing; we ſhall explain the Rules of theſe two ſorts of Subſtitutions in the two firſt Sections of this Title, and in the third ſome Rules that are common to both the one and the other.

It is to be obſerved in relation to Gradual Subſtitutions, by which Eſtates are conveyed to many Perſons ſucceſſively, that by the fifty ninth Article of the Ordinance of *Orleans* the Subſtitutions were reſtrained to two Degrees, excluſive of the Inſtitution of the firſt Heir or Executor; and the ſaid Ordinance having occaſioned many Law-Suits, on account of the preceding Subſtitutions which were to extend beyond two Degrees, it was ordained by the fifty ſeventh Article of the Ordinance of *Moulins*, that the Subſtitutions which were prior to the Ordinance of *Orleans* might be extended to four Degrees, and that for the future they ſhould be limited to two Degrees. But this Ordinance is not obſerved in ſome Places, where they retain the Uſage of extending the Subſtitutions, even to four Degrees beſides the firſt Inſtitution. And this Uſage has, in all appearance, taken its Riſe from the hundred and fifty ninth Novel of *Juſtinian*, where, in a particular Caſe, he extends the Prohibition to alienate the Eſtate out of the Family to four Generations, altho it is done in a dark ambiguous manner, ſo as that we cannot clearly collect from thence a general Rule which may reſtrain all Subſtitutions to four Degrees. Which may be an Effect of the manner in which it is believed that this Novel has been compoſed by *Tribonian*, the ſame which he made uſe of with reſpect to other Novels, of which an antient *Greek* Author ſays, That he ſold them for Money to thoſe who ſtood in need of them, and were willing and able to pay for them *c*.

Beſides theſe Ordinances which have regulated the Degrees of Subſtitutions, that of the Month of *January*, 1629, has made three other Regulations in relation to this matter of Subſtitutions and Fiduciary Bequeſts. The firſt is by the hundred and twenty fourth Article, that the ſaid Degrees ſhall be computed by the Number of Perſons, and not by the Stocks. The ſecond is by the hundred and twenty fifth Article, that Fiduciary Bequeſts ſhall not take place in Moveables, except it be Jewels of a very great Value. And the third is, that they ſhall not take place in the Teſtaments of poor Country People. But this Ordinance has not been ſtrictly obſerved. And in the Provinces which are governed by the written Law, all Perſons without diſtinction make Subſtitutions of all their Goods. And as to the Number of Degrees, we ſee that even in the Places where they have retained the Uſe of ſubſtituting even to four Degrees, yet the ſaid Number of Degrees is extended in ſuch a manner, that they are computed not according to the Number of Perſons, but according to the Stocks. Thus ſeveral

a Quoniam indignum eſt ob inanem obſervationem irritas fieri tabulas & judicia mortuorum: placuit ademptis his quorum imaginarius uſus eſt, inſtitutioni hæredis verborum non eſſe neceſſariam obſervantiam: utrum imperativis & directis verbis fiat, aut inflexis. *l.* 15. *C. de teſtam.*

b Omne verbum ſignificans teſtatoris legitimum ſenſum legare vel fideicommittere volentis utile atque validum eſt: ſive directis verbis, quale eſt *Jubeo* forte, ſive precariis, quale eſt *rogo, volo, mando, fideicommitto.* l. 2. comm. de legat.

c Ὑπηρέτει δὲ τῷ Ἰουστινιανῷ εἰς ἃς ἔιπομεν νεαρὰς, ὁ Τριβουνιανὸς ἐκεῖνος, ἔν τε εἰς φύσεως δεξιότητα, καὶ εἰς φιλοχρηματίαν, δεινόν τι πειράζουσιν. Ὅσις ἐν τῷ συγγράφειν τὰς νεαρὰς, παρὰ ἐχόντων ὑποθέσεις δεχόμενος χρήματα. τὰ μὲν πρὸς τὸ θέλημα τῶν δεδόντων ἐνέλατλε. τὰ δὲ ἀσαφῆ καὶ δυσνόητα καὶ πρὸς ἐννοιας ῥέποντα δίτλας ἐσχεδίαζεν. ὡς ἂν οἱ ἀναγινώσκοντες ἐμπίπλωσιν εἰς δηχόνοιαν. That is to ſay, *That* Juſtianian *in compoſing his Conſtitutions, which are called Novels, took the Advice and Aſſiſtance of* Tribonian: *That famous* Tribonian, *ſo well known by his Cunning and Dexterity, and by his Avarice; who in compoſing theſe new Conſtitutions, took Money from thoſe whoſe Intereſts gave the occaſion for making the ſaid Laws; and he worded them, and altered them as they had a mind, making uſe of Expreſſions that were dark, difficult, and equivocal, ſuch as were capable of ſeveral Meanings.* Harmenopolus, lib. 1. tit. 1. 10.

Bor-

Brothers ſubſtituted to one another, make but one Degree; whereas, by that Ordinance, each Subſtitute was to be reckoned one Degree: And this likewiſe is the Rule in all other Places. For the Degrees of Subſtitutions are nothing elſe but the Places of the Perſons ſubſtituted, who ſucceed one after another. Thus, a ſecond Son being ſubſtituted to his eldeſt Brother, and happening to ſucceed to him in the Fiduciary Bequeſt, makes the firſt Degree in the ſaid Fiduciary Bequeſt; and the third Brother, who ſhall ſucceed to the ſecond, will make the ſecond Degree therein. And altho it be true, that theſe Brothers are among themſelves in the ſame Degree of Generation, yet there is this Difference between the Computation of Degrees in Subſtitutions, and that of Degrees in Generations, that in theſe the Number of Children who are deſcended from one and the ſame Father, is no Obſtacle to their being all of them in the ſame Degree of Generation: And theſe Degrees are not multiplied but by divers Generations from Father to Son, which deſcend from one to the other by ſeveral Degrees. But in Fiduciary Bequeſts the Perſons ſubſtituted coming only one after the other, each in his reſpective Order, every one of them makes his own Degree independently of the Degree of Generation which the Perſons ſubſtituted may be in among themſelves; and there cannot be two of them in the ſame Degree except in the Caſe where ſeveral Subſtitutes are called jointly to ſucceed together to the fiduciary Bequeſt at the ſame time; as if ſeveral Children were ſubſtituted together to their Father, that they might ſhare among them the fiduciary Bequeſt after his Death. For as they ſucceeded all together at the ſame Inſtant, there would be in reſpect of them all only one Change from their Father to them; which would make only one Degree, which they would make up all of them together.

Beſides this Regulation which has ſet bounds to the Degrees of Subſtitutions, in order to put a ſtop to the Inconveniencies which attend the Liberty of ſubſtituting without reſtriction, the Ordinances have made another Regulation which is of no leſs Importance; which directs that all Diſpoſitions, whether they be ſuch as are to have their effect in the Life-time of thoſe who make them, or after their Death which contain fiduciary Bequeſts or Subſtitutions, ſhall be publiſhed and enrolled, to the end that Perſons who have any thing to tranſact with the Poſſeſſors of the Goods which are ſubſtituted, and others who have an Intereſt therein, may not be impoſed upon *d*.

We may add as a laſt Remark, that in our Language the Word *Subſtitute* is indifferently made uſe of, either to ſignify that one Perſon is ſubſtituted to another, or that an Eſtate is ſubject to a Subſtitution. Thus we ſay that a Teſtator has ſubſtituted ſuch a one to his Executor, or to a Legatary. And we ſay likewiſe that he has ſubſtituted or entailed ſuch an Eſtate, ſuch a Land.

d The Edict of the Month of May 1553. *Ordinance of* Moulins, *Article* 57.

SECT. I.

Of Subſtitutions or Fiduciary Bequeſts of an Inheritance, or a part of one.

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I.

1. *Definition of Subſtitutions or Fiduciary Bequeſts.*

A Subſtitution or Fiduciary Bequeſt is a Diſpoſition which tranſmits a Succeſſion, or a part of one, or certain Goods, from the Perſon of the Executor or Legatee, to another Succeſſor *a*, after the time regulated by the Teſtament *b*.

a Ut eam hæreditatem alii reſtituat. §. 2. *inſt. de fideic. hared.* Poteſt autem quiſque & de parte reſtituenda hæredem rogare. *d.* §. Poteſt quis etiam ſingulas res per fideicommiſſum relinquere. *inſt. de ſing. reb. per fideic. rel.*

b Rogo te Luci Titi, cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, reſtituas. *d.* §. Poſt quinquennium. *l.* 16. §. 7. *ff. ad Senat. Conſ. Trebell.* Cum moreretur. *l.* 78. §. 9. *eod.*

II.

2. *Who may ſubſtitute.*

The Liberty of ſubſtituting is the ſame with that of inſtituting Executors, and bequeathing Legacies: and whoever can name Executors or Legataries, may alſo ſubſtitute to them other Perſons to take one after another the Goods which he ſhall have appropriato them *c*.

c *The ſame Capacity is required for every Diſpoſition that may be made by a Teſtament, as for making a Teſtament.* See the ſecond Section of Teſtaments.

III.

3. *Divers Ways of ſubſtituting to an Inheritance, or a part of one.*

Whether there be only one Executor inſtituted, or whether there be many, the Teſtator may ſubſtitute either to the whole Inheritance, or a part of it. And if there be ſeveral Executors, he may reſtrain the Subſtitution to the Portions of ſome of them whom he ſhall think fit to charge therewith; leaving the others free to them *d*. And he may likewiſe either ſubſtitute his Executors one to another; or ſubſtitute only to one of them, either one of his Coexecutors or other Perſons; or charge one of his Executors to reſtore the Fiduciary Bequeſt to ſuch of the Coexecutors as the ſaid Executor ſhould think fit to make choice of: and the Liberty of this Choice which the ſaid Executor will have, will be no ways contrary to the Neceſſity he will be under of reſtoring the ſaid Fiduciary Bequeſt to ſome other Perſon *e*. But the Effect of this Liberty will be either to reſtore it to the Coexecutor whom he ſhall have made choice of, if he makes any choice, or to leave it to all the Coexecutors jointly, if he chuſes none of them ſingly *f*.

d Nihil autem intereſt utrum aliquis ex aſſe hæres inſtitutus, aut totam hæreditatem, aut pro parte reſtituere rogatur. §. 8. *inſt. de fideic. har.*

e Cum quidam, pluribus hæredibus inſtitutis, unius fideicommiſiſſet, *ut, cum moreretur uni ex cohæredibus cui ipſe vellet, reſtitueret eam partem hæreditatis, quæ ad eum perveniſſet*: veriſſimum eſt, utile eſſe fideicommiſſum. Nec enim in arbitrio ejus, qui rogatus eſt, poſitum eſt an omnino velit reſtituere; ſed cui potius reſtituat. Plurimum enim intereſt, utrum in poteſtate ejus quem teſtator obligari cogitat, faciat, ſi velit dare, an poſt neceſſitatem dandi, ſolius diſtribuendi liberum arbitrium concedat. *l.* 7. §. 1. *ff. de reb. dub.*

f *See the twelfth Article of the ſecond Section of Legacies.*

IV.

4. *The Subſtitution is limited to the Goods which the Teſtator leaves.*

In all the Caſes where an Executor is charged with a Subſtitution, he cannot be obliged to give more than he receives *g*. And if, for example, a Teſtator had requeſted his Executor to inſtitute by his Teſtament another Perſon for his Executor; this Diſpoſition would be reſtrained to the Goods of the ſaid Teſtator. And altho his Executor ſhould accept of the Executorſhip, yet he would be at liberty to diſpoſe of his own proper Goods *h*. For otherwiſe this Teſtator would ſell his Kindneſs for more than the Worth of what he had given.

g Placet non plus poſſe rogari quem reſtituere, quam quantum ei relictum eſt. *l.* 114. §. 3. *in f. ff. de leg.* 1.

h Ex facto tractatum eſt, an per fideicommiſſum rogari quis poſſit, ut aliquem hæredem faciat. Et Senatus cenſuit: rogari quidem quem, ut aliquem hæredem faciat, non poſſe. Verum videri per hoc rogaſſe, ut hæreditatem ſuam ei reſtituat: id eſt, quidquid ex hæreditate ſua conſecutus eſt, ut ei reſtitueret. *l.* 17. *ff. ad Senat. Trebell. d. l.* 114. §. 6. *ff. de leg.* 1. See the following Article.

V.

V.

5. The Executor who is charged with a Subſtitution, may retain a fourth part of what was left him.

He who is inſtituted Executor, and charged with a Subſtitution, whether it be of the whole Inheritance, if he is ſole Executor, or of the Portion thereof which is left him by the Teſtament, if he is only Executor for a part, not only cannot be engaged by a Subſtitution to reſtore more than what is left him by the Teſtator; but he cannot even be obliged to reſtore the whole. And as the Executor who is charged with a Legacy may retain a fourth part of the Inheritance for the Falcidian Portion; ſo the Executor charged with a Subſtitution may retain a fourth part of the Inheritance, if he is univerſal Heir or Executor, or a fourth part of his Portion if he is only Heir or Executor for a part: and it is this fourth part which is called the Trebellianick Portion *i*; of which we ſhall treat under the following Title.

i See the fourth Title.

VI.

6. The Fruits of the Goods which are ſubſtituted remain to the Executor, if the Teſtator does not otherwiſe diſpoſe of them.

The Executor who is charged with a Subſtitution which would oblige him to reſtore to the Subſtitute all the Profit he had made by the Goods of the Teſtator, would not be bound to reſtore the Fruits of the Inheritance which he had reaped until the time that the Subſtitution was to take place. For theſe Fruits were only a Revenue ariſing from the Inheritance, which was his until the Caſe of the Subſtitution ſhould happen. Thus theſe Fruits having accrued to him, they ought to remain his, unleſs the Teſtator had otherwiſe diſpoſed of them *l*.

l In fideicommiſſaria hæreditatis reſtitutione conſtat non venire fructus, niſi ex quo mora facta eſt, aut cum quis ſpecialiter fuerit rogatus & fructus reſtituere. *l.* 18. *ff. ad Senat. Trebell.*

Quoties quis rogatur hæreditatem reſtituere, id videtur rogatus reddere quod fuit hæreditatis: fructus autem non hæreditati, ſed ipſis rebus accepto feruntur. *d. l.* §. 2.

Hæredes mei quidquid ad eos ex hæreditate boniſve meis pervenerit id omne poſt mortem ſuam reſtituant patriæ meæ Coloniæ Beneventanorum. Nihil de fructibus pendente conditione perceptis petitum videri conſtitit. *l.* 57. *eod. See the following Article, and the fourth Title. V. l.* 32. *eod.*

VII.

7. The Executor who is charged to reſtore all that he has had of the Goods of the Deceaſed, ought to reſtore that which he has receiv'd, either as a Legacy or otherwiſe, out of the Inheritance.

If in the Caſe of the preceding Article the Executor had received not only that which belonged to him as Executor, but alſo ſome Legacy which his Coexecutor had been charged to pay him, or ſome Advantage which was left him by a Diſpoſition of the Teſtator over and above what his Coexecutors had; theſe ſorts of Advantages would be comprehended in the Subſtitution, which is conceived in ſuch Terms as would oblige the Executor to reſtore all that he had received of the Goods of the Teſtator, unleſs his Diſpoſition could be interpreted in another Senſe *m*.

m Cum virum prudentiſſimum Papinianum reſpondiſſe non ignoremus, etiam legata hujuſmodi fideicommiſſo contineri, id eſt, ubi hæres rogatus fuerit, *quidquid ex hæreditate ad eum pervenerit, poſt mortem reſtituere:* animadvertimus etiam præceptionis compendium teſtatoris verbis comprehenſum eſſe. Sane, quoniam in fideicommiſſis voluntas magis quam verba plerumque intuenda eſt, ſi quas pro rei veritate præterea probationes habes ad commendandam hanc patris voluntatem, quam fuiſſe adſeveras, apud præſidem Provinciæ experiri non vetaris. *l.* 16. *C. de fideic.*

VIII.

8. The Subſtitution may be either to a certain time, or upon condition.

The Teſtator may not only charge his Executor to reſtore the Inheritance to another Perſon at the time of the Death of the ſaid Executor, but likewiſe to reſtore it after a certain time, as at the time when the Subſtitute ſhall be of full Age. And one may alſo ſubſtitute upon condition, as if the Subſtitute were called only in caſe that he ſhould have Children *n*.

n Liberum eſt vel pure, vel ſub conditione relinquere fideicommiſſum, vel ex certo die. §. 2. *in f. inſt. de fideic. hæred.* See the Texts cited on the firſt Article under the Letter *b*.

IX.

9. The Executor ought to reſtore the Fruits of the Fiduciary Bequeſt from the time of his Delay, and is alſo liable to Coſts and Damages if there be ground for ſuch a Demand.

If the Executor who is charged with a Fiduciary Bequeſt, delays to make reſtitution thereof after the Time or Caſe of the Subſtitution is come to paſs, and that the Perſon in whoſe favour the Subſtitution was made has made a legal demand thereof, he will be accountable for all the Fruits, the Revenues and Intereſt, from the time of the Demand, or even from the time that the Subſtitution was to take place, if he had knaviſhly detained the Goods which were to have been delivered by virtue of the Subſtitution, as if he had concealed the Teſtament. And he would be liable alſo in this Caſe for Coſts and Damages to the Perſon to whom the Goods were to be reſtored, if there were any room for ſuch a Demand *o*.

o Is qui fideicommiſſum debet, poſt moram non tantum fructus, ſed etiam omne damnum quo adfectus eſt fideicommiſſarius, præſtare cogitur. *l.* 26. *ff.*

ff. de legat. 3. See the following Article. See the fourteenth Article.

When a Party is condemned to pay Intereſt, or to make reſtitution of the Fruits, the ſame is in place of Damages; and by our Uſage no other Damages are adjudged except in particular Caſes where there is notorious Knavery, or that they be due by the nature of the Engagement, as to which the Reader may conſult the Preamble of the Title of Intereſt, and of Coſts and Damages.

X.

10. *If the Executor is not in delay, he is not bound to make reſtitution of the Fruits.*

If the Subſtitute to whom the Goods were to be reſtored, knowing nothing of his Right, had neglected to demand them of the Executor who was charged to reſtore them, and had ſuffered him to enjoy them beyond the time at which the Reſtitution ought to have been made; the ſaid Executor would not be bound to reſtore the Fruits which he had reaped during that time. For beſides that he might look upon the ſaid Goods as his own until the Perſon for whom he held them in truſt had ſtripped him of them, he might either doubt of the Validity of the Subſtitution, or not know that the ſame was open, or preſume that the Perſon who was ſubſtituted to the Goods was willing that he ſhould enjoy them *p*.

p Si hæres poſt multum temporis reſtituat, cum præſenti die fideicommiſſum ſit, deducta quarta reſtituet. Fructus enim qui percepti ſunt, negligentia petentis, non judicio defuncti percepti videntur. *l.* 22. §. 2. *ff. ad Senatusconſ. Trebell.*

Altho this Text relates to another Rule explained in the fourth Article of the ſecond Section of the Trebellianick Portion, yet it implies that which is explained in this Article, and it is a Conſequence thereof which it is eaſy to compr hend. It may be ſaid with reſpect to this Article, that this Executor ought to be diſcharged from the Reſtitution of the Fruits with much more reaſon than the Executor who is charged with a Legacy. See the third Article of the eighth Section of Legacies, and the Remark that is there made on it.

XI.

11. *What care the Executor ought to take of the Goods that are ſubſtituted.*

The Executor who is charged with a Subſtitution or Fiduciary Bequeſt of the Inheritance is bound to take care of it, but the Care which he is obliged to take is only ſuch as that there be no room to charge him with any Fault or Negligence that may border upon Knavery. And the Diligence which he may have uſed in ſome Affairs would not render him the more obnoxious, altho he had failed to uſe the ſame Diligence in other Affairs of the like nature. Thus, for example, if he had gathered in ſome Debts of the Inheritance, that would not make him anſwerable for other Debts *q*.

q Si quis rogetur reſtituere hæreditatem, & vel ſervi deceſſerint, vel aliæ res perierint, placet, non cogi eum reddere quod non habet: culpæ plane reddere rationem, ſed ejus quæ dolo proxima eſt. *l.* 22. §. 3. *ff. ad Senat. Trebell.*

Cum hæreditas ex cauſa fideicommiſſi in tempus reſtituenda eſt: non idcirco nominum periculum ad hæredem pertinebit, quod hæres a quibuſdam pecuniam exegerit. *l.* 58. §. 1. *eod. l.* 108. §. 12. *ff. de leg.* 1. See the ſecond Article of the tenth Section of Legacies.

It is neceſſary to remark upon this Article, and upon the ſecond Article of the tenth Section of Legacies, the Difference between an Executor charged with a Legacy, and him who is charged with an univerſal Subſtitution of an Inheritance, or of part of an Inheritance, in that the Engagement of this laſt having a larger Extent, and his own Intereſt being concerned therein, it would ſeem that he were not bound to take the ſame care as the Executor who is charged only with one thing, for a leſs time, and where the Intereſt of another Perſon is concerned, which he ought leſs to neglect than his own.

XII.

12. *The Executor recovers the Expences he has laid out on the fiduciary Bequeſt.*

The Executor who reſtores the Inheritance to the Perſon who is ſubſtituted to him, may not only retain the fourth Part of it for the Trebellianick Portion, but all the Expences he has been at on account of the Inheritance *r*.

r Si quem ſumptum fecit hæres in res hæreditarias, detrahet. *l.* 22. §. 3. *ad Senat. Trebell.* See the ninth Article of the tenth Section of Legacies.

XIII.

13. *If a Father who is charged with a fiduciary Bequeſt for his Children diſſipates the Effects, they may be taken out of his hands.*

If a Father had been charged to reſtore to his Son an Inheritance, and that he had ſquander'd away and diſſipated the Effects thereof, or commited other Frauds, he might be obliged to reſtore the ſaid Effects to his Son, altho he were ſtill under his Father's Juriſdiction, and altho the Fiduciary Bequeſt were upon that condition that it ſhould not take place till after the Son were emancipated, or at ſome other Term. And if this Son ſhould happen to be in his Minority, the Adminiſtration of the Goods would be committed in the mean while to a Curator. For as it would be neither juſt nor decent to oblige the Father to give Security for the fiduciary Bequeſt, ſo on the other hand it would be equitable to prevent the Loſs of the Goods by the only means that would be poſſible, that is, by taking them out of his hands. But if the Father had not whereupon to ſubſiſt otherwiſe, a Maintenance would be allotted him out of the Goods which he held in truſt for his Son *s*.

s Imperator Hadrianus, cum Vivius Cerealis filio ſuo Vivio Simonidi, ſi in poteſtate ſua eſſe deſiiſſet, hæreditatem reſtituere rogatus eſſet, ac multa in fraudem fideicommiſſi fieri probaretur, reſtitui hæreditatem filio juſſit, ita ne quid in ea pecunia, quamdiu

diu filius ejus viveret, juris haberet. Nam quia cautiones non poterant interponi conſervata patria poteſtate, damnum conditionis propter fraudem inflixit. Poſt decreti autem auctoritatem, in ea hæreditate filio militi comparari debuit, ſi res a poſſeſſoribus peti, vel etiam cum debitoribus agi oporteret. Sed paternæ reverentiæ congruum eſt, egenti forte patri, officio judicis, ex acceſſionibus hæreditariis emolumentum præſtari. *l.* 50. *ff. ad Senat. Trebell.* See the twentieth and twenty firſt Articles.

XIV.

14. *Puniſhment of the Executor who detains the Goods of the Fiduciary Bequeſt.*

If after an Executor, who is charged with an Inheritance in truſt, has reſtored it, other Goods belonging to the Inheritance be diſcovered which he had fraudulently kept back, he would be bound to reſtore them together with the Fruits or other Revenues of the ſame, and likewiſe would be liable to Coſts and Damages if there were room for any ſuch Demand. But if the Reſtitution had been made by virtue of a Tranſaction or other Agreement executed fairly and honeſtly, which had diſcharged him in ſuch a manner from all After-reckoning, as that the Goods which were not reſtored ought to be comprehended therein, he would retain them *t*.

t Hæres ejus, qui poſt mortem ſuam rogatus erat univerſam hæreditatem reſtituere, minimam quantitatem, quam ſolam in bonis fuiſſe dicebat, his quibus fideicommiſſum debebatur, reſtituit. Poſtea repertis inſtrumentis, apparuit quadruplo amplius in hæreditate fuiſſe. Quæſitum eſt, an in reliquum fideicommiſſi nomine conveniri poſſit? Reſpondit, ſecundum ea quæ proponerentur, ſi non tranſactum eſſet, poſſe. *l.* 78. §. *ult. ff. ad Senat. Trebell.*

It is neceſſary to remark on this Article, as to what relates to Damages, the Difference between the Executor who is guilty of delay, of which mention has been made in the ninth Article, and the Executor who detains the Goods of the fiduciary Bequeſt. For there is much more reaſon to condemn this laſt in Damages. See the ninth Article, and the Remark that is there made on it.

XV.

15. *The Charges paſs with the Goods to the Subſtitute.*

After the Executor who is charged with a fiduciary Bequeſt of an Inheritance has made reſtitution of it, as all the Goods and all the Rights belonging to the ſaid Inheritance paſs to the Perſon for whoſe Behoof the fiduciary Bequeſt was made, ſo he ought alſo to bear the Charges of the Inheritance, and to warrant the Executor who has reſtored the Inheritance to him againſt all the Charges thereof *u*.

u Placet, ut actiones quæ in hæredem hæredibuſque dari ſolent, eas neque in eos, neque his dari qui fidei ſuæ commiſſum, ſicuti rogati eſſent, reſtituiſſent: ſed his, & in eos quibus ex teſtamento fideicommiſſum reſtitutum fuiſſet. *l.* 1. §. 2. *ff. ad Senat. Trebell.*

XVI.

16. *Children charged with a Fiduciary Bequeſt, retain their Legitime or Child's Part.*

If a Father or other Aſcendant having inſtituted one of his Sons for his Executor, had charged him with a fiduciary Bequeſt of the whole Inheritance, or a part of it, or of ſome Goods, this Diſpoſition would not diminiſh the Legitime or filial Portion due to the ſaid Child, and he would retain it. For Children cannot be deprived of their Legitime, and they ought to have the ſame free of all Charges, as has been ſaid in its place *x*.

x Si quis de cætero reſtitutionem fecerit ſuarum rerum, primum quidem ſervat filio legitimam partem. *Nov.* 39. *c.* 1. *l.* 32. *C. de inoff. teſtam.* See the Title of the Legitime.

¶ Beſides the Legitime or filial Portion which Children who are charged with Subſtitutions or Fiduciary Bequeſts may retain, it has paſſed into a Cuſtom that they may moreover retain the Trebellianick fourth part, of which we have already made mention, and which we ſhall explain in the laſt Title. Thus, for example, an only Son charged with a fiduciary Bequeſt will have for his Legitime or Filial Portion the third part of the Goods, and for his Trebellianick Portion the fourth part of the two other thirds which he is obliged to reſtore; which makes in all the half of the whole, and hath given occaſion to the common Saying, that the Son hath the Deduction of two fourth Parts, altho this Deduction does not always amount to a Half, and that it ought to vary according as the number of Children varies the Quota of their Legitimes or filial Portions, purſuant to the Rules explain'd in the Title of the Legitime or Filial Portion.

Moſt Authors agree, that this Uſage is taken from the Canon Law *in the 16th Chapter de Teſtamentis*, becauſe that Decretal affirms a Sentence of a Judge who had decreed this double Deduction of the Legitime and alſo of the Trebellianick Portion. And ſome have pretended that theſe two Deductions may be founded on Conſequences drawn from ſome of the *Roman* Laws: but there is not one of them on which this Deduction can be founded; nay, on the contrary, the moſt able Interpreters look upon this double Deduction to be an Error. But altho it be an Error againſt the *Roman* Law, yet it is noways an Error againſt Equity, nor againſt the

Law of Nature, which appropriates to Children the Goods of their Fathers. And it is on the contrary a Rule which, ſeeing it renders the Condition of the Children more advantageous than it was under the *Roman* Law, altho only in the Caſes where they are burdened with Subſtitutions or Fiduciary Bequeſts, ought to be received as favourably in the Provinces which are governed by the written Law, as is in the Provinces which are governed by their Cuſtoms, that Cuſtom which appropriates the greateſt part of Eſtates to the Heirs of Blood, and even to collateral Relations of the remoteſt degree, to whom it gives much more than the *Roman* Law gives to Children, and ſo as no Diſpoſition made in conſideration of Death can leſſen the ſame. And likewiſe this double Deduction has been accounted ſo equitable in itſelf, that it has been received every where.

It is in all probability becauſe of theſe Conſiderations that ſome Interpreters have been of opinion, that this double Deduction ought to be extended to Legacies as well as to Fiduciary Bequeſts, and that Children overcharged with Legacies ought to have in the firſt place their Legitime or Child's Part, and next the Falcidian Portion of the Surplus, which would certainly be as equitable in this Caſe as in the others. And there would likewiſe be much more reaſon for granting to Children overcharged with Legacies, the Deduction of the Falcidian Portion over and above their Legitime or Child's Part, than for granting them the Deduction of the Trebellianick Portion in the caſe of Subſtitutions; becauſe Children are not commonly charged with Subſtitutions, unleſs it be in favour of their own Children, or of the Deſcendants of the Perſon who has made the Subſtitution; whereas Legacies may be in favour of other Perſons than thoſe of the Family: and becauſe the Executor who is charged with Fiduciary Bequeſts has the uſe and Profits of the Goods until the time of the Reſtitution comes; but the Executor who is charged with the Legacy is ſtripped of it from the time that the Succeſſion is open. But other Authors have on the contrary been of opinion, that this Rule of the two Deductions, which they ſay has been eſtabliſhed only by an Error, ought not to be drawn to Conſequences beyond the antient Rules. And this laſt Opinion has prevailed over the other; and therefore they have only extended in ſome Places the double Deduction of the Legitime, and of the Trebellianick Portion, in favour of Aſcendants who are charged with Fiduciary Bequeſts by their Deſcendants.

XVII.

17. *The Wife's Jointure, as alſo a Woman's Marriage-Portion, are taken out of the ſubſtituted Goods.*

If the Legitime or Child's Part of a Son who is charged with a Subſtitution is not ſufficient to ſettle a Jointure on his Wife proportionable to what ſhe brought with her in Marriage, and to anſwer the other Rights and Claims which ſhe may be entitled to by virtue of her Marriage, the other Goods that are ſubſtituted would be ſubject to the ſame, and ſo much would be taken from them as ſhould be found neceſſary to make up the Deficiency in the Legitime or Child's Part for theſe Purpoſes. For Fathers and other Aſcendants, who charge their Children and other Deſcendants with Subſtitutions or Fiduciary Bequeſts, do not mean thereby to reſtrain them in their Conduct, and to hinder them from marrying. Thus the Goods which they leave them are firſt appropriated to the Jointures, and other Rights of their Wives, according as the Quality of the Perſons may demand. And if it were a Daughter charged with a Fiduciary Bequeſt, ſhe would in like manner retain out of the ſubſtituted Goods, that which would be neceſſary for her Marriage-Portion, ſuitable to her Quality, if her Legitime or Child's Part were not ſufficient for it *y*.

y Cum proponeretur quidam filiam ſuam hæredem inſtituiſſe, & rogaſſe eam, ut, *ſi ſine liberis deceſſiſſet, hæreditatem Titio reſtitueret*, eaque dotem marito dediſſe certæ quantitatis, mox decedens ſine liberis, hæredem inſtituiſſe maritum ſuum: & quæreretur an dos detrahi poſſet: dixi non poſſe dici in everſionem fideicommiſſi factum, quod & mulieris pudicitiæ, & patris voto congruebat. Quare dicendum eſt, dotem decedere, ac ſi, quod ſuperfuiſſet rogata eſſet reſtituere. *l.* 22. §. 4. *ff. ad Senat. Trebell.*

Si quis de cætero reſtitutionem fecerit ſuarum rerum, primum quidem ſervet filio legitimam partem. ——— Deinde ex reliqua ſubſtantiæ parte, ſi non ſuffecerit legitima pars ad dotis aut ante nuptias donationis oblationem honeſte, & ſecundum perſonarum qualitatem & merita, excipere etiam hoc ad reſtitutionem, ſecundum quod adjectum legitimæ parti dotem aut ante nuptialem facit donationem. Sancimus enim ſecundum hunc modum excipi modis omnibus ad reſtitutionem nuptialia documenta, & ſuper his factas alienationes, aut hypothecas: & vel ſi gravata ſit perſona aut viri aut mulieris reſtitutione tali, liceat ei etiam nuncupatam ante nuptialem ſeu propter nuptias donationem auferre, nihil quantum in illis rebus reſtitutione valente. Et ſi mulier reſtitutione gravetur, non impedimentum ad dotis oblationem fieri. *Ea enim quæ communiter omnibus proſunt, iis quæ ſpecialiter quibuſdam utilia ſunt præponimus.* Sitque hoc nuptialibus donationibus, & harum exactionibus privilegium. *Nov.* 39. *c.* 1.

¶ We might gather as a Conſequence from the laſt of theſe Texts, that the double Deduction of the Legitime, and of the Trebellianick Portion, of which mention has been made in the Remark on the preceding Article, is not agreeable to the *Roman* Law. For if *Juſtinian* had thought that a Son who was burdened with a Fiduciary Bequeſt was to have both his Legitime or Child's Part, and alſo the Trebellianick Portion, in all probability he would have expreſſed it; and that ſeeing he gave leave to deduct out of the Fiduciary Bequeſt a Jointure for the Wife of the Heir or Executor who ſhould be charged therewith, and added, as he has done in this Text, that if the Legitime or Child's Part were not ſufficient for that purpoſe, the ſaid Jointure ought to be taken out of the other Goods that were ſubject to the Fiduciary Bequeſt, he would not have failed to have added likewiſe the Trebellianick fourth Part, and to have ſaid, that if the Legitime and the Trebellianick Portion were not ſufficient, the Surplus would be taken out of the reſt of the ſubſtituted Goods. As to which it may be remarked, that ſeeing by this new Right of the double Deduction, the Son who is charged with a Subſtitution of the Inheritance retains the half of the Goods for his Legitime and Trebellianick Portion, it would ſeem that the Fiduciary Bequeſt ought not likewiſe to be diminiſhed by taking from thence a Jointure for the Wife of the Heir or Executor who ſhould be charged with the ſaid Fiduciary Bequeſt: eſpecially if, according to the Sentiment of ſome, this Deduction on account of Jointures and Marriage-Portions ſhould be extended beyond the firſt Degree of the Subſtitution, and that the Perſons who are ſubſtituted being charged to reſtore the ſame Goods to other Subſtitutes called to the Succeſſion after them, ſhould have the Power of making the ſame Deduction every one in their order.

XVIII.

18. *He who is ſubſtituted to the Portion of one of two Perſons who ſhall die laſt, ſucceeds to neither of them, if they both die together.*

If a Father inſtituting his Children his Executors, had charged ſuch of them as ſhould die laſt to reſtore his Portion of the Inheritance to another Perſon, and it happened that all theſe Children died at the ſame time, their Heirs would ſucceed to them, and would exclude the Subſtitute. For he was ſubſtituted only to one of them who ſhould die the laſt, and only for his Portion. Thus the Subſtitution would be without effect, unleſs the Perſon ſubſtituted ſhould prove that one of the two ſurvived the other; ſince if it cannot be known which of the two died laſt, the Condition of the Subſtitution is not come to paſs; and the Subſtitute cannot ſay of any one of them that he has ſucceeded to him z.

z Si ejus qui noviſſimus ex filiis mortuus eſt, partem hæreditatis propinquo voluit pater reſtitui, & ſimul fratres diem ſuum obiiſſent: propinquum, ſi non oſtenderit quis noviſſimus obiiſſet, ad partem hæreditatis non admitti, ſed matrem ex Tertylliano Senatus-conſulto ad utriuſque hæreditatem admitti conſtat. *l.* 34. *ff. ad Senat. Trebell.* See the Remark on the twelfth Article of the ſecond Section, In what manner Children ſucceed. See the ſeventh Article of the ſecond Section of the preceding Article.

It is to be remarked on the ſeventh Article here quoted, and on this preſent Article, that in this the Subſtitution was only of the Portion of one of the two Brothers; ſo that the Subſtitute not being able to make appear which of the two Brothers has ſurvived the other, he will have no Portion at all. But in the Caſe of the ſeventh Article above-mentioned, the Intention of the Teſtator called the Subſtitute to the Succeſſion of both the Brothers, as has been remarked there.

XIX.

19. *A Child born to a Son who is charged with a Subſtitution, makes the Subſtitution to ceaſe.*

If a Teſtator having inſtituted one of his Children or Deſcendants his Heir or Executor, had charged him with a fiduciary Bequeſt or Subſtitution of the Inheritance, either in favour of other Deſcendants of the ſame Teſtator, Brothers, Uncles, or Nephews to the ſaid Executor, or in favour of other Perſons; the ſaid fiduciary Bequeſt or Subſtitution would not have its effect except in the Caſe that the ſaid Executor ſhould die without Iſſue; and if he left any Iſſue, the ſaid fiduciary Bequeſt or Subſtitution would be null. For the Intention of this Teſtator would not have been to prefer the Subſtitutes to theſe Children *a*.

a Cum avus filium ac nepotem ex altero filio hæredes inſtituiſſet, a nepote petiit, ut, ſi intra annum trigeſimum moreretur, hæreditatem patruo ſuo reſtitueret. Nepos, liberis relictis intra ætatem ſupra ſcriptam vita deceſſit, fideicommiſſi conditionem, conjectura pietatis, reſpondi defeciſſe: quod minus ſcriptum, quam dictum fuerat, inveniretur. *l.* 102. *ff. de condit. & dem. v. l. jubemus C. ad Senat. Trebell.*

Cum acutiſſimi ingenii vir, & merito ante alios excellens Papinianus, in ſuis ſtatuerit reſponſis, ſi quis filium ſuum hæredem inſtituit, & reſtitutionis poſt mortem oneri ſubegit, non aliter hoc videri diſpoſuiſſe, niſi cum filius ejus ſine ſobole vitam ſuam reliquerit, nos hujus ſenſum merito mirati, pleniſſimum ei donamus eventum, ut ſi quis hæc diſpoſuerit, non tantum filium hæredem inſtituens, ſed etiam filiam, vel ab initio nepotem vel neptem, pro-

nepotem vel proneptem, vel aliam deinceps poſteritatem, & eam reſtitutionis poſt obitum gravamini ſubjugaverit : non aliter hoc ſenſiſſe videatur, niſi ii qui reſtitutione onerati ſunt, ſine filiis vel filiabus, nepotibus vel neptibus, pronepotibus vel proneptibus fuerint defuncti : ne videatur teſtator alienas ſucceſſiones propriis anteponere. *l.* 30. *C. de fideic.*

XX.

20. *The Executor ought to make an Inventary, and to give Security, if it be neceſſary for the preſervation of the Fiduciary Bequeſt.*

Seeing the Executor, who is charged with a Fiduciary Bequeſt either of the whole Inheritance, or of a part of it, cannot accept it but with this Charge, he is obliged to make an Inventary of the Goods, in order to preſerve the Right of the Subſtitute. And this Inventary ought to be made either in preſence of the Subſtitute, if he can be there; or if he was not preſent, or even was not born, the Executor ought to make it in ſuch manner as the Judge ſhall direct. And both in the one and the other Caſe, beſides the Inventary, the Executor is bound to give Security, if the Circumſtances require it, and unleſs the Teſtator has diſcharged him from giving any *b*.

b Legatorum nomine ſatisdari oportere, prætor putavit : ut quibus teſtator dari fierive voluit, his diebus detur, vel fiat. *l.* 1. *ff. ut legat. ſeu fid. ſerv. cauſ. cav.*

Idemque in fideicommiſſis quoque probandum eſt. *d. l.* §. 10. *l.* 1. *C. ut in poſſ. legat. vel fid. ſ. c. m.*

Oportet hujuſmodi hæredem qui non creditores ſolum, ſed etiam legatarios & fideicommiſſarios veretur & metuit, non damnificari ſolum, ſed etiam non lucrari, convocare omnes legatarios & fideicommiſſarios ad inventarii præſentiam. *Nov.* 1. *c.* 2. §. 1.

Ipſis rerum experimentis cognovimus ad publicam utilitatem pertinere, ut ſatisdationes quæ voluntatis defunctorum tuendæ gratia in legatis & fideicommiſſis introductæ ſunt, eorumdem voluntate remitti poſſint. *l.* 2. *C. ut in poſſeſſ. leg. vel fid. ſ. c. m.* See the fourth Article of the firſt Section of the Falcidian Portion.

XXI.

21. *Even the Father and Mother are obliged to give Security in two Caſes for the Fiduciary Bequeſt.*

If the Executor were a Father, or other Aſcendant, charged with a Fiduciary Bequeſt in behalf of his own Children, he would be excepted from the Rule of giving Security, unleſs the Teſtator had obliged him to do it, or that the ſaid Executor had contracted a ſecond Marriage *c*.

c In his duobus caſibus, id eſt, cum teſtator ſpecialiter ſatisdari voluerit, vel cum ſecundis ſe pater vel mater matrimoniis junxerit, neceſſe eſt, ut eadem ſatisdatio, pro legum ordine, præbeatur. *l.* 6. *C. ad Senat. Trebell.*

SECT. II.

Of Subſtitutions, or particular Fiduciary Bequeſts of certain Things.

SEEING particular Fiduciary Bequeſts of certain Things are of the nature of Legacies, as has been ſhewn in the Title of Legacies, we muſt apply to theſe Fiduciary Bequeſts the Rules of that Title which are applicable to them.

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17. *The Legatary who is charged with a Fiduciary Bequeſt which proves to be null, reaps the Benefit of it, and not the Executor.*

I.

1. *One may ſubſtitute Things of all kinds.*

ONE may make a Subſtitution or Fiduciary Bequeſt of particular Things of all kinds, ſuch as a Fief, a Houſe, or other Tenement, and of other ſorts of Goods, of a Sum of Money, and of every other Thing which one has a mind ſhould go from one Succeſſor to another *a*.

a Poteſt etiam quis ſingulas res per fideicommiſſum relinquere, veluti fundum, argentum, hominem, veſtem, & pecuniam numeratam. *Inſt. de ſing. reb. per fideic. relict.*

II.

2. *One may charge with a Fiduciary Bequeſt either the Executor, or a Legatee.*

The Teſtator may charge with a Fiduciary Bequeſt of a particular Thing, either his own Executor or a Legatee, whether the Thing be a part of the Inheritance, or belong to the Executor or Legatee, or to ſome other Perſon *b*.

b Vel ipſum hæredem rogare (poteſt quis) ut alicui reſtituat, vel legatarium. *Inſt. de ſing. reb. per fid. rel.* Poteſt autem non ſolum proprias res teſtator per fideicommiſſum relinquere, ſed & hæredis, aut legatarii, aut fideicommiſſarii, aut cujuſlibet alterius. §. 1. *eod.*

Ut hæredibus ſubſtitui poteſt, ita etiam legatariis. *l.* 50. *ff. de legat.* 2.

III.

3. *Different manners of ſubſtituting.*

Theſe Subſtitutions, or Fiduciary Bequeſts of particular Things, may be made in ſeveral manners; which may be diſtinguiſhed either by the Differences of the Expreſſions which the Teſtators may make uſe of, or by the Differences which may diverſify the Diſpoſitions of this nature, independently of the ways of expreſſing them *c*.

c See the following Articles.

IV.

4. *All Expreſſions which explain the Intention of the Teſtator are ſufficient for a Fiduciary Subſtitution.*

As to the Expreſſions, in what manner ſoever the Teſtator may have explained himſelf, his known Intention ought to ſerve as a Rule. And even the Expreſſions which ſeem to leave the Fiduciary Bequeſt to the Diſcretion of the Executor or Legatee who is charged with it, oblige him as much as thoſe which ordain it in expreſs Terms. Thus, for example, if a Teſtator had ſaid that he is ſure his Executor, or a Legatee, will reſtore to ſuch a one ſuch a Thing, or that he intreats them to reſtore it, theſe Expreſſions would make a Fiduciary Bequeſt, which would not depend on the Will of the Perſon whom the ſaid Diſpoſition might concern *d*.

d In fideicommiſſis præcipue ſpectanda ſervandaque teſtatoris voluntas. *l.* 11. §. 19. *in f. ff. de legat.* 3.

Etiam hoc modo, cupio des, opto des, credo te daturum, fideicommiſſum eſt. *l.* 115. *ff. de leg.* 1. *l.* 118. *eod.*

Omne verbum ſignificans teſtatoris legitimum ſenſum legare vel fideicommittere volentis, utile atque validum eſt: ſive directis verbis, quale eſt *jubeo* forte, ſive precariis utatur teſtator, quale eſt *rogo, volo, mando, fideicommitto. l.* 2. *C. comm. de legat. & fid. l.* 67. §. *ult. ff. de legat.* 2. See the forty ſeventh Article of the eighth Section of Teſtaments.

V.

5. *Divers manners of Diſpoſitions which have the Nature of a Fiduciary Subſtitution. Example.*

As to the different manners of Diſpoſitions which have the nature of Fiduciary Subſtitutions, this Diverſity depends on the Will of the Teſtator *e*; who may, for example, either make a ſimple Fiduciary Bequeſt, charging his Executor, or a Legatee, to reſtore to ſuch a one a Land or Tenement, or other Thing; or forbid the Alienation of a Fief or other Eſtate out of his own Family, or that of his Executor, or of a Legatee, to whom he had deviſed it: for this Prohibition to alienate the ſaid Fief or Eſtate would imply a Subſtitution in favour of thoſe of that Family to which the ſame was appropriated *f*.

e See the Articles which follow.
f See the twelfth Article.

VI.

6. *One may make a Fiduciary Subſtitution in favour of Perſons to be born.*

One may make a Fiduciary Subſtitution of a particular Thing either in favour of certain Perſons, naming them, or of Perſons that are not as yet born, but who may be born *g*, or even indefinitely in favour of a Perſon who ſhall be choſen out of a Family by the Executor, or the Legatee, who is charged with the Fiduciary Subſtitution *h*.

g See the thirteenth Article of the ſecond Section of Heirs and Executors in general; the twenty ſecond and twenty third Articles of the ſecond Section of Teſtaments, and the third Article of the ſecond Section of Legacies.

h Peto de te uxor chariſſima uti cum morieris, hæreditatem meam reſtituas filiis meis vel uni eorum. *l.* 57. §. 2. *ff. ad Senat. Trebell.*

VII.

7. *Order of the Fiduciary Subſtitutes, if there be ſeveral to ſucceed ſucceſſively.*

If the Fiduciary Subſtitution reſpects ſeveral Perſons who are called ſucceſſively one after another, the Subſtitutes will ſucceed in the Order regulated by the Teſtator, if he has given any Directions about it, or according as they ſhall be called by the Executor or Legatee, who is charged with the Fiduciary Subſtitution, if the Teſtator has left him the Liberty to regulate the Order of their

their ſucceeding, which depends on the following Rules *i*.

i See the following Articles.

VIII.

8. Different manners of regulating this Order.

The Teſtators may regulate differently the Order of the Fiduciary Subſtitutes according to their different Intentions. Thus, a Teſtator may name them every one in the Rank which he pleaſes to give them. Thus, he may without naming them, point them out by ſome Deſcription, ſuch as the eldeſt Males of his Deſcendants. Thus, he may ſimply ſubſtitute thoſe of his Family. And what he may do with reſpect to his Children and Deſcendants, or thoſe of his own Family, he may likewiſe do the ſame with reſpect to the Children either of the Family of his Executor, or of that of a Legatary, if he ſubſtitutes to him *l*.

l See the Texts cited on the following Article.

IX.

9. A Fiduciary Subſtitution made indefinitely either to one of a certain Family, or to a certain Family.

If the Fiduciary Subſtitution be indefinite in favour of ſome one Perſon of a Family, whom the Teſtator had not any other way deſcribed, as if he had charged his Executor, or a Legatee, having Children or Grandchildren, to leave to one of them a Houſe, or ſome other Tenement; this undetermined Fiduciary Subſtitution would leave it to the Executor or Legatee who is charged with it, to make choice of the Perſon: And he would fulfil the ſame by leaving the ſubſtituted Goods to any one of the Family *m* whom he ſhould pleaſe to pitch on, even altho he ſhould leave it to the remoteſt of the Family, preferring him to thoſe who were in a nearer Degree *n*. But if the Fiduciary Subſtitution were not limited to one of the Family; as, if the Teſtator had ſubſtituted indefinitely thoſe of his own Family, or of the Family of the Executor, or of the Legatee, thoſe of the ſaid Family who ſhould happen to be in the neareſt Degree, would exclude the moſt remote, and thoſe who ſhould happen to be in the ſame Degree, would ſucceed jointly, unleſs there ſhould be ground to judge otherways of the Intention of the Teſtator by Circumſtances which might diſcover the ſame *o*.

m Unum ex familia, propter fideicommiſſum à ſe cum moreretur relictum, hæres eligere debet. *l.* 67. *ff. de legat.* 2.

n Si cum forte tres ex familia eſſent ejus, qui fideicommiſſum reliquit, eodem vel diſpari gradu, ſatis erit uni reliquiſſe. Nam poſtquam paritum eſt voluntati, cæteri conditione deficiunt. *d. l.* 67. §. 2. Verum eſt enim in familia reliquiſſe, licet uni reliquiſſet. *l.* 114. §. 17. *ff. de legat.* 1.

o In fideicommiſſo quod familiæ relinquitur, hi ad petitionem ejus admitti poſſunt, qui nominati ſunt: aut poſt omnes eos extinctos, qui ex nomine defuncti fuerint eo tempore, quo teſtator moreretur, & qui ex his primo gradu procreati ſint, niſi ſpecialiter defunctus ad ulteriores voluntatem ſuam extenderit. *l.* 32. §. *ult. ff. de legat.* 2.

Quid ergo, ſi non ſint ejuſdem gradus? ita res temperari debet, ut proximus quiſque primo loco videatur invitatus. *l.* 69. §. 3. *eod.*

¶ We have added at the end of the Article the Temperament of the Intention of the Teſtator. For if, for example, a Perſon of great Quality had ordained that a Land which had been erected into a Title of a Dutchy, County, or Barony, ſhould remain in his Family, it would be preſumed that his Intention was to appropriate the ſame to the eldeſt Heirs Male, and not to leave a Handle for Law-Suits and Wrangling by the Diviſion of an Eſtate of this kind. As to which it may be obſerved, that it is very difficult for a Caſe of ſuch a Subſtitution to fall out, ſo indefinite as not to diſtinguiſh neither the Degrees, nor the eldeſt of each Degree, nor the Males from the Females; for thoſe who make Subſtitutions do not uſually fail to make theſe Diſtinctions. But if a Teſtator had failed to do it, the Rule explained in this Article would point out the Order of the Subſtitutes, and would diſtinguiſh thoſe who are called either jointly together, or by preference; and even in Caſes where the Teſtators have explained themſelves the moſt clearly, there may fall out Events in which the Uſe of this Rule may be neceſſary.

X.

10. If the Executor who was to chuſe the Fiduciary Subſtitute out of ſeveral, did not make the Choice, they will all of them have a Share in the ſubſtituted Goods.

If in the Caſe of the preceding Article the Executor, or the Legatee, who was to chuſe the Subſtitute, ſhould happen to die without having named him, the ſubſtituted Goods would belong in common to all thoſe among whom the Choice was to be made. For ſeeing no one of them would have more Right than the other, and that there would remain no body to diſtinguiſh them, the Teſtator, who was the only Perſon who could give Direction therein, not having done it, but having conſidered them all alike, they would be all of them called together; and if there remained only one of them, he would have

have the whole *p*.

p Rogo fundum, cum morieris, reſtituas ex libertis cui voles: quod ad verba attinet, ipſius erit electio. Nec petere quiſquam poterit quamdiu præferri alius poteſt, defuncto eo priuſquam eligat, petent omnes. Itaque eveniet, ut quod uni datum eſt, vivis pluribus unus petere non poſſit, ſed omnes petant, quod non omnibus datum eſt. Et ita demum petere poſſit unus, ſi ſolus moriente eo ſuperſuit. *l.* 67. §. 7. *ff. de legat.* 2.

XI.

11. *The Fiduciary Subſtitute who is choſen by the Executor, derives his Right only from the Teſtator.*

The Fiduciary Subſtitute, who has been named by the Executor who had the power of chuſing him from among others, derives his Right only from the Teſtator, and not from the Perſon who has choſen him, altho it was in his power not to have named him. Which hath this effect, that if, for example, this Executor having declared this Choice by his Teſtament, had therein bequeathed to the Perſon whom he then named for the Subſtitute, the Thing which was ſubject to the Fiduciary Subſtitution, it would not be in effect a Legacy. For he would not thereby give any thing that were his own, ſince he would only leave what he was obliged to reſtore, having only the liberty of chuſing the Perſon to whom he was to reſtore it. Thus, he could much leſs impoſe on this Fiduciary Subſtitute any Condition, or any Charge *q*.

q Unum ex familia, propter fideicommiſſum à ſe cum moreretur, relictum hæres eligere debet: ei, quem elegit, fruſtra teſtamento ſuo legat, quod, poſteaquam electus eſt, ex alio teſtamento petere poteſt. *l.* 67. *ff. de legat.* 2.

Non enim facultas neceſſariæ electionis, propriæ liberalitatis beneficium eſt. Quid eſt enim quod de ſuo videatur reliquiſſe qui quod relinquit, omnimode reddere debuit. *d. l.* §. 1. *in f.*

Plurimum enim intereſt, utrum in poteſtate ejus, quem teſtator obligari cogitat, faciat, ſi velit dare, an poſt neceſſitatem dandi, ſolius diſtribuendi liberum arbitrium concedat. *l.* 7. §. 1. *ff. de reb. dub.*

XII.

12. *The Prohibition to alienate does not oblige, unleſs it be made in favour of ſome Perſon.*

What has been ſaid in the fifth Article, that the Prohibition to alienate may imply a Fiduciary Subſtitution, ought to be underſtood of a Prohibition that has ſome Cauſe, and which is in favour either of a Family, or of a Perſon to whom the Teſtator intended that the Thing of which he had prohibited the Alienation ſhould go. For a bare Prohibition to an Executor, or to a Legatee, to alienate certain Lands or Tenements, without having ſome regard to the Children of the ſaid Executor, or the ſaid Legatee, or to other Perſons, would have no manner of effect, and would be no Obſtacle why the ſaid Executor or Legatee might not juſtly alienate Lands that would be his in ſuch a manner, as that no other Perſon would have any Right, or Expectation, or Intereſt whatſoever in them by the Will of the Teſtator *r*.

r Divi Severus & Antoninus reſcripſerunt, eos, qui teſtamento vetant quid alienari nec cauſam exprimunt, propter quam id fieri velint. Niſi invenitur perſona cujus reſpectu hoc à teſtatore diſpoſitum eſt, nullius eſſe momenti ſcripturam; quaſi nudum præceptum reliquerint: quia talem legem teſtamento non poſſunt dicere. Quod ſi liberis, aut poſteris, aut libertis, aut hæredibus, aut aliis quibuſdam perſonis conſulentes, ejuſmodi voluntatem ſignificarent, eam ſervandam eſſe. *l.* 114. §. 14. *ff. de legat.* 1.

XIII.

13. *The Prohibition to alienate certain Lands, and to diſpoſe of them out of the Family, does not take away the Choice of one of the Family.*

If a Teſtator, naming for his Executor his Son who had Children, had forbidden him to alienate certain Lands, requiring him to leave them in his Family; this Executor could not give away the ſaid Lands to others than his Children; but he might leave them to any one of his Children whom he ſhould pleaſe to name. For by leaving them to one, it would ſtill be in the Family that he had left them. And altho the Perſons ſubſtituted ſhould be the Deſcendants of this Teſtator, and that he had an equal Affection for them all, yet his Expreſſion would mark that he left it to his Son to chuſe any one of his own Children, and that what he had in view was only to appropriate the ſaid Lands to his Family, to prevent their going to any other Family, whether it were by an Alienation or other Diſpoſition of the Executor who is charged with the Subſtitution *s*.

s Cum pater, filio hærede inſtituto, ex quo tres habuerat nepotes, fideicommiſit, ne fundum alienaret, & ut in familia relinqueret: & filius decedens duos hæredes inſtituit, tertium exhæredavit, eum fundum extraneo legavit: Divi Severus & Antoninus reſcripſerunt verum eſſe non paruiſſe voluntati defuncti filium. *l.* 114. §. 15. *ff. de legat.* 1.

Verum eſt in familia reliquiſſe, licet uni reliquiſſet. *d. l.* 114. §. 17. See the ninth Article, and the Remark which is made on it.

XIV.

14. *The Fiduciary Subſtitute ought to have either the Thing ſubject to the Subſtitution, or its value.*

If an Executor or a Legatee were charged with a Fiduciary Bequeſt, which could not be otherways performed than by giving to the Subſtitute the Value of that which the Teſtator intended ſhould be given him; this Value would be due to him from the ſaid Executor or Legatee. Thus, for example, if he were charged to buy a certain Houſe, or certain Lands, for the Fiduciary

ciary Subſtitute, and the Proprietor of the ſaid Houſe or Lands would not ſell them, he would owe the Price of them. Thus, for another example, if he were charged to inſtruct a young Man in a Trade, of which ſome accident had render'd him incapable, as if he was fallen lame, or become blind, this Fiduciary Bequeſt would be eſtimated in Money *t*.

t Cum per fideicommiſſum aliquid relinquitur, ipſum præſtandum, quod relictum eſt. Cum vero ipſum præſtari non poteſt, æſtimationem eſſe præſtandam. *l.* 11. §. 17. *ff. de legat.* 3.

Si cui legatum relictum eſt, ut alienam rem redimat, vel præſtet: ſi redimere non poſſit, quod dominus non vendat, vel immodico pretio vendat, juſtam æſtimationem inferat. *l.* 14. §. 2. *eod.*

XV.

15. *The Fruits and Intereſt of the ſubſtituted Goods are due from the time of the delay.*

The Executor or Legatee who is charged with a Fiduciary Subſtitution of a particular thing, owes the Fruits and Intereſt thereof from the time that he delays to acquit it after it is due, in the ſame manner as the Executor who is charged with a Fiduciary Subſtitution of the Inheritance, purſuant to the Rnle explained in the ninth Article of the firſt Section; and he is alſo liable to Damages purſuant to the ſame Rule, if there ſhould be room for ſuch a Demand *u*.

u Is qui fideicommiſſum debet, poſt moram non tantum fructus, ſed etiam omne damnum quo affectus eſt fideicommiſſarius; præſtare cogitur. *l.* 26. *ff. de legat.* 3. *See the third Article of the eighth Section of Legacies, and the Remark there made upon it; as alſo the ninth Article of the firſt Section of this Title.*

XVI.

16. *The Executor cannot revoke the Payment of the Fiduciary Bequeſt, which proves null if he has once acquitted it.*

If there were ſome Nullity in the Formalities of the Teſtament, or ſome other Defect, which would annul the Fiduciary Bequeſt, and the Executor who was charged with it had acquitted it; he could not oblige the Fiduciary Subſtitute to reſtore back to him that which he had willingly paid; and the Pretext that the Fiduciary Bequeſt was not due, would be uſeleſs. For he would by that Payment only have fulfilled more faithfully the Intention of his Benefactor *x*.

x Et ſi inutiliter fideicommiſſum relictum ſit, attamen ſi hæredes comperta voluntate defuncti, prædia ex cauſa fideicommiſſi avo tuo præſtiterunt: fruſtra ab hæredibus ejus de ea re quæſtio tibi movetur, cum non ex ea ſola ſcriptura, ſed ex conſcientia relicti fideicommiſſi, defuncti voluntati ſatisfactum eſſe videatur. *l.* 2. *C. de fideic.*

XVII.

If a Legatary being charged with a Fiduciary Bequeſt out of his Legacy, it ſhould happen that the thing ſubſtituted could not be reſtored, as if the Subſtitute were become incapable of it, or by reaſon of ſome other Event; the Executor could not pretend that this Fiduciary Bequeſt which proves uſeleſs ought to return to him, but the Legatary would reap the Benefit of it. For it was a Charge upon his Legacy, which ceaſes in his favour *y*.

17. *The Legatary charged with a Fiduciary Bequeſt which proves to be null, reaps the Benefit of it, and not the Executor.*

y Fideicommiſit ejus cui duo millia legavit, in hæc verba: *a te Petroni peto, uti ea duo (millia) ſolidorum reddas collegio cujuſdam templi.* Quæſitum eſt, cum id collegium poſtea diſſolutum ſit, utrum legatum ad Petronium pertineat, an vero apud hæredem remanere debeat. Reſpondit, Petronium jure petere: utique ſi per eum non ſtetit, parere defuncti voluntati. *l.* 38. §. 6. *ff. de legat.* 3.

SECT. III.

Of ſome Rules common to Fiduciary Subſtitutions of an Inheritance, and to thoſe of particular Things, and to tacit Fiduciary Subſtitutions.

WE muſt not confine the Rules that are common to theſe two ſorts of fiduciary Subſtitutions to the Rules which ſhall be explained in this Section; for it is eaſy to judge that the Rules for the Interpretation of Teſtaments, and many others that have been explained in ſeveral Places, may be applied to them. But we have put down in this Section ſome Rules that are not ſo general, and which agree more particularly to theſe two ſorts of Fiduciary Subſtitutions.

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I.

1. *One may ſubſtitute either one Perſon alone, or many.*

All Subſtitutions or fiduciary Bequeſts, whether they be univerſal, of the whole Inheritance, or particular, of certain things, may be made either in favour of one Perſon alone, or of many, whom the Teſtator calls to the Succeſſion, that they may divide it among them, whether it be in equal or unequal Shares *a*.

a Plures in unius locum poſſunt ſubſtitui. §. 1. *inſt. de vulg. Subſt.*

Altho this Text relates chiefly to the Vulgar Subſtitution, yet it may be applied to the Fiduciary Subſtitution, and the Teſtator has the ſame Liberty in this as in the other.

II.

2. *One may ſubſtitute in one or more Degrees.*

Whether there be only one Subſtitute or many, the Subſtitution may either end with the firſt Degree, or be extended to ſeveral Degrees from one Subſtitute to another ſucceſſively. And the Subſtitution becomes open to every Degree, when the Perſon who filled the preceding Degree happening to fail, another ſucceeds in his Place *b*.

b Poteſt autem quis in teſtamento ſuo plures gradus hæredum facere. *Inſt. de vulg. ſubſt.*

The ſame Remark is to be made on this Text, as has been made on the preceding Article.

See concerning the Degrees of Subſtitutions the Preamble of the firſt Section.

III.

3. *One may ſubſtitute the ſame Perſons which may be inſtituted Executors.*

All Perſons who are capable of ſucceeding, are alſo capable of being ſubſtituted. Thus one may ſubſtitute as well as inſtitute Children not yet born, Perſons unknown to the Teſtator, but whom he ſufficiently deſcribes in order to diſtinguiſh them; and in general one may ſubſtitute all Perſons, who at the time that the Subſtitution becomes open may be in a Condition to reap the Benefit of it, and in whom there is no manner of Incapacity *c*.

c See the firſt Article, and the thirteenth Article of the ſecond Section of Heirs and Executors in general; the firſt, ſeventeenth, twenty ſecond, twenty third, twenty fourth, and twenty fifth Articles of the ſecond Section of Teſtaments; and the third Article of the ſecond Section of Legacies.

IV.

4. *Perſons incapable of Fiduciary Subſtitutions.*

We muſt reckon in the number of Perſons incapable of Fiduciary Subſtitutions, all thoſe to whom the Laws prohibit the giving of any thing by a Teſtament: Which takes in not only Strangers who are called Aliens, and thoſe who are civilly dead, whether it be by a Sentence of Condemnation which ought to have this Effect, or by a Profeſſion of ſome Religious Order; but alſo all other Perſons to whom ſome Law, or ſome Cuſtom, forbids us to give any thing *d*.

d See the ſecond Section of Heirs and Executors in general, and the Preamble to the ſame Section.

V.

5. *Tacit Fiduciary Subſtitutions are forbidden.*

Seeing thoſe who intend to make Diſpoſitions that are prohibited, make uſe of other Perſons Names, to whom they give, that they may reſtore it to thoſe to whom they cannot give, we give the Name of tacit Fiduciary Subſtitutions to theſe ſecret Diſpoſitions, which in outward Appearance regard the Perſons whoſe Names are made uſe of, and which in reality and in ſecret are intended for thoſe to whom the Law forbids to give. And theſe ſorts of Fiduciary Bequeſts or Subſtitutions are unlawful, as much as a Diſpoſition would be, in which the Perſons to whom it is not lawful to give, had been expreſly named *e*.

e See the Texts cited on the following Article.

VI.

6. *The Crime of thoſe Perſons who lend their Names to tacit Fiduciary Subſtitutions.*

The Perſons who lend their Names to theſe tacit Fiduciary Subſtitutions or Bequeſts, whether they engage themſelves by Writing, or by Word of Mouth, or in whatever manner it be that they receive any thing with deſign to reſtore it

it to the Perſons to whom the Teſtator could not give, are conſidered in the Eye of the Law as if they had ſtole that which they may receive by virtue of ſuch a Diſpoſition: And they are ſo far from being under an Obligation thereby to reſtore what they have received, to the Perſons whom the Teſtators had in their view, that they contract no other Engagement than to reſtore to the Executors that which they may have received on that account, together with the Fruits and Intereſt thereof that were fallen due even before the Demand *f*.

f Prædonis loco intelligendus eſt qui tacitam fidem interpoſuerit, ut non capienti reſtitueret hæreditatem. *l.* 46. *ff. de hæred. petit.*

Eum qui tacitum fideicommiſſum in fraudem legis ſuſcepit, eos quoque fructus, quos ante litem motam percepit, reſtituere cogendum, reſpondit, quod bonæ fidei poſſeſſor fuiſſe non videtur. *l.* 18. *ff. de his quæ ut ind.*

In tacitis fideicommiſſis fraus legi fieri videtur, quoties quis neque teſtamento, neque codicillis rogaretur, ſed domeſtica cautione, vel chirographo obligaret ſe ad fideicommiſſum præſtandum ei, qui capere non poteſt. *l.* 103. *ff. de legat.* 1.

In fraudem juris fidem accommodat, qui vel id quod relinquitur, vel aliud tacite promittit reſtituturum ſe perſonæ quæ legibus ex teſtamento capere prohibetur: ſive chirographum eo nomine dederit, ſive nuda pollicitatione repromiſerit. *l.* 10. *ff. de his quæ ut indig.*

VII.

7. *How tacit Fiduciary Subſtitutions are proved.*

The tacit Fiduciary Subſtitutions and Bequeſts may be proved not only by Writings, if there are any; but likewiſe by the other ſorts of Proofs, according to the Rules which have been explained in the Title relating to this Matter *g*.

g Tacita fideicommiſſa frequenter ſic deteguntur, ſi proferatur chirographum, quo ſe caviſſet cujus fides eligitur, quod ad eum ex bonis defuncti pervenerit, reſtituturum: ſed & ex aliis probationibus manifeſtiſſimis idem fit. *l.* 3. §. 5. *ff. de jur. fiſci.*

¶ It is neceſſary to obſerve on this Article, and on the Text that is here quoted, that there is a Difference between our Uſage and the *Roman* Law, as to tacit Fiduciary Bequeſts or Subſtitutions; which conſiſts in this, that by the *Roman* Law the Exchequer reaped the Benefit of a tacit Fiduciary Bequeſt which was made in favour of a Perſon to whom it was not lawful to give, and that by our Uſage it is the Heir or Executor who has the Advantage thereof. Thus they were more reſerved under the *Roman* Law than we are in *France*, as to the Proofs of tacit Fiduciary Bequeſts, and in order to avoid the favouring of the Cauſe of the Exchequer too much, they required a ſtrict Proof of the Fraud, as appears from the Text quoted on the Article; and we ſee in another Text, that Preſumptions, which might ſerve as Proofs in our Uſage, were not ſufficient. It was in the Caſe of a Teſtament of a Husband, who had inſtituted for his univerſal Heir or Executor his Wife's Father. The Queſtion was, whether it was not a Fraud againſt the Laws which were then in force, and which did not ſuffer in certain Caſes the Husband to make his Wife his univerſal Heireſs or Executrix *a*: and it is decided in that Law, that the bare Conſideration of the paternal Affection, which united this Teſtator's Father-in-Law to his Wife, to whom he could not leave all his Eſtate, was not a ſufficient Preſumption that it was a tacit Fiduciary Bequeſt, made with a view that the Eſtate ſhould be reſtored to the Teſtator's Widow. *Si gener ſocerum hæredem reliquerit, taciti fideicommiſſi ſuſpicionem ſola ratio paternæ Affectionis non admittit b.* If the like Queſtion ſhould happen in the Provinces, which are governed by their peculiar Cuſtoms, where the Huſband cannot give any thing to the Wife, nor the Wife to the Husband, they would reject this Preſumption, as it might be rejected when the Intereſt only of the Exchequer was concerned; and on the contrary they would have great regard to the ſaid Preſumption, not only in conſideration of the Underſtanding which might be preſumed to be between the Father and the Daughter, but likewiſe for this other Reaſon, which ſome Cuſtoms have eſtabliſhed by an expreſs Law, that Perſons who are not allowed to give to one another by their Teſtaments, ſuch as the Huſband to the Wife, the Wife to the Huſband, are as much tied up from giving to other Perſons to whom the Husband and Wife may ſucceed. Thus the Prohibition of Diſpoſitions made by Minors in their Teſtaments in favour of their Tutor or Guardian, is extended to his Children; and this is expreſly regulated ſo by ſome Cuſtoms.

a Ult. Tit. 15. *&* 16.
b l. 25. *ff. de his qua ut ind.*

VIII.

8. *One cannot reſtore the Goods that are ſubſtituted before the time of the Subſtitution*

The Executor or Legatary, who is charged with a Fiduciary Subſtitution, is not tied up to wait for the time in which the Subſtitution is to take place, and he may reſtore before-hand to the Subſtitute the Goods which are ſubject to the Fiduciary Subſtitution, provided that

comes, if the too precipitate Reſtitution turns to the prejudice of the Subſtitute.

that it be without prejudice to the Intereſt of other Perſons, as has been explained in another place *h*, and provided alſo that this precipitate Reſtitution do not turn to the Damage of the Fiduciary Subſtitute, contrary to the Intention of the Teſtator. For if, for example, a Teſtator had charged his Executor, or a Legatary, with a Fiduciary Bequeſt of a yearly Penſion, to be paid to ſome poor Perſon for his Maintenance, or of a Sum of Money payable after a certain time, to be laid out to ſome Uſe for the benefit of the Perſon for whom the ſaid Fiduciary Bequeſt was intended, ſuch as the bringing him up to ſome Trade, or the giving of a Marriage Portion to a poor young Woman; he who ſhould be charged with theſe Fiduciary Bequeſts, could not in the firſt Caſe advance in one Payment all the ſeveral yearly Sums which were deſtined for Alimony, unleſs ſome Circumſtances ſhould render this advancing of the Payment more profitable to the Perſon for whom the ſaid Alimony was bequeathed: And in the ſecond Caſe, if the Perſon for whoſe benefit the Fiduciary Bequeſt was made, were not as yet of Age ſufficient to learn a Trade, or the ſaid young Woman ripe for Marriage, the advanced Payment, without the Precaution of taking Security that the Money ſhould be applied to the Purpoſes for which it was deſigned, would not acquit the Executor who had paid it. But if the Term for the Payment of the Legacy in Truſt, were only in favour of the Executor, and that no other Perſons had any Intereſt therein, he might without difficulty pay the ſame before the Term *i*.

h See the ſeventeenth and eighteenth Articles of the tenth Section of Legacies.

i Javolenus eum qui rogatus poſt decem annos reſtituere pecuniam ante diem reſtituerat, reſpondit: ſi propter capientis perſonam, quod rem familiarem tueri non poſſet, in diem fideicommiſſum relictum probetur, ut perdituro ei id hæres ante diem reſtituiſſet nullo modo liberatum eſſe. Quod ſi tempus hæredis cauſa prorogatum eſſet, & commodum medii temporis eſſe ſentiret: liberatum eum intelligi. Nam & plus eum præſtitiſſe, quam debuiſſet. *l.* 15. *ff. de ann. leg.*

IX.

9. A Donation has the Effect of an Election of a Subſtitute, whom the Donor was impowered to chuſe.

If he who was charged with a Fiduciary Bequeſt or Subſtitution at the time of his Death, in favour of ſome one of his Children whom he ſhould think fit to chuſe, had given in his Life-time to one of his Children the Things which were ſubject to this Fiduciary Bequeſt; this Donation would be in the place of an Election, if the ſame were not revoked. For altho that the Liberty of this Choice ought to laſt until the Death of the Perſon charged with this Fiduciary Subſtitution, and that it would be the Intereſt of all the Children that the ſaid Donation ſhould not deſtroy the ſaid Liberty; yet it would be ſufficient that the Donee had been made choice of, and that the ſaid Choice had not been revoked; ſeeing the ſaid Choice would be confirmed by the Will of him, who, having it in his power to make another Choice, had not done it. So that it would be the ſame thing, as if this Choice had been made at the time of his Death *l*.

l A filia pater petierat, ut *cui vellet ex liberis ſuis, prædia cum moreretur, reſtitueret.* Uni ex liberis prædia fideicommiſſi viva donavit. Non eſſe electionem, propter incertum diem fideicommiſſi, certæ donationis videbatur, nam in eum deſtinatio dirigi poteſt, qui fideicommiſſum inter cæteros habiturus eſt, remota matris electione. *l.* 77. §. 10. *ff. de leg.* 2.

X.

10. The Bounds of the Liberty to give to one of the Subſtitutes more than to the others.

If a Teſtator, having inſtituted his Son his Heir or Executor, had charged him to reſtore to his Children his Inheritance, praying him at the ſame time to give to one of them whom he ſhould name to him, ſomething more than would fall to the Share of the others; the ſaid Executor would not have an indefinite Liberty to give to this Son the greateſt part of the Inheritance, but only a power to regulate and ſettle ſome ſmall Advantage for him that would not make too great an Inequality between him and the others *m*.

m Pater cum filia pro ſemiſſe hærede inſtituta, ſic teſtamento locutus fuerat: *Peto, cum morieris, licet alios quoque filios ſuſceperis, Sempronio nepoti meo plus tribuas in honorem nominis mei.* Neceſſitas quidem reſtituendi nepotibus viriles partes, præcedere videbatur. Sed moderandæ portionis, quam majorem in unius nepotis perſonam conferri voluit, arbitrium filiæ datum. *l.* 76. §. 5. *ff. de legat.* 2.

XI.

11. Order of the Subſtitutes in divers Degrees.

If a Father who had ſeveral Children, having inſtituted his Wife his Executrix, had intreated her to reſtore his Inheritance to their Children, or to ſuch of them as ſhould happen to be alive, or to reſtore it to their Grandchildren, or to any one of them whom ſhe ſhould chuſe, or to ſome one of his Family whom ſhe ſhould name; a Diſpoſition conceived in theſe Terms would not leave to the ſaid Executrix an indefinite Liberty to chuſe whomſoever ſhe ſhould think fit from among

theſe three ſorts of Subſtitutes. But this Expreſſion would call in the firſt place all the Children of the firſt Degree, and they would all of them be preferred to all the Grandchildren of the Teſtator; and in default of the Children, ſhe might chuſe among the Grandchildren, but could not prefer to them the collateral Relations, whom ſhe could not call to the Succeſſion but in default of the Children and Grandchildren *n*.

n Peto de te, uxor cariſſima, (uti) cum morieris, hæreditatem meam reſtituas filiis meis, vel uni eorum, vel nepotibus meis, vel cui volueris, vel cognatis meis, ſi cui voles ex tota cognatione mea. Inter filios reſpondi ſubſtitutionem fideicommiſſi factam videri. Circa nepotes autem, (&) cæteros cognatos, facultatem eligendi datam, ex cæteris autem cognatis, ſi nepotes ſupereſſent, non recte mulierem electuram, propter gradus fideicommiſſi præſcriptos. Deficiente vero gradu nepotum, ex cognatis, quam velit perſonam eligi poſſe. *l.* 57. §. 2. *ff. ad Senat. Trebell.*

What is ſaid here of the Choice from among the Grandchildren, muſt be underſtood without prejudice to their Legitime or Child's Part.

XII.

12. *The Parties who are mutually ſubſtituted to one another, may renounce the mutual Subſtitution.*

If two Brothers who are ſubſtituted reciprocally to one another, in caſe one of them ſhould die without Iſſue, had agreed between themſelves that the Subſtitution or Fiduciary Bequeſt ſhould have no effect, this Agreement would annul the Suſtitution. For they might diſcharge one another from it, that each of them might poſſeſs freely that which his Father had left him, and that neither of them might have any Temptation to wiſh for the other's Death. Which Conſideration renders ſuch an Agreement ſo favourable, that Minority alone would not be ſufficient to ſet it aſide, unleſs it ſhould appear by the Circumſtances that one of the Parties had ſuſtained Damage by the Agreement *o*.

o De fideicommiſſo a patre inter te & fratrem tuum viciſſim dato, ſi alter veſtrum ſine liberis exceſſerit vita, interpoſita tranſactio rata eſt: cum fratrum concordia, remoto captandæ mortis alterius voto improbabili, retineiur. Et non poteſt eo caſu reſcindi, tanquam circumventus ſis: cum pacto tali conſenſeris: neque eam, cui ſubveniri ſolet ætatem agere te proponas: nec, ſi ageres, iiſdem illis de cauſis in integrum reſtitutionis auxilium impetrare deberes. *l.* 11. *C. de tranſact.*

Cum proponas, filios teſtamento ſcriptos hæredes rogatos eſſe (ut) *qui primus rebus humanis eximeretur alteri portionem hæreditatis reſtituerit:* Quoniam precariam ſubſtitutionem fratrum conſenſu remiſſam adſeris, fideicommiſſi perſecutio ceſſat. *l.* 16. *C. de pact.*

XIII.

13. *The Preſcription of ſubſtituted Goods runs both againſt the Executor, and likewiſe againſt the Subſtitute.*

If a third Perſon who had honeſtly and fairly poſſeſſed ſome Goods, which were ſubject to a Fiduciary Bequeſt or Subſtitution, for ſo long a time as to acquire a Right by Preſcription, computing therein the time which had run againſt the Executor who was charged with the Fiduciary Subſtitution, the Subſtitute could not deduct that time upon pretence that the Preſcription could not run againſt the Executor to his Prejudice. For the Executor was the Maſter of the Goods, and it was his Buſineſs to enter a Claim, in order to interrupt the Preſcription: And the Subſtitute might likewiſe on his part have watched for his own Intereſt. And it would be the ſame thing if it were ſome Right belonging to the Inheritance, which, for want of a Demand on the part of the Executor, had been loſt by Preſcription *p*.

p Si temporalis actio in hæreditate relicta fuerit, tempus, quo hæres experiri ante reſtitutam hæreditatem potuit, imputabitur ei, cui reſtituta fuerit. *l.* 70. §. *ult. ff. ad Senat. Trebell.* See the eleventh Article of the firſt Section. See the following Article.

We muſt underſtand this and the following Article, of Fiduciary Bequeſts or Subſtitutions which had not been publiſhed or inrolled, purſuant to the Ordinances which have been taken notice of at the end of the Preamble of this Title. For if a Subſtitution of a Land, for inſtance, had been inrolled, the Right of the Subſtitutes would be preſerved againſt all Purchaſers and other Occupiers.

XIV.

14. *The Preſcription of Lands ſubſtituted, which are alienated by the Uſufructuary, diveſts the Subſtitute of the Property thereof.*

If a Legatary of an Uſufruct of Lands, which are ſubject to a Fiduciary Subſtitution, had diſpoſed of the Property of the ſaid Lands by his Teſtament, in favour of a Perſon who, being ignorant of the Fiduciary Subſtitution, had poſſeſſed the ſaid Lands during the time required for Preſcription; this Poſſeſſor could not any more be moleſted in his Poſſeſſion by the Subſtitute *q*.

q Sticho teſtamento manumiſſo, fundi uſusfructus erat legatus: &, cum is uti fruique deſiſſet, fidei hæredum teſtator commiſit, uti eum fundum darent Lucio Titio. Sed Stichus teſtamento ſuo ejuſdem fundi proprietatem nepotibus ſuis legavit. Et hæredes Stichi ex teſtamento ejus legatariis nepotibus eum fundum tradiderunt. Quæſitum eſt cum nepotes legatarii ignoraverint conditionem fundi ſupra ſcripti priore teſtamento datam, & pluſquam tempore ſtatuto poſſederint, an eum fundum ſibi adquiſierint. Reſpondit, ſecundum ea quæ proponerentur, legatarios ſibi adquiſiſſe. *l.* 36. *ff. de uſu & uſuf. & red. legat.*

We muſt make the ſame Remark on this Article, which has been made on the preceding.

XV.

15. *The Fiduciary Subſtitution after*

If it ſhould happen that the Executor or Legatee, who is charged with a Fiduciary Subſtitution that ought to take

the Death of the Executor or Legatary, is not open by their civil Death.

take place at his Death, ſhould fall into a State of Civil Death, whether it were by a Sentence of Death, or by a Condemnation to ſome other Puniſhment, which would be attended with the Confiſcation of his Goods; this Civil Death and this Confiſcation would not lay open the Fiduciary Subſtitution. For beſides that the Subſtitution would be underſtood only of a Natural Death, and that the Subſtitute might die before the Executor or Legatee, it might ſo happen that the Sentence of Condemnation might be annulled by an Act of Grace of the Prince, and that ſo this Executor or Legatee being reſtored to his former State and Condition, would enter again to the Poſſeſſion of his Goods, or might acquire others. Thus, this Fiduciary Subſtitute could not demand the Goods that are ſubſtituted. But it would be juſt in ſuch a Caſe, that Proviſion ſhould be made for the Securiy of the ſubſtituted Goods, by Precautions to be taken between the Fiduciary Subſtitute and thoſe to whom the ſubſtituted Goods ſhould go *r*.

r Cornelio Felici mater ſcripta hæres rogata erat reſtituere hæreditatem poſt mortem ſuam, cum hæres ſcripta condemnata eſſet a fiſco, & omnia bona mulieris occuparentur; dicebat Felix, ſe ante pœnam eſſe? hoc enim conſtitutum eſt. Sed ſi nondum dies fideicommiſſi veniſſet, quia poſſet ipſe prius mori, vel etiam mater alias res acquirere, repulſus eſt interim a petitione. *l.* 48. §. 1. *ff. de jure fiſci.*

As to the Precautions mentioned in the Article, ſee the third Article of the ſecond Section of the Falcidian Portion.

XIV.

16. The Subſtitution to an Executor, or Legatee, in caſe he ſhould die without Iſſue, remains without any effect, if he leaves Children behind him.

If an Executor or Legatee were charged with a Fiduciary Bequeſt or Subſtitution, in caſe he ſhould happen to die without Iſſue, and that he had Children who ſurvived him, this Fiduciary Subſtitution would remain without any effect. And even altho theſe Children ſhould renounce the Succeſſion of their Father, yet the Subſtitute would have no Right, becauſe the Condition of the Fiduciary Subſtitution would not be accompliſhed, and becauſe the Intention of this Teſtator was not to engage the ſaid Children to become Heirs to their Father, but to leave to him the free Uſe and Diſpoſal of the ſubſtituted Goods, in caſe he had Children *s*.

s Cum erit rogatus, *ſi ſine liberis deceſſerit*, per fideicommiſſum reſtituere, conditio defeciſſe videbitur, ſi patri ſupervixerint liberi. Nec quæritur, an hæredes extiterint. *l.* 114. §. 13. *ff. de leg.* 1. *l.* 1. *C. de cond. inſ. v. l.* 6. §. 2. *C. ad Senat. Trebell. l.* 85. *ff. de hæred. inſt.*

¶ It is not ſo much for the Caſe explained in this Article, that we have added this laſt Rule to this Title, as for the Conſequences which may be gathered from it for reſolving a Queſtion which is commonly propoſed, and which is expreſſed in theſe Terms, to wit, *If the Children who are in the Condition, are in the Diſpoſition*; that is to ſay, if the Children who ſurviving their Father, make the Right of the Subſtitute to ceaſe, are themſelves ſubſtituted.

This Queſtion has divided the Interpreters, the greateſt part of whom have been of opinion, that the Children are ſubſtituted. Others, and among them the moſt able Interpreter of them all, are of a contrary opinion; and to ſupport it, they quote the Text cited on this Article, and ſome others, but without explaining the Conſequences which they gather from them: And ſeeing none of thoſe Texts decide preciſely this Queſtion, and that it is ſo frequently ſtarted, that we cannot well diſpenſe with examining it, it would ſeem that it might be urged againſt the Opinion of thoſe who will have the Children to be ſubſtituted, that the Text cited on this Article, and all the others which decide that the Fiduciary Subſtitution, *in caſe there be no Iſſue*, ceaſes when there is Iſſue, ſeem to imply the Conſequence, that there is no Subſtitution with reſpect to the Children. This Conſequence is not only founded on this Reaſon which is expreſſed in the Texts, that the Condition of the Fiduciary Subſtitution is not come to paſs; for to this one might reply, that this Reaſon reſpects only the Subſtitute; but it it is alſo founded on this, that we ſee that in all the Laws which mention this Caſe, and which decide it after the ſame manner, there is not any one of them in which it has been thought fit to add any Words to this effect, That truly the Fiduciary Subſtitution was null in reſpect of the Subſtitute, but that it would go to the Children, as being comprehended in the Diſpoſition of the Teſtator, and called by him to the ſubſtituted Goods. This Addition ſeems to be ſo natural and ſo neceſſary, that ſeeing none of the Authors of theſe Laws have thought of it, we may conclude from thence that they did not think that the Subſtitution took in the Children. And among theſe Texts there is not one of them where this Addition would have been more natural

ral and more neceſſary than in the Text cited on this Article, and which we have made choice of for that reaſon. For the Circumſtance of the Childrens renouncing their Father's Succeſſion, made it ſtill more neceſſary to have added, That altho they were not Heirs to their Father, yet they would nevertheleſs reap the Benefit of the Fiduciary Subſtitution.

We may add to theſe Reaſons, altho they ſeem to be deciſive enough in themſelves, that if we examine into the Intention of the Teſtator who ſubſtitutes to his Executor, or to a Legatee, *in caſe he has no Children*, it does not ſeem as if he had any the leaſt View of calling the Children to the Subſtitution. For if that had been his Intention, he would have ſubſtituted the Children in the firſt place, and not called another Subſtitute, except in default of them. Thus, when the Teſtator does no other thing, but barely diſpoſe in favour of a Fiduciary Subſtitute, in caſe he have no Children, his Intention appears to be, That in caſe there be Children, their Father ſhall not be any longer charged with the Fiduciary Subſtitution, but ſhall have free Liberty to diſpoſe of the Goods in favour of ſuch of his Children as he ſhall think fit to chuſe, or of other Perſons.

We think that we may venture to ſay in relation to this Queſtion, that the Interpreters who have invented it, have made a doubt of that which the Simplicity of the Principles ſets in a clear and evident Light, and that their Sentiment is contrary to the Rules: And the Author whom we juſt now quoted was of this Opinion, as to this matter *. The Reader may have remarked in ſome Places of this Book ſuch like Opinions of the Interpreters, oppoſite to the Spirit of the Laws. And we make this Reflection here, that we may have an opportunity of obſerving farther, that we ſee in this Queſtion, and in the Sentiment of thoſe Interpreters, a remarkable Example of the Difficulties which they have ſtarted in the matter of Subſtitutions, framing in this manner Queſtions, and deciding them by other Principles than thoſe of the Laws, and taking afterwards their own Deciſions for new Principles, from whence they raiſe and reſolve in the ſame manner other Queſtions. Thus it is that they have perplexed this matter of Subſtitutions, which altho in it ſelf intricate enough, may nevertheleſs be reduced to Principles and Rules that are plain enough, and which are ſufficient for reſolving all the Queſtions that can ariſe, or that can be imagined. It is to theſe Principles, and to theſe Rules, that we have confined our ſelves in this Book, as well as the others, having endeavoured to comprehend therein every thing that is in the Laws, which is conformable both to our Uſage, and to Equity, without leaving out even the particular Caſes which are ſpecified in the Laws, and which may make the Uſe of the Rules eaſier.

* Deficientibus ſuperioribus conjecturis, negarem & pernegarem eos qui ſunt in conditione eſſe in diſpoſitione, ex l. Gallus, &c. *Cujac. conſult.* 35. *Theſe Conjectures taken from the Words of the Teſtament about which this Author was conſulted, make no Alteration in his Opinion touching the general Poſition.*

TIT. IV.

Of the Trebellianick Portion.

BY the Trebellianick Portion is meant the fourth Part, which the Laws appropriate to Executors who are charged with an univerſal Fiduciary Bequeſt of the whole Inheritance, or of a part of it; which diſtinguiſhes the Trebellianick Portion from the Falcidian Portion. For the Falcidian Portion relates to Legacies, and to particular Fiduciary Bequeſts of certain Things.

This fourth Part was called the Trebellianick Portion, becauſe of a Decree of the Senate, which was named thus from the Name of one of the Conſuls of that Year in which it was made, ordaining that the Executor who ſhould be charged to reſtore the Inheritance to the Fiduciary Subſtitute, ſhould be diſcharged of all the Debts and Burdens, and that the ſame ſhould paſs with the Goods to the Subſtitute. But ſeeing the Executors, who had but little or no profit from the Inheritance which they were obliged to reſtore, refuſed to accept it, when they were only to make Reſtitution of it; it was ordained by another Decree of the Senate, that the Executor who ſhould be charged with a Fiduciary Bequeſt of the Inheritance, might retain the fourth Part thereof. But becauſe of ſome Inconveniencies in this laſt Decree of the Senate, which it would be to no purpoſe to mention here, *Juſtinian* confounded the two Decrees of

of the Senate together, giving to the firſt the Effects of them both, in ſuch Parts of them as he intended ſhould ſubſiſt both of the one and the other. So that the Name of Trebellianick Portion has ever ſince been applied to this Fourth Part that is taken out of the Fiduciary Subſtitutions of Inheritances. But this Trebellianick Fourth Part being founded on the ſame Equity, and being of the ſame nature with the Falcidian Portion, or rather being only a ſort of Falcidian Portion, in that it retrenches the Diſpoſitions of a Teſtator who ſhould charge his Executor to reſtore more than three Fourths of the Inheritance; this Affinity between theſe two Fourths has been the Reaſon why the Laws have confounded them together, and that they have even given to the Trebellianick Portion the Name of the Falcidian *a*. And ſeeing for this reaſon the Rules of the Falcidian Portion do almoſt all of them agree to the Trebellianick Portion, it is neceſſary that we ſhould join them to thoſe which ſhall be explained in this Title, in which we ſhall confine our ſelves to ſuch Rules as are neceſſarily to be diſtinguiſhed from thoſe of the Falcidian Portion. And as to the Rules of the Falcidian Portion, which have no relation to the Trebellianick Portion, they come within ſo narrow a compaſs, and are ſo eaſily diſtinguiſhed, that it would be altogether uſeleſs to make any Remark on them here, ſeeing they may be eaſily diſcerned by the bare reading of them.

We ſhall ſay nothing here of the double Fourth Part which belongs to Children who are charged with Fiduciary Subſtitutions, to avoid repeating what has been ſaid of this matter on the ſixteenth Article of the firſt Section of Direct and Fiduciary Subſtitutions.

The Reader ought not to be ſurpriz'd that he finds in this Title only a few Articles; for it was neceſſary that we ſhould confine our ſelves to the Rules of which it is compoſed: And all the Rules which may be thought to be wanting here, and which ſwell in the Body of the *Roman* Law the Title relating to this Subject, have been explained either under the Title of the Falcidian Portion, as we have juſt now remarked, or in the other Titles of this fifth Book, where we have ſet down every Rule in its proper place.

a V. l. 6. C. ad Senat. Trebel. l. 1. §. 19. eod.

SECT. I.

Of the Uſe of the Trebellianick Portion, and wherein it conſiſts.

The CONTENTS.

1. *Definition of the Trebellianick Portion.*
2. *It takes place for an Executor who has but a part of the Inheritance.*
3. *The Teſtator may in lieu of the Trebellianick Fourth Part aſſign to the Executor either Houſes, Lands, or ſome other Thing.*

I.

THE Trebellianick Portion is the fourth Part of the Inheritance, which ought to remain to the Executor who is charged to reſtore it *a*. *1. Definition of the Trebellianick Portion.*

a Ut ei qui rogatus eſſet hæreditatem reſtituere, perinde liceret quartam partem retinere, atque ex lege falcidia ex legatis retinere conceditur. §. 5. *inſt. de fideic. hæred.*

II.

If he who is charged with a Fiduciary Subſtitution, be Heir or Executor only for a Part of the Inheritance which he is charged to reſtore, he will have the Trebellianick Portion out of it; which will be the fourth Part of his Portion of the Inheritance. And it would be the ſame thing, if ſeveral Heirs or Executors were charged to reſtore their Shares of the Inheritance, or only ſome of them theirs. For every one of them would have the Trebellianick Portion of his own Share *b*. *2. It takes place for an Executor who has but a part of the Inheritance.*

b Poteſt autem quiſque & de parte reſtituenda hæredem rogare. §. 2. *in f. eod.*

Et hoc caſu eadem obſervari præcipimus quæ in totius hæreditatis reſtitutione diximus. §. 8. *in f. eod.*

III.

Altho the fourth Part which ought to remain to the Executor, be a Quota of the Inheritance, which makes it neceſſary that there ſhould be a Partition of the Eſtate made between the Executor and the Fiduciary Subſtitute; yet the Teſtator may aſſign to the Executor a certain Land, or Tenement or other Thing, or even a Sum of Money in lieu of the ſaid fourth Part; and in this Caſe if the Executor reſtore the whole Inheritance to the Fiduciary Subſtitute, excepting what is thus reſerved to him by the Teſtator *3. The Teſtator may in lieu of the Trebellianick fourth Part aſſign to the Executor either Houſes, Lands, or ſome other thing.*

Teſtator, the Subſtitute would be ſolely anſwerable for all the Charges; whereas if the Executor ſhould take the fourth Part of the Inheritance, the Goods and the Charges of the Inheritance would be divided between them proportionably to their Shares *c*.

c Si quis una aliqua re deducta, ſive præcepta, quæ quartam continet (veluti fundo, vel alia re) rogatus ſit reſtituere hæreditatem, ſimili modo ex Trebelliano Senatus-Conſulto reſtitutio fiet, perinde ac ſi quarta parte retenta rogatus eſſet reliquam hæreditatem reſtituere. Sed illud intereſt, quod altero caſu, id eſt, cum deducta, ſive præcepta aliqua re reſtituitur hæreditas: in ſolidum ex eo Senatus-Conſulto actiones transferuntur. Et res, quæ remanet apud hæredem, ſine ullo onere hæreditario apud eum remanet, quaſi ex legato ei acquiſita. Altero vero caſu, id eſt, cum quarta parte retenta rogatus eſt hæres reſtituere hæreditatem & reſtituit: ſcinduntur actiones, & pro dodrante quidem transferuntur ad fideicommiſſarium, pro quadrante remanent apud hæredem. Quin etiam licet una re aliqua deducta aut præcepta, reſtituere aliquis hæreditatem rogatus ſit, in qua maxima pars hæreditatis contineatur, æque in ſolidum transferuntur actiones: & ſecum deliberare debet is, cui reſtituitur hæreditas, an expediat ſibi reſtitui. Eadem ſcilicet interveniunt & ſi duabus pluribuſve deductis præceptiſve rebus, reſtituere hæreditatem rogatus ſit. Sed & ſi certa ſumma deducta præceptave, quæ quartam vel etiam maximam partem hæreditatis continet: rogatus ſit aliquis hæreditatem reſtituere: idem juris eſt. §. 9. *inſt. de fideic. hared.* *l.* 30. §. 3. *ff. ad Senat. Treb.* *l.* 2. *C. eod.* *l.* 47. §. 1. *ff. ad leg. Falc.*

SECT. II.

Of the Cauſes which make the Trebellianick Portion to ceaſe, or which diminiſh it.

The CONTENTS.

1. *The Teſtator may forbid the Deduction of the Trebellianick Portion.*
2. *The Executor who reſtores voluntarily the whole Inheritance, without retaining any thing, cannot afterwards demand the Trebellianick Portion.*
3. *The Fiduciary Subſtitute who is charged with a ſecond Reſtitution, has no right to the Trebellianick Portion.*
4. *How the Fruits are reckoned or not reckoned as Part of the Trebellianick Portion.*
5. *The Fruits are not reckoned to the Children as Part of their Trebellianick Portion.*
6. *Penalty of the Executor who is charged to reſtore the Inheritance, and who has not made an Inventary of the Effects.*

I.

1. The Teſtator may forbid the Deduction of the Trebellianick Portion.

If the Teſtator has expreſly forbidden the Deduction of the Trebellianick Portion, the Executor is at liberty either to accept or refuſe the Inheritance: but if he does accept it, he will be obliged to fulfil the Fiduciary Subſtitution without retaining any thing *a*.

a Neratius ſcribit ſi hæres rogatus reſtituere totam hæreditatem, *non deducta Falcidia, &c.* *l.* 1. §. 19. *ff. ad Senat. Trebell.*

Si vero expreſſim deſignaverit (teſtator) non velle hæredem retinere Falcidiam, neceſſarium eſt valere teſtatoris ſententiam. *Nov.* 1. *c.* 2. §. *ult.*

Aut ſi parere noluerit, eum quidem recedere ab hujuſmodi inſtitutione, locum vero fieri (ſicut dudum prædiximus) ſubſtitutis, & cohæredibus, & fideicommiſſariis, & legatariis. *d.* §. *in f.*

See the laſt Article, and the Remark that is there made on it.

II.

2. The Executor who reſtores voluntarily the whole Inheritance, without retaining any thing, cannot afterwards demand the Trebellianick Portion.

If the Executor who might have retained the Trebellianick Portion, had reſtored the whole Inheritance without any Deduction, he would not afterwards be admitted to demand it: For it would be preſumed that he had made Reſtitution of the whole Inheritance, only that he might fulfil more punctually the Fiduciary Subſtitution; unleſs it ſhould appear by the Circumſtances that ſome Error in Fact, or ſome other Cauſe, ought to deſtroy this Preſumption *b*.

b Si totam hæreditatem rogatus reſtituere tu ſponte adieris, & ſine deductione quartæ partis reſtitueris: difficile quidem crederis per ignorantiam magis, non explendi fideicommiſſi cauſa hoc feciſſe: ſed ſi probaveris per errorem te quartam non retinuiſſe, recuperare eam poteris. *l.* 68. §. 1. *ff. ad Senat. Trebell.*

See the fifteenth and ſixteenth Articles of the fourth Section of the Falcidian Portion.

III.

3. The Fiduciary Subſtitute, who is charged with a ſecond Reſtitution, has no right to the Trebellianick Portion.

If the Fiduciary Subſtitute of the Inheritance, or of a part of it, were likewiſe charged to reſtore it to another Perſon, he could not deduct a ſecond Trebellianick Portion out of it, altho the Executor who had reſtored the Inheritance to him had retained his fourth Part: For the Trebellianick Portion is due only to the Executor who ſucceeds immediately to the Teſtator, unleſs the Teſtator has likewiſe granted it to this Fiduciary Subſtitute *c*.

c Nunquam legatarius vel fideicommiſſarius, licet ex Trebelliano Senatus-Conſulto reſtituitur ei hæreditas, utitur legis Falcidiæ beneficio. *l.* 47. §. 1. *ff. ad leg. Falc.*

Neratius ſcribit: ſi hæres rogatus reſtituere totam hæreditatem, non deducta Falcidia, rogato & ipſi, (ut) alii reſtituat: non utique debere eum detrahere fideicommiſſario ſecundo quartam: niſi liberalitatem tantum ad priorem fideicommiſſarium hæres voluit pertinere. *l.* 1. §. 19. *ff. ad Senat. Trebell.*

Qui

Qui fideicommiſſam hæreditatem ex Trebelliano, cum ſuſpecta diceretur totam accepit, ſi ipſe quoque rogatus ſit alii reſtituere, totum reſtituere cogetur: & erit in hac quoque reſtitutione Trebelliano locus. Quartam enim Falcidiæ jure fideicommiſſarius retinere non potuit: nec ad rem pertinet, quod, niſi prior, ut adiretur hæreditas, deſideraſſet, fideicommiſſum ſecundo loco datum intercidiſſet. Cum enim ſemel adita eſt hæreditas, omnis defuncti voluntas rata conſtituitur. Non eſt contrarium quod legata cætera non ultra dodrantem præſtat. Aliud eſt enim, ex perſona hæredis conveniri: aliud proprio nomine defuncti precibus adſtringi. *l.* 55. §. 2. *eod.*

IV.

4. How the Fruits are reckoned or not reckoned as part of the Trebellianick Portion.

If the Goods ſubject to the Fiduciary Subſtitution were to be reſtored only ſome time after the Death of the Teſtator, or after the Exiſtence of a condition on which the Subſtitution ſhould depend, the Fruits which the Executor had reaped before the Subſtitution was open, would be reckoned to him as part of his Trebellianick Portion *d*. But the Fruits reaped by the Executor after the time that the Fiduciary Subſtitution was to take place, when the Reſtitution of the ſubſtituted Goods was delayed only thro the Negligence of the Subſtitute, would not be reckoned as part of the Trebellianick Portion due to the ſaid Executor *e*.

d Fructus in quartam imputantur. *l.* 18. §. 1. *ff. ad Senat. Trebell.*

Ante diem fideicommiſſi cedentem fructus, & uſuræ quas debitores hæreditarii, cum poſtea ceſſiſſet dies ſolverunt: item mercedes prædiorum ab hærede perceptæ, portioni quadrantis imputantur. *l.* 52. §. 5. *eod.*

e Si hæres poſt multum temporis reſtituat cum præſenti die fideicommiſſum ſit, deducta quarta reſtituet. Fructus enim, qui percepti ſunt, negligentia petentis, non judicio defuncti, percepti, videntur. Alia cauſa eſt, ſi ſub conditione, vel in diem rogatus fuerit. Tunc enim quod percipitur ſummovet Falcidiam, ſi tantum fuerit quantum quartam facit & quartæ fructus. Nam fructus, qui medio tempore percepti ſunt, ex judicio teſtantis percepti videntur. *l.* 22. §. 2. *eod.*

See the ſixteenth Article of the fourth Section of the Falcidian Portion, the ninth Article of the firſt Section of Subſtitutions, and the fifteenth Article of the ſecond Section of the ſame Title.

V.

5. The Fruits are not reckoned to the Children as part of their Trebellianick Portion.

The Rule explained in the preceding Article, which reckons to the Executor the Fruits as Part of his Trebellianick Portion, relates only to ſuch Executors as are not Children or Deſcendants of the Teſtator. For the Fruits which the Children enjoy before the Fiduciary Subſtitution is open with which they are charged by their Father, Mother, or other Aſcendant, accrue to them without any Diminution of the Claims or Demands which they may have upon the Inheritance which they are charged to reſtore; whether it be that the Fiduciary Subſtitution be in favour of their own Children, or other Deſcendants of the Teſtator. And they will have over and above the Fruits which they may have enjoyed, their entire fourth part of the whole Inheritance; even altho the Teſtator had ordained that thoſe Fruits ſhould be reckoned as part of it *f*.

f Jubemus quoties pater vel mater filio ſuo, filiæ, filiis vel filiabus, ex æquis vel in æquis partibus hæredibus inſtitutis, invicem ſeu ſimpliciter quoſdam ex his, aut quemdam rogaverit qui prior ſine liberis deceſſerit, portionem hæreditatis ſuæ ſuperſtiti ſeu ſuperſtitibus reſtituere: ut omnibus modis retenta quarta pro authoritate Trebelliani Senatus conſulti, non per imputationem reditnum, (licet hoc teſtator rogaverit vel juſſerit) ſed de ipſis rebus hæreditariis, dodrans reſtituatur. Idemque in retinenda legis Falcidiæ portione obtinere jubemus. Et ſi pater vel mater filio ſeu filia inſtitutis (ſicut ſupradictum eſt) hæredibus, rogaverit eos eaſve nepotibus vel neptibus, pronepotibus vel proneptibus ſuis, ac deinceps reſtituere hæreditatem. *l.* 6. *C. ad Senat. Trebell.*

VI.

6. Penalty of the Executor who is charged to reſtore the Inheritance, and who has not made an Inventary of the Effects.

Seeing the Trebellianick Portion is a fourth Part of the Inheritance, the Executor who pretends to retain this fourth Part, ought to ſhew what the Goods of the Inheritance conſiſt in, in order to regulate that which he may retain, and that which he ought to reſtore. And this is what he cannot do but by making an Inventary of all the Goods of the Inheritance. Which lays a double Tie on this Executor to make the ſaid Inventary; both for his own Intereſt, that he may eſtabliſh his Right to the Trebellianick Portion, and regulate the Proportion of it, and for the Intereſt of the Fiduciary Subſtitute, that he may be able to judge of the Fidelity of the Reſtitution of the ſubſtituted Goods, as has been mentioned in the twentieth Article of the firſt Section of Subſtitutions. Thus the Executor, who being charged with a Fiduciary Subſtitution of the Inheritance, or of a part of it, had neglected to make an Inventary of the Goods, would be very juſtly deprived of the Trebellianick Portion, unleſs it were in a Caſe which ſhould not require this Precaution, or that particular Circumſtances ſhould exempt him from this Penalty, which would be juſtly inflicted on him in caſe his not having made an Inventary could be any ways imputed to his want of Fidelity, or to his Neglect *g*.

g See the Texts cited on the twentieth Article of the firſt Section of Direct and Fiduciary Subſtitutions.

¶ It is to be remarked on this Article, and on the twentieth Article of the firſt Section of Subſtitutions, that ſeveral Interpreters have been of opinion, that altho the Executor who is charged with a Fiduciary Subſtitution of the Inheritance has neglected to make an Inventary of the Goods, he is not for that Omiſſion to be deprived of the Trebellianick Portion. And the chief Foundation on which they build their Opinion is, that the Privation of the Trebellianick Portion being a Puniſhment, it ought not to be inflicted on the Executor unleſs there be an expreſs Law that has eſtabliſhed it: That it is true, that the Laws have ordained that the Executor ſhall forfeit his Right to the Falcidian Portion of Legacies when he has neglected to make an Inventary; but that this Puniſhment ought not to be extended to the Executor who is charged with a Fiduciary Subſtitution of the Inheritance, or of a part of it, becauſe Penal Laws are not to be extended beyond the Caſes for which they were deſigned. The other Interpreters, on the contrary, ground their Opinion on the Neceſſity of an Inventary, in order to juſtify the Fidelity of the Executor in making the Reſtitution; and they add, that whatever the Laws have regulated in the matter of the Falcidian Portion is common to the Trebellianick Portion, becauſe of the Confuſion which the Laws have made of theſe two Fourths into one, as has been obſerved in the Preamble of this Title, and that the ſame Reaſons make it neceſſary to have an Inventary in the one caſe as well as the other; and that likewiſe *Juſtinian* in his firſt Novel, *Chap.* 2. where he ordains, that the Falcidian Portion ſhall be forfeited in caſe there be no Inventary, obliges the Executor to ſatisfy not only the entire Legacies, but alſo the Fiduciary Bequeſts; *Non retinebit Falcidiam, ſed complebit legatarios & fideicommiſſarios:* Which Words thoſe of the other Party reſtrain to Fiduciary Bequeſts of particular things, and that with very good reaſon.

This Queſtion has been variouſly decided in divers Tribunals of *Europe*, and there have been likewiſe contrary Judgments given thereupon in ſeveral Parliaments of this Kingdom; in which they have always had a due regard to the particular Circumſtances of each Caſe: For it is certain that there are Caſes in which it would not be juſt to deprive the Executor of the Trebellianick Portion for want of an Inventary; as for example, if an Executor were charged to reſtore the Inheritance at the ſame Inſtant that he ſhould accept it; becauſe in this Caſe, which was very frequent under the *Roman* Law, there would be no Inventary to make, the Fiduciary Subſtitute having nothing to do but to take the Declaration of the Executor who reſtores the Inheritance to him, and ſo to take poſſeſſion of the Goods: And the like Caſe might happen if a Teſtator who had a mind to convey his Inheritance, or a Part of it, to a Relation or Friend who was abſent in a foreign Country, had inſtituted another Perſon his Executor, and had charged him to reſtore the Inheritance which he left to him in truſt to his abſent Friend as ſoon as he ſhould return, and that the ſaid abſent Perſon chanced to return about the time of the Teſtator's Death; for the Executor in this caſe being willing to reſtore the ſubſtituted Inheritance at the ſame time that he accepted it, would have no occaſion to make an Inventary in order to preſerve his Trebellianick Portion. There are alſo other Caſes in which it would not be juſt to deprive the Executor of the Trebellianick Portion for his not having made an Inventary; as for example, if the Executor were a Minor, and his Guardian had omitted to make the ſaid Inventary, or if the Death of the Teſtator had happened in the time of a Plague. And if in theſe and other the like Caſes the Fiduciary Subſtitute ſhould pretend that the Reſtitution were not entire, he would be allowed to bring Proofs of the Goods, and of their Value. We were in doubt whether we ſhould except alſo the Caſe where the Executor ſhould happen to be a Son of the Teſtator's, and were charged with a Fiduciary Subſtitution in favour of his own Children: if, for example, the Subſtitution were only for the Benefit of one of the Children, and that the Circumſtances ſhould give ground to preſume that ſome Favour had been ſhewn to the other Children in prejudice of the Subſtitution. What gives occaſion to the Doubt is, that on the one part the Father might prejudice the Intereſt of the Child who was to have the Benefit of the Subſtitution, and might diminiſh the Reſtitution in favour of the other Children; and that on the other part the ſaid Father of the Subſtitute being to retain out of all the Goods of the

Teſtator

Teſtator both his Legitime, and alſo the Trebellianick Portion, according to the Remark made on the ſixteenth Article of the firſt Section of Subſtitutions, the ſame is conſidered as a Part of his Legitime. So that it might be a Hardſhip to deprive him of it for want of an Inventary. But if the Executor were a Stranger, or even a collateral Relation, and charged with a Fiduciary Subſtitution, it would ſeem to be juſt that for the want of an Inventary he ſhould forfeit the Trebellianick Portion, as he would forfeit the Falcidian Portion on the ſame account, there being the ſame Reaſons for both. And altho we ſhould ſuppoſe that *Juſtinian* in this Novel had only the Falcidian Portion in his view, yet it does not ſeem to be neceſſary that we ſhould have an expreſs Law to oblige the Executor who is charged with a Fiduciary Subſtitution to make an Inventary of the Goods, in order to prove his Fidelity in making reſtitution of them. This Duty is enjoined by the Law of Nature, and by conſequence it is natural alſo that the want of an Inventary ſhould be puniſhed by ſome Penalty, which ought to be at leaſt the Privation of a Benefit, which conſiſting in a Quota of the Inheritance, could not be given to the Executor unleſs he ſhould make appear what the Inheritance conſiſted in; ſeeing otherwiſe it would be an Encouragement to fraudulent Concealments of the Effects.

It is upon theſe different Conſiderations that we have thought proper to compoſe this Article in the manner in which it is conceived, in order to reconcile the Letter of the Rules of Law with Equity, which ought to be the Life and Spirit of them.

THE

PUBLICK LAW:

BEING A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

TOME II.

LOVE II

NATURAL ORDER

IN THE

CIVIL LAW

TO THE

SUPPLEMENT

OF

PUBLICK LAW:

THE

The Author's Epiſtle Dedicatory to the *French* KING.

SIR,

YOUR *Majeſty having done me the honour to approve of the Deſign of the Work of the* Civil Law in its Natural Order, *and to lay Your Commands on me to finiſh it, I began with that Part of the ſaid Laws which is called the* Private Law, *which conſiſts of the Matters which reſpect the Intereſts of particular Perſons among themſelves, and from whence ariſe the Differences which take up the time of all the Tribunals, and even of Your Majeſty's Council, and of which Your Majeſty is pleaſed often to take Cognizance Yourſelf; but I did not hope to live long enough, nor to have Strength enough to undertake the Matters of the Publick Law. Beſides, I had very good reaſon to be afraid of the Conſequence and Difficulties of the great number of Matters which this Law takes in; which obliged me to confine my firſt Deſign to the Matters of the* Private Law. *For in order to examine the* Publick Law *thoroughly in its full Extent, and ſuch as it is received in Your Kingdom; it is neceſſary that we ſhould begin with the Foundations of the Authority and Power which God hath placed in the ſacred Perſon of Your Majeſty for the Government thereof, the Rights annexed to the ſaid Power, the Veneration, the Obedience, and the Fidelity which all Your Subjects owe to Your Majeſty, and to all Your Orders and Commands. We muſt enter into a particular detail of all Your Majeſty's Royal Rights, which take in the Uſe of the Sovereign Power in Peace and in War, the Forces and other Succours that are neceſſary for preſerving the State in Peace and Tranquillity, and defending it againſt the Attacks of Enemies. We muſt therein treat of the general Policy of the Kingdom, of the different Orders of Perſons which compoſe the State, of their Functions and their Duties, of the Military Art, of the Revenue, of the Adminiſtration of Juſtice, of the Puniſhment of Crimes, of the Order of Judicial Proceedings, of the Duties of Judges, and of all the particular Matters which are comprehended under theſe general Parts of the Publick Order. Seeing it is in theſe Matters that Your Majeſty is chiefly engaged, and that they are the Object which is moſt worthy of Your Royal Care, I have endeavoured, that I might keep up as much as*

was

was poſſible to the Dignity of theſe Matters, and of Your Majeſty's great Zeal, both for Religion and Juſtice, to build upon the Principles both of the one and the other thoſe of the Matters of the Publick Law. For as the Publick Order is the Work of God himſelf, who diſpoſes of the Government of all Kingdoms, who gives to Kings and other Princes all their Power and Authority, who regulates the Uſe and Order of the Body of the Society of Mankind, of which they are the Heads; ſo it is from the Fountain of Truths which he teaches us by the means of Religion, and from the natural Lights of Juſtice and Equity, that we are to gather the Detail of the Rules of the Publick Law, *as well as all the others. I hope, Sir, that ſince God has given me the Grace to undertake this Work with theſe Views, he will be pleaſed ſo far to give a Bleſſing thereto, that the Truths which I have gathered from the Fountains which flow from him, may not loſe their Strength and Beauty thro my Weakneſs and want of Skill; and that the ſincere Deſign which I have had to ſerve the greateſt Prince of the World, either in the preſent or paſt Ages, may render agreeable to him, and uſeful to his Subjects, and perhaps to himſelf, a Work which in its own Nature is not unworthy of him. I am, with a moſt profound Veneration, S I R,*

YOUR MAJESTY'S

Moſt Humble, Moſt Obedient,

and Moſt Faithful Servant and Subject,

Domat.

ADVERTISEMENT.

THE Author of this Book is induced to publiſh it to the World, that he may diſcharge the Engagement under which he put himſelf, when, as he was explaining in the Treatiſe of Laws, which is placed as an Introduction to the Book of the *Civil Law in its Natural Order*, the Matters treated of there, and diſtinguiſhing them from the Matters of the Publick Law, he ſaid, that he intended to compoſe another Book of Matters relating to the *Publick Law a.* He thought that ſince God had been pleaſed to make uſe of him as an Inſtrument in ſetting in order the Matters contained in the Book of the Civil Law, it was a Duty incumbent on him to attempt ſuch another Work in relation to the Publick Law: And altho the Matters of the Publick Law, having a relation to the general Order of a State, ſeemed to claim the Precedence before thoſe which regard only what is tranſacted between particular Perſons, and which belong to that Part of the Law which is called the Private Law, which has been explained in the Treatiſe of the *Civil Law in its Natural Order*; yet ſeveral Conſiderations determined the Author to begin with the Private Law. Which Reaſons are to be explained here, not only to juſtify the ſaid Order, which the Author has thought fit to obſerve, but likewiſe to inform the Reader of ſome Differences, which it is of importance to take notice of, that are between the Deſign of the Book of the *Civil Law in its Natural Order*, and that propoſed in this Book of the *Publick Law*; for theſe Conſiderations produce both theſe Effects.

Seeing the Matters relating to the Private Law, which have been explained in the Book of the *Civil Law in its Natural Order*, do almoſt all of them derive their Rules from the Law of Nature, and that of all Nations the *Romans* have cultivated the moſt the Knowledge of the ſaid Rules, and have left the moſt ample Collections of them; it is principally in the Books of the *Roman* Law that the Rules of the Law of Nature are preſerved, and it is there that we have the firſt knowledge of them; and the ſaid Books of the *Roman* Law are conſidered as the General Law, that is to ſay, the Law that ought to be obſerved every where, as containing the eſſential Rules of Equity; and it is for this Reaſon likewiſe, that the *Roman* Law is called Written Reaſon, *Ratio Scripta.* For altho there be in the *Roman* Law many Principles of Niceties that are contrary to our Uſage, and even to Equity, and that we find there many Rules which we reject; yet ſeeing the greateſt part of what compoſes the Books of the *Roman* Law conſiſts in Principles and Rules of the Law of Nature; that we have there the Detail of the greateſt part of the Science of the Private Law; and that the ſaid Detail contains an infinite Number of Principles and Rules, the Uſe of which extends not only to the Matters of the Publick Law, but likewiſe to thoſe of all the ſeveral kinds of Laws, and even to thoſe of the Canon Law; it was natural, and even neceſſary, for the Deſign of ſetting the Laws in their true Order, that ſince we had determined to ſet about this Work on the Books of the *Roman* Law, we ſhould begin with the Private Law, which is the principal and greateſt part of it; whereas it contains much fewer Rules of the Publick Law, and there is hardly in it any one Rule concerning ſeveral Matters that are of the greateſt Importance in the Publick Law.

From this firſt Conſideration there ariſes a ſecond one, which has likewiſe induced the Author to begin with the Private Law, that he might follow the natu-

a See the Treatiſe of Laws towards the Cloſe.

ral Method of beginning with what is eaſieſt. The Facility which is meant here, is not that which the Reader may have to learn more eaſily ſome Matters than others; but that of the Compoſition, which has been more difficult in many of the Matters of the Publick Law, than it has been in thoſe of the Private Law. For as to the Compoſition of the *Civil Law in its Natural Order*, we had the advantage to find almoſt all the particular Rules collected together in the Body of the *Roman* Law; and there are but few that it was neceſſary to add to them. So that the main Difficulty which occurred in the Compoſition of the ſaid Book of the *Civil Law in its Natural Order*, was not to find out Matter for Rules; but it was quite of another nature, and conſiſted on one hand, to find out in ſeveral Rules the Principles and Reaſons on which they were grounded, and which are not found in the *Roman* Law, and to compoſe the greateſt part of the Definitions which are there wanting; and on the other hand, to give to almoſt all the Rules a different Turn of Expreſſion from what they have in the Texts of the *Roman* Law, in order to ſet them in their true Light, and to ſhew their true meaning, either by aſſembling together many of the ſaid Rules which ought to make only one, or by dividing ſome of them which contain different Rules, which it is neceſſary to diſtinguiſh, and to rank in the natural Order which their different Situations give them, according to the Connexion which they have with one another, and according as they depend upon or follow one another. But as for the Publick Law, we had not a Collection of Materials ready prepared to our hand, out of which we might compoſe the Rules thereof. For beſides that as to many of the Matters which ſhall be treated of in this Book, there is nothing to be found concerning them in the *Roman* Law, as has been juſt now obſerved, we do not meet with any where elſe a Collection of Rules of all the Matters of the Publick Law, that is to ſay, of that ſort of Rules which are of natural Equity, and which have the ſame Character with thoſe of the Private Law, which have been explained in the Book of the *Civil Law in its Natural Order*, and which may be the Subject-matter of a Science, as being an Object of the Underſtanding. But we have only in the Ordinances the arbitrary Rules of the Publick Law, which are only the Object of the Memory, and do not demand the Uſe of reaſoning, except when there happens to ariſe Doubts and Difficulties about their true Meaning. In which Caſe there is a Neceſſity of having a recourſe to the Principles of Natural Equity, in order to reſolve them; as has been explained in the ſame Treatiſe of Laws *b*.

This Aſſiſtance therefore of Materials for Rules having been wanting in the Compoſition of this Book of the *Publick Law*, as to the greateſt part of the Matters thereof, we have been obliged in many of them to ſearch into their Nature and their Extent, and to pick out what might ſerve as matter for Rules, and from thence to frame a Syſtem, as it were, of a new kind of Science: not that we call it ſuch by reaſon of the Novelty of all the particular Matters contained in it, but becauſe of the Syſtem it ſelf; which on one hand is new with reſpect to the Order in which the particular Matters are ranked, and which on the other hand contains divers Matters not commonly reckoned to be part of the Publick Law, but which ought however to be naturally comprehended therein becauſe of the relation which they have to the general Order of a Commonwealth. For it is this Relation which makes the Character of the Matters of the Publick Law.

There is likewiſe this Difference between the Matters of the Publick Law and thoſe of the Private Law, That the Rules relating to the Matters of Private Law are of a far more frequent and more neceſſary Uſe in the Adminiſtration of Juſtice, than the Rules of the Publick Law. For the Rules of the Private Law concern all ſorts of Perſons indifferently, and as much Perſons in a private Capacity as in publick Imployments, ſeeing every one may have in his domeſtick Affairs occaſions where it may be neceſſary to have recourſe to the Rules of the Private Law; whereas it is much ſeldomer that there ariſe Affairs in Families which demand the Uſe of the Rules of the Publick Law. Thus, the Study of the Private Law is in one Senſe of a more general Neceſſity, and of a larger Extent, than that of the Publick Law; which was likewiſe another Reaſon why we thought fit to explain the Rules of the Private Law before thoſe of the Publick Law, altho in another Senſe there are more Perſons concerned and

b See the twenty eighth Article of the eleventh Chapter of the Treatiſe of Laws.

intereſted in the Publick Law than in the Private Law. For whereas many Perſons live without ſtanding in need of the Adminiſtration of Juſtice, to maintain them in their Rights, there is no body who is not intereſted in the good Order of the Government, which cannot ſubſiſt but by the Rules of the Publick Law. Every one hath alſo his different Duties which he owes to the Publick, and eſpecially thoſe who exerciſe ſome Publick Function, have their peculiar Duties and Obligations which are proportioned to their Profeſſions; and the ſeveral Rules of all theſe Duties and Obligations make a part of the Publick Law, and ſhall be the Subject-matter of this Book. So that if the Publick Law be not quite ſo neceſſary as the Private Law, for the common and ordinary Uſe of all ſorts of Perſons, yet it is nevertheleſs of ſuch an extenſive Uſefulneſs, that every body is concerned in it.

The Reader may be able to judge, by theſe different Conſiderations, of the Motives which have induced the Author to treat of the Matters of the Private Law before thoſe of the Publick Law; and may ſee at the ſame time the Differences between the manner of the Compoſition of the one and of the other. And it remains ſtill that we ſhould explain more particularly the Diſtinctions between the Matters of the Publick Law, and thoſe of the Private Law, and the other Matters of divers kinds of Laws, in order to give an Idea of the Matters which are treated of in this Book, and to draw a Plan of them, whereby one may ſee the Nature and Order of the Matters: And this ſhall be the Subject-matter of the Preface, which ſhall likewiſe contain ſome Reflexions neceſſary to be made before we enter on the particular Rules.

Some Perſons may perhaps think that we ought not in this Book to have enlarged on the Functions and Duties of every Profeſſion, nor upon other Matters which perhaps may be thought not ſo proper to come within this Deſign. The Author was in doubt for theſe very Reaſons, whether he ought not to ſuppreſs all thoſe Matters; but many Perſons of great Abilities, and of a ſuperior Rank, were of opinion, that he ought not to leave them out, nor even the Detail of the Functions and Duties of particular Perſons, becauſe the ſaid Detail does naturally come within the Deſign of this Book.

If any one ſhould be ſurprized that we have quoted here ſeveral Texts of the *Roman* Law, which do not exactly ſuit with our Uſage, they may be pleaſed to conſider, that all the Texts cited here carry with them their own Authority, having a Character of Truth, ſuch as may juſtify their being quoted, ſeeing the Spirit of the ſaid Texts is always agreeable to our Uſage.

FR
MVSEVM
BRITANNICVM

THE PREFACE.

1. *Order of the Matters of the Publick Law with reſpect to the Society of Mankind.*

ALL the Laws which regard the Conduct of Men among themſelves, being nothing elſe but the Rules of the Society in which God has placed them, it is in this Order that we muſt diſcover that of the ſaid Laws, and of the Subject-matter of them; and it is for this Reaſon that we have prefixed to the Book of the *Civil Law in its Natural Order* a Treatiſe, where we have eſtabliſhed the firſt Principles and Foundations of the Order of Society, of which we have there drawn a Plan, in order to give a View both of the Matters themſelves, and the Laws relating to them.

As it is therefore in that Plan, that we have given the Idea of the Nature and Order of the Matters of the Book of the Civil Law, and of the Spirit and Uſe of the Rules of the ſaid Matters; ſo we may by the help of the ſaid Plan give likewiſe an Idea of the Matters of the Publick Law which are to be treated of in this Book, and of the Laws which are the Rules of the ſaid Matters.

In order to diſtinguiſh the Matters which are to be treated of in this Book, from thoſe that have been explained in the *Civil Law in its Natural Order*, and from all other Matters of the ſeveral ſorts of Laws, it is neceſſary to conſider, in the ſaid Plan of the Order of the Society of Mankind, all the ſeveral ſorts of Matters in general, the Situations which link them together, or ſeparate them one from another, and the Characters which make their Differences. And we ſhall be able by that means to diſcern what it is that diſtinguiſhes them all among themſelves, in the ſame manner as in Geography, we diſtinguiſh the Countries one from another by their Situations, and by their Confines: and altho we have explained in the Treatiſe of Laws the general Order of all the Matters of the Laws, yet we cannot forbear to mention it here, in ſo far as relates to the Publick Law. But what we ſhall take notice of here, ſhall be with another view, in a manner altogether different: So that there will not be any Repetitions of the ſame Things for the ſame Purpoſes.

But ſince it is impoſſible to give juſt Ideas of the Order of Society, with reſpect to the Diſtinction between the Matters of the Publick Law, and thoſe of the other kinds of Laws, without premiſing ſome general Reflexions, and which are ſomewhat long, the Reader will be pleaſed to excuſe the Length of them becauſe of their Neceſſity.

All the Laws in general are of two ſorts: One of thoſe which concern Religion; and the other of thoſe relating to the Temporal Policy. And each of theſe two kinds of Laws hath alſo its peculiar Matters.

We muſt obſerve, that among other Differences between Religion and the Policy for Temporal Affairs, there is one which is remarkable, and which it is neceſſary to explain here.

Seeing there is in the whole Univerſe only one true Religion, which for this Reaſon is called Catholick, that is to ſay Univerſal, all Perſons who make Profeſſion thereof are united in one Church, under one Chief Vicar of Jeſus Chriſt,

Succeſſor

Succeſſor of Saint *Peter*, in whom is veſted the univerſal Power of the Spiritual Government of the ſaid Church, who is the Center of its Unity, and who is at the ſame time the common Father of all the Faithful, who are the Members thereof diſperſed over the whole Univerſe. But it is not the ſame with reſpect to the Temporal: For altho it be true that the Society which God has formed among Men, does not exclude any one from being a Member thereof, and that it takes in all Mankind, yet there is no Power on Earth which has an univerſal Government over all the People; and it happened only under *Adam* and under *Noah*, that Mankind, conſiſting of one ſingle Family, was under the Power of one Man alone. But excepting theſe two Times, Mankind being multiplied and diſperſed, they divided themſelves into different Nations, and formed different ſorts of Governments, which we have ſeen ever ſince throughout the ſeveral Ages; and there never has been any other Power which had a general common Authority over all the Nations beſides God, who alone is called King of Kings, and Lord of Lords *a*. So that whereas Religion hath its Unity in that of the Church, which is extended to the whole Univerſe, and that therefore whatever is eſſential in Religion, whether it reſpect the Matters, or the Rules, is common every where, and that all Catholick Nations are ſubject to the ſole Government thereof; each State hath its peculiar Policy for Temporal Affairs, and its Order of Government diſtinguiſhed from the others, even in Matters that are moſt eſſential and moſt fundamental. Thus, there are ſome States whoſe Government is a Monarchy, and others where it is a Commonwealth. Thus, among the Monarchies, ſome of them are Hereditary, others Elective; and among the Commonwealths, the Government in ſome of them is in the hands of a few Perſons, which makes that kind of Commonwealth which is called Oligarchy; and in others, many of the inferior ſort of the People have a Share in the Government, which is called Democracy; and there are ſome, where the Commonwealth is governed by ſome of the principal Families, which is called Ariſtocracy. As for the Detail of the Ways of the Government, each State hath its own proper Ways; and they are all of them diſtinguiſhed by their ſeveral ſorts of Regulations for the publick Order. Which is the reaſon why neither their Laws, nor the Matters which they regulate, are all the ſame every where.

It would ſeem by theſe Reflexions upon the Difference there is between Religion and the Temporal Policy, that ſeeing, with reſpect to Spirituals, there are but few Kingdoms where the true Religion is received, and that as to Temporals, there is no univerſal Power which extends over all Mankind, one might think that as there is no Government, either Spiritual or Temporal, which extends to all Men, and conſequently no Laws whereof the Obſervance can be enjoined them by an Authority that is common over them all, ſo there is not among them an univerſal Society.

But it is nevertheleſs certain, that there is among all Men a Bond or Tie which God hath formed, and which engages every particular Perſon to another, in Duties which the Conjunctures may furniſh them with occaſion to perform. And if there be ſome barbarous Nations that are ignorant of this Truth, yet Religion teaches us that every Man ought to look upon every other Man as his Neighbour and Fellow-Creature; and that whatever Diſtinction there may be among Men on account of the Differences of Nations, Languages, Cuſtoms, and Religion, yet they all mutually owe to one another the good Offices and the Duties which the Occaſions that bring them together, and their Wants may demand.

It is the Precept of this Duty, which the ſecond Law enjoins to all Men without diſtinction, which is the Foundation of the Univerſal Society which God hath eſtabliſhed among them, and from which no one is excluded; not only becauſe that thoſe who know this Law ought to look upon themſelves as Neighbours to all other Men, and on all other Men as their Neighbours; but becauſe they ought to conſider even thoſe Perſons who are the fartheſt from obſerving this Duty at preſent, as being ſtill in a poſſibility of loving and practiſing it, which gives to all Men a Right in that Society.

But beſides this Foundation of the univerſal Society of Mankind, which is the Spirit of the Divine Law, there is yet another, which is a Conſequence of the former; and which is the Humanity that is common to all Men, and known

a King of Kings, and Lord of Lords, Rev. 19. 16.

throughout

throughout all the World, even to thoſe who live in Darkneſs, and have not received the Light of the Goſpel.

By Humanity we mean here, that natural Sentiment which cauſes every one, at the ſight of his own Image, and of his own Nature in all other Men, to be touched with the different Impreſſions of Tenderneſs, Compaſſion, and other Affections, which the ſight of his own Likeneſs raiſes in him, according to the Condition in which he ſees him, and which diſpoſes him to the performance of thoſe different Duties which the Wants of his Fellow-Creatures may demand of him; and in general, to do for others that which he would that they ſhould do for him, and not to do that to them which he would not that others ſhould do to him. And this Sentiment is nothing elſe but an effect of the Nature of Man: For God having formed him of a Nature deſtined to love him, and to love his Fellow-Creature, and ſo to accompliſh by this double Love the two firſt Laws which are the Foundation of all the others, as has been explained in the Treatiſe of Laws; the Corruption occaſioned by the Fall of Man not having totally deſtroyed, but only weakened and darkened in him the Spirit of theſe two Laws, he has retained his Inclination to Love. But having loſt both the Love of God, and the Rectitude of that Love which he ought to have for his Neighbour, there remains in him, together with a Self-Love, which has taken the place of the Love of God, an Inclination to love in others a Reſemblance of his own Nature. And this is what we call that Humanity which we ſee exerciſed among Men, by ſome more, and by others leſs, according to the Bounds or Extent that their Self-Love leaves for the Love of others.

It is by this Principle of Humanity, and by the Lights which have remained in the Spirit of Man after his Fall, and which make in every one his Reaſon and Underſtanding, that the Society of Mankind has been kept up among thoſe who know nothing of Religion. For it is by the help of this Reaſon, and of this Humanity, that they diſcern that which we call Equity, or to ſpeak more properly, they are Equity it ſelf; ſeeing it is nothing elſe but the Light of Reaſon, and the Sentiment of Humanity, which compoſe the Law of Nature.

It is likewiſe by the help of theſe Principles that Nations have made to themſelves Laws, and that they have eſtabliſhed in every Nation an Order of Government. And becauſe theſe Ties among Men are not confined to what paſſes within the Bounds of every State, and that it is neceſſary that Nations be linked to one another, whether it be on account of the Engagements between the particular Inhabitants of one Nation and thoſe of another, or becauſe of the Correſpondencies between thoſe who are Governors of each Nation, the want of a common Sovereign, veſted with the univerſal Monarchy, has obliged the Inhabitants of the ſeveral Nations to uſe Humanity and Reaſon in doing mutual Juſtice to one another on the Occaſions which form between them ſome Engagement, or ſome Duty; and many Nations have, beſides this common Tie, Treaties with one another, which are to them inſtead of Laws. But ſeeing the Non-obſervance of thoſe Treaties, and the Violations of the Law of Nature, have among thoſe who are not ſubject to one common Sovereign no other Revenger but God alone, who does not exerciſe his Government over Mankind in a viſible manner, he has permitted the Uſe of Wars for repreſſing and puniſhing the Injuſtices of one Nation towards another, when the Injuſtices are ſuch as deſerve to be chaſtiſed in this violent manner, and which, by rendring this manner of Chaſtiſement neceſſary, do render it alſo juſt, as ſhall be hereafter explained.

We may judge by this State of the Society of Mankind throughout the Univerſe, that God has made the ſame to ſubſiſt by the means of three ſeveral kinds of Ties, which diſtinguiſh it as it were into three Parts, or into three Orders, according to ſo many different manners of his Conduct towards Mankind.

The firſt of theſe kinds of Ties, is that which is made by Religion, the Spirit of which takes in all People, and tends to bring into the Boſom of the Church all Nations without diſtinction.

The ſecond, is that which is made by Humanity, the Tie of which ought to unite all Mankind notwithſtanding their Differences in Matters of Religion.

The third, is that which is formed in every State, by the Order which unites all the Families whereof it is compoſed under one and the ſame Government, whether they profeſs in it the true Religion, or whether they be ignorant of it.

The firſt of theſe three kinds of Ties, which is that of Religion, extends over the whole Univerſe. For altho the true Religion be not as yet known in all Places, yet it is the Spirit of the Chriſtian Church to embrace all Nations without Diſtinction; and there is no Country where Chriſtianity either hath not been already known, or will not be known in its due time.

The ſecond kind of Ties, which is that which is made by the natural Rules of Humanity and Equity, ought naturally to have its Extent over all the World; and it doth alſo prevail every where in ſome degree; but in many Places it is violated in ſeveral manners, and differently, according as the People are more or leſs ſwayed by Intereſt and Paſſion.

The third Tie, which is that made in every State by the Union of the Perſons who compoſe it under one and the ſame Government, is confined within the Boundaries of each State. So that there are as many Ties of this kind as there are States which are diſtinguiſhed by their different Governments.

As theſe three different Orders, or Parts of the Univerſal Society, have their different Relations to the common Good, and to the different Engagements and Duties of Men; ſo the ſubject Matter of their Laws, and alſo their Laws themſelves, have in the ſame manner their Differences proportioned to their Uſes.

The firſt Order, which is that of Religion, whether we conſider it in the Extent given to it by its Spirit, which excludes no body, or in its effective Extent over the Nations which receive it, and which are within the Pale of the Church, hath for the ſubject Matter of its Laws every thing which relates to the good Order of the Society with reſpect to Divine Worſhip. This takes in the Lights which God hath communicated to his Church, of his Nature, of his Attributes, of the Creation of Man, of his Fall, of the Myſteries which have recovered him from his Fall, of the Law which he ought to obſerve, of all the particular Rules of Faith, and of Manners; one part whereof relates to the Duties of Subjects towards their Princes, and of Princes towards their Subjects, and other Matters which make a part of the Publick Order; the Authority of the Church, and the Regulations which the Apoſtles, their Succeſſors, and the Councils have eſtabliſhed in it; a great part whereof is preſerved by the Tradition of the Eccleſiaſtical Diſcipline, that is to ſay, the Polity of the Church. And all theſe Matters of Religion have for their Laws the Ten Commandments, the Goſpel, the Doctrine of the Apoſtles, and all the Books of the Old and New Teſtament, the Councils, Tradition, and the Decrees of Popes. As to which there is this Difference to be obſerved between Matters of Faith and Manners, and Matters of Diſcipline, That theſe being ſubject to Changes, their Rules are ſubject alſo to Alteration, and may be different according to the Times and Places; whereas the Rules of Faith, and the eſſential Precepts of Manners are the ſame every where, and remain always unchangeable, becauſe they are nothing elſe but Divine Truths revealed in the Holy Scriptures. But beſides theſe Laws of the Church, ſeeing it hath for its Government only Powers, whoſe Miniſtry is ſpiritual, and that it is not wont to repreſs by Force and by temporal Puniſhments thoſe who tranſgreſs its Laws, and diſturb its Order in a manner which would deſerve theſe ſorts of Puniſhments; Chriſtian Princes have reckoned it their Duty to protect by their Laws the Laws of the Church, and to chaſtiſe and puniſh with temporal Puniſhments, even with Death itſelf, thoſe who tranſgreſs the Laws of the Church in the Caſes where theſe Puniſhments ought to be inflicted. We ſhall examine more fully in the nineteenth Title of the firſt Book this Matter of the Uſe of the Temporal Power in Matters relating to the Church; and we ſhall there ſhew in what manner the Spiritual and Temporal Powers agree and conſiſt with one another.

The ſecond Order, or the ſecond Part of the Society which is formed and maintained among Nations by Humanity, and by natural Equity, being common to all the People of the Univerſe, hath for its Subject the Uſe of Commerce, and of the ſeveral Communications and Intercourſes which one Nation has with another, and the particular Subjects of one State with thoſe of another, the Liberty of Paſſage from one Country to another, the Freedom of Navigation over the Seas, Fidelity in Commerce, Hoſpitality, and other Matters of the like nature, which have render'd Negotiations neceſſary, Treaties between Nations, Embaſſies, the Safety of Ambaſſadors and Envoys. And even in a time of War, there are Rules of Humanity and of Equity that ought to be obſerved in it; ſuch as thoſe that relate to the manner of making War, and of declaring it, the Safety of Hoſtages,

tages, Humanity towards Priſoners of War, Moderation in Acts of Hoſtility, the Obſervance of Treaties of Peace, of Truces, of Suſpenſions of Arms, the right Uſe of Repriſals, and other Matters of the like kind.

As to what relates to the Rules of theſe Matters between Nations, it is neceſſary to diſtinguiſh between the People who know the Chriſtian Religion, and thoſe who are ignorant of it. Theſe have for Laws common among them all, without diſtinction, the Rules of Humanity and of Natural Equity, which compoſe the Law of Nature, that is to ſay, the Law which Nature dictates to all Men; and ſome of them have beſides theſe Rules thoſe of the Treaties which they have made among themſelves, one Nation with another; and they have alſo for Rules between Nations, certain Uſages which are commonly received over all, and which they faithfully obſerve. But the People who know the Chriſtian Religion, have among them, beſides the Rules of Natural Equity, and the Rules of Treaties, and of theſe Uſages obſerved between Nation and Nation, the Laws of Religion, which comprehends within its bounds all the ſeveral Duties of what nature ſoever they be; and which not only contains Rules that are more perfect than thoſe which are derived barely from the Law of Nature, but likewiſe enforces a more ſtrict and religious Obſervance of the Rules of the Law of Nature themſelves.

However, ſeeing there is no common Power which hath Authority over all the Nations, to maintain the Obſervance of theſe Laws, and to puniſh the Tranſgreſſors of them, as has been already remarked, there are only two ways of ſupplying that Defect. One, which chiefly relates to particular Perſons, when the particular Subjects of one State ſuffer ſome Injuſtice from thoſe of another, is to demand Juſtice from the Judge of that other State. For it is to the Judge of the Perſon againſt whom Juſtice is demanded, that the injured Party ought to addreſs himſelf; ſeeing it is he alone who has power to condemn thoſe over whom his Authority reaches, and who are not ſubject to others. And the other way, which chiefly regards the Injuſtices in which the whole Nation is intereſted, and which may deſerve to be repreſſed by Force, is the Way of Arms by a juſt War, which becomes neceſſary, as has been already remarked, when a Nation, or thoſe who are Governours thereof, fail towards another Nation in the Obſervance of the Rules of the Law of Nature, or of thoſe of their Treaties; and violate the Fidelity which they reciprocally owe to one another, and which is the only Security of the Peace which can unite them.

It is this kind of Laws of Humanity, and of Equity, which regulate what is tranſacted between one Nation and another in the Matters that have been juſt now mentioned, which we call the Law of Nations; altho this Word of the Law of Nations have another Meaning in the *Roman* Law, as ſhall be hereafter remarked.

As to the third part of the Order of Society, which is confined to the Perſons united in one State under one and the ſame Government, the Matters which ariſe from this Order are of two ſorts, which it is neceſſary to diſtinguiſh. The firſt is of the Matters which concern the general Order of the State, ſuch as thoſe relating to the Government, the Authority of the Sovereign, the Obedience that is due to him, the Forces that are neceſſary for preſerving the Publick Quiet, the Management of the publick Revenue, the Order of the Adminiſtration of Juſtice, the Puniſhment of Crimes, the Functions of the different ſorts of Offices, Imployments, and Profeſſions which the publick Order demands, the general Policy for the Uſe of the Seas, of Rivers, of the Highways, of Mines, of Foreſts, of the Game, of Fiſhing, the Government of Towns and other Places, the Diſtinctions of the different Orders of Perſons, and other Matters of the like nature.

The ſecond ſort of Matters of this third part of the Order of Society in every State, is of thoſe which relate to what is tranſacted between particular Perſons; their ſeveral Engagements, whether by Covenants, ſuch as Sales, Exchanges, Hiring and Letting, Loans, Depoſits, Partnerſhips, Donations, Tranſactions, and others: or without Covenant, ſuch as Guardianſhips, Preſcriptions, Succeſſions, Teſtaments, Subſtitutions, and others.

It is this firſt ſort of Matters, which having relation to the general Order of a State, are the Matters which belong to the *Publick Law*; and thoſe of the ſecond ſort reſpecting only what paſſes among particular Perſons, are the Matters of that other part of the Law, which is called for this reaſon the *Private Law*.

As to the Laws of theſe two kinds of Matters, there are two ſorts of them in uſe in all the Nations of the World. One is of the Laws of Nature; and the other is of the Laws peculiar to every Nation; ſuch as the Cuſtoms which a long Uſage has authorized, and the Laws which the Legiſlative Power of every Nation may enact. But beſides theſe two ſorts of Laws that are common to all the Nations, the States where Chriſtianity is known, have over and above the Laws of Religion, which comprehends within its Bounds every thing that relates to the good Order of the Government; and it likewiſe approves the peculiar Laws of every State. For we ought to ſuppoſe, that in a Catholick State there is no Law contrary to the Law of God.

We muſt obſerve on what we have juſt now ſaid of Religion, with reſpect to the States where it is known, that altho we mean here by Religion only the true Religion, which is the Catholick; yet ſeeing there are many States which make profeſſion of the Chriſtian Religion, and which altho they be ſeparated from the Catholick Religion, and conſequently engaged in falſe Religions, have nevertheleſs knowledge of, and do receive many Principles and many Rules of the true Religion, eſpecially of thoſe which relate to the good Order of the Temporal Government; they may be diſtinguiſhed from thoſe States which are ignorant of the true Religion, ſuch as the *Mahometans* and Idolaters: and we ought to comprehend them in what has been ſaid of People who have the knowledge of Religion, reſtraining with reſpect to them what has been ſaid of the Knowledge which they may have thereof, to the Knowledge of ſuch of the Laws of Religion which they profeſs the Obſervance of.

It is theſe two ſorts of Matters of this third part of the Order of the Society of Mankind which have been treated of; to wit, the Matters of the *Publick Law* in this Book, and thoſe of the *Private Law* in the Book of the *Civil Law in its Natural Order*; but in another Method and Order than what they ſeem naturally to have. For it would ſeem that the Matters of the *Publick Law* relating to the general Order of the Government of a State, ought to go before the Matters which paſs between particular Perſons, and which make the *Private Law*; but other Conſiderations determined us to begin with the *Private Law*, as has been explained in the *Advertiſement*.

It appears by this Plan of the Order of the Society of Mankind, of the Parts which compoſe this Society, and of the Laws and Matters of every one of the ſaid Parts, that theſe ſeveral Matters are in a different manner the Object of different ſorts of Knowledges; which we might diſtinguiſh as ſo many different Parts of the Science of Laws, if it is permitted to comprehend them all under one common Name. Thus the Laws which concern Matters of Religion, may be conſidered as the Science of the Church, and they are called the Laws of the Church. Thus the Rules of what paſſes between Nations which are under different Governments, and which are gather'd either from Humanity itſelf and Natural Equity, or from their Treaties and their Uſages, make the Syſtem of the Laws which we call the Law of Nations; and which under this Name comprehends as it were a kind of Science of this ſort of Laws, which hath its Definitions, its Principles, and its particular Rules. Thus the Laws which relate to Matters of the *Publick Law*, and thoſe which compoſe the *Private Law*, are conſidered as a Body of Laws, the Knowledge whereof is termed the Science of the Law; which Term, in the common Acceptation thereof, ſeems to be reſtrained to the Laws which regulate in every State that which regards the general Order of the Policy, and that of the Adminiſtration of Juſtice; and which form a Syſtem, the Obſervance whereof is enforced by the Authority of the Secular Powers of every State, as the Spiritual Powers maintain the Authority of the Laws of the Church. Which diſtinguiſhes the Science of the Laws of the Church, and that of the *Publick* and *Private Law*, from the Science of the Law of Nations; in that the Nations who live under different Governments having no common Sovereign whoſe Authority may oblige them to the Obſervance of the Rules of the Law of Nations, the imperfect State of theſe Rules is the reaſon why they are not conſidered as the ſubject Matter of a Policy, or of a Science of Law, but as Engagements and Duties of Natural Equity and Humanity, the Obſervance whereof depends purely on the Will of thoſe whom they concern; and the Injuſtices committed againſt the ſaid Duties cannot be reſtrained by a Temporal Authority, which is ſuperior both to the Perſons who commit the Injuſtice, and to thoſe who ſuffer it. So that properly ſpeaking, it is only thoſe Per-

ſons who have the Government of a Nation in their hands to whom the Knowledge of the Law of Nations is neceſſary. But ſeeing the Laws of the Church, and thoſe of the Publick and Private Law, make up a Science of Law, which is neceſſary for the publick Welfare, and for the Adminiſtration of Government and Juſtice in a State; the Study of this Science is become neceſſary to the Perſons who are to exerciſe either Imployments or Profeſſions, which have any relation to this Order of Government, or to this Adminiſtration of Juſtice. And it is for this reaſon that theſe Profeſſions and theſe Imployments are appropriated to Perſons whoſe Capacity for them is publickly acknowledged, and who have acquired the ſaid Capacity by a regular Study in an Univerſity: from which they have a Teſtimony of their Abilities in this Science by theſe ſorts of Qualities or Titles, which are called Degrees of Batchelor, Licentiate, Doctor, in the Faculty of Law.

It is for the Study of this Science that the Canon Law and the Civil Law are taught in the Univerſities. It is in the Canon Law that we have the Laws of the Church, the Articles of Faith, the Rules of Manners, and the Order of the Eccleſiaſtical Diſcipline. What concerns Faith and Manners is taken from the Scriptures, and from the Explanations thereof which we have from Tradition and the Councils. And what relates to the Diſcipline of the Church is taken out of the ſame Councils, from Tradition, from the Decrees of the Popes, and the Doctrine of the Fathers. And it is the Books of the *Roman* Law, which are otherwiſe termed the Civil Law, that contain the Depoſitum of the Laws, in the manner that has been explained in the Preface to the Book of the *Civil Law in its Natural Order*. And becauſe the Order of the general Government of a State, and of the Adminiſtration of Juſtice, which are the Object of this Science, requires the Uſe of Secular Authority, for the Defence of Religion, and the Obſervance of the Laws of the Church; and that in many Caſes the Knowledge of the ſaid Laws is neceſſary to thoſe who exerciſe the Functions of the Civil Government, and of the Adminiſtration of Juſtice, it has been thought fit to join to the Study of the Civil Law, which is neceſſary for obtaining Degrees in the Univerſities, the Study of the Canon Law, which has otherwiſe this Connexion with the Civil Law, that beſides the Rules concerning Spiritual Matters, it contains many Rules which relate only to Secular Affairs, concerning which the Popes have made ſeveral Conſtitutions, whether it be becauſe of the Relation which the Temporal Power has to the Spiritual in ſeveral Matters, as for example that of an Oath, Marriage, Uſury, and others; or becauſe of the Temporal Authority which the Popes have in their own Dominions in all Matters whatſoever.

We may judge by this general Idea of theſe three Parts of the Order of the Society of Mankind, and by the Reflections which have been juſt now made thereupon, that there is in every one of them ſome Matters which have ſuch a Connexion and ſuch a Relation to others of another Part, that they have a Place likewiſe in that other Part, and by that means are comprehended under two Parts, whereas the other Matters of each Part are peculiar to that Part, and are confined to it. Thus, for example, in the firſt of theſe three Parts, which is that of Religion, the Matters which concern the Myſteries of Faith are ſo peculiar to that Part, that they have no manner of relation to the two other Parts. And in the ſame part of Religion, the Neceſſity of maintaining Order in the Church, and of curbing thoſe turbulent Spirits who ſhould attempt to diſturb that Order, demands the Uſe of the Authority of Temporal Princes, who may chaſtiſe them with other Puniſhments than thoſe which the Church can inflict. This neceſſity of maintaining Order in the Church by the Interpoſition of the Authority of Temporal Powers, hath alſo a relation to the Temporal Policy of the State, which makes it a Duty incumbent on thoſe who have the Civil Government in their hands, to maintain the ſaid Order in the Church; and becauſe of this Relation, the Protection of the Policy of the Church becomes a Matter of the Temporal Policy of a State. Thus, for another example, in the ſame Part of Religion, the Matter touching the Diſpoſal of Church Benefices belongs properly to the Church, which ought to have the filling up the Places of its Miniſtry. But becauſe there ariſe often Difficulties about the Poſſeſſion of Benefices; and that thoſe whoſe Poſſeſſion is the moſt evident and moſt legal, ought to be maintained therein during the Pendency of the Suit, even againſt thoſe who may chance to have a better Title, and ſuch as may annul the Right of the Poſſeſſors, the Nature of Poſſeſſion makes the

Diſpute touching the Poſſeſſion of Benefices to be a Matter of the Temporal Government, to which it belongeth to maintain the Poſſeſſors in their Poſſeſſion, to hinder all Acts of Violence, and to chaſtiſe thoſe who ſhould attempt any thing by force. So that this Matter concerning the Poſſeſſion of Benefices, as well as that of the Puniſhment of Perſons who cauſe Troubles and Diſturbances in the Church, and ſome other Matters of the like nature, having ſuch relation to the Temporal Policy of a State, they have alſo a Rank among the Matters of this third Part. Thus in the ſecond Part, which is that of the Law of Nations, the Neceſſity of Commerce in a State, obliging the Inhabitants to communicate to Strangers what they have of their own that is ſuperfluous, and to draw from other Countries what the Inhabitants there have that the others want; Commerce with Strangers is a Matter, concerning which the Government of a State eſtabliſhes Rules different from thoſe of the Law of Nations. Thus in the ſame ſecond Part of the Law of Nations, the Neceſſity of War in the Caſes which may oblige Nations to have recourſe to it, rendring the Uſe of Arms and of Military Government neceſſary in a State, this is likewiſe a Matter in which this Military Government hath its Rules, which make a Part of the general Policy of a State.

There is no occaſion to give Inſtances of Matters of the Temporal Policy of a State, in order to ſhew that there are Matters in this third Part, which have relation to other Matters of the two other Parts, of Religion, and of the Law of Nations. For beſides that thoſe very Examples, which we have juſt now mentioned with reſpect to the two firſt Parts, produce the ſame Effect, and that the Reader may judge thereof by the Remark which has been newly made on an Oath, on Marriage, on Uſury, and on the other Matters which have relation to the Temporal and to the Eccleſiaſtical Policy; we make here this Remark touching the Connection and Relation which ſome Matters of one Part have with thoſe of another, only to give a reaſon of our treating in this Book of the *Publick Law*, of ſome Matters which more naturally belong to the Policy of the Church than to that of the State; but which we are obliged to explain becauſe of this Relation and Connection which they have to the Temporal Policy of the Publick Law, as may be ſeen by the Plan, and the Table of the Matters of this Book.

We cannot forbear making here one Reflection, in order to give an account why in this Idea which we have juſt now given of the Law of Nations, and of the general Government of every State, we have not followed that which the *Roman* Law gives us of it; where, in the very firſt Beginning of the Body of the *Roman* Laws, Law in general is diſtinguiſhed into two kinds, one of the *Publick Law*, and the other of the *Private Law a:* and this laſt is ſubdivided into three Parts. The firſt, of the Law of Nature, which is reduced to that which is common to Men and Beaſts, ſuch as the Conjunction of the two Sexes, the Procreation and Education of Children *b*; the ſecond of the Law of Nations *c*; the third of the Civil Law *d*. And afterwards there are comprehended among the Matters of the Law of Nations, the Contracts of Sale, of Letting and Hiring, Leaſes, Obligations *e*, and in general every thing which natural Reaſon renders juſt among all Men *f:* and the Civil Law is limited to that which is peculiar to every State *g*.

We

a Hujus ſtudii duæ ſunt poſitiones, publicum & privatum. Publicum jus eſt, quod ad ſtatum rei Romanæ ſpectat; Privatum quod ad ſingulorum utilitatem. Sunt enim quædam publice utilia, quædam privatim. Publicum jus in ſacris, in ſacerdotibus, in magiſtratibus conſiſtit. *l.* 1. §. 2. *ff. de juſt. & jur.*

b Jus naturale eſt, quod natura omnia animalia docuit. Nam jus iſtud non humani generis proprium; ſed omnium animalium, quæ in terra, quæ in mari naſcuntur, avium quoque commune eſt. Hinc deſcendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus; hinc liberorum procreatio, hinc educatio. Videmus etenim cætera quoque animalia, feras etiam iſtius juris peritia cenſeri. *d. l.* 1. §. 3.

c Jus gentium eſt quo gentes humanæ utuntur. Quod a naturali recedere facile intelligere licet, quia illud omnibus animalibus, hoc ſolis hominibus inter ſe commune ſit. *d. l.* §. *ult.*

d Jus civile eſt, quod neque in totum a naturali vel gentium recedit, nec per omnia ei ſervit: itaque cum aliquid addimus, vel detrahimus juri communi, jus proprium id civile efficimus. *l.* 6. *eod.*

e Ex hoc jure gentium introducta bella, diſcretæ gentes, regna condita, dominia diſtincta, agris termini poſiti, ædificia collocata, commercium, emptiones, venditiones, locationes, conductiones, obligationes inſtituræ. *l.* 5. *eod.*

f Quod vero naturalis ratio inter omnes homines conſtituit, id apud omnes peræque cuſtoditur, vocaturque jus gentium, quaſi quo jure omnes gentes utuntur. *l.* 9. *in fin.*

g Omnes populi, qui legibus & moribus reguntur; partim ſuo proprio, partim communi omnium jure utuntur.

We may ſay of theſe Diſtinctions, that they do not agree with our Uſage. For we do not comprehend the Law of Nations under the Name of the Private Law; we do not rank Contracts of Sale, of Letting and Hiring, nor other Obligations, under the Law of Nations; by which Word we underſtand only the Rules of what paſſes between one Nation and another, as has been already explained. We do not confine the Civil Law to that which is peculiar to one People, as are in *France* the Ordinances and Cuſtoms; but under the Name of the Civil Law we take in all the Rules of natural Equity which relate to Matters of Contracts, of Covenants, Mortgages, Guardianſhips, Preſcriptions, Donations, Succeſſions, Teſtaments, and others, which are treated of in the *Roman* Laws, to which we give likewiſe the Name of the Civil Law. And, in fine, as to the Law of Nature, we do not reſtrain it to that which is common to Men and Beaſts; but we underſtand by this Law, all the Rules of natural Equity, which Reaſon teaches Men, and which in this Diſtinction of the *Roman* Law is called the Law of Nations *h*. Thus the Law of Nature, in the Senſe which we give to this Word, does not make a kind of Law diſtinct from the others; but on the contrary, it is to be found in all of them. For there is an infinite number of Rules of natural Equity, both in Religion, in the Law of Nations, and in the Policy of every State; both in that part of it which is called the Publick Law, and likewiſe in that which has the Name of the Private Law. It is only this Law of Nature, that we conſider in the *Roman* Law, and which is the Cauſe why we receive the Rules of the *Roman* Law which are of natural Equity, and which for this Reaſon are not only in uſe with us, but have their Authority in all Places. And it is for this reaſon, becauſe the *Roman* Law contains a vaſt Collection of theſe Rules of natural Equity, that we call it the General or Common Law of Mankind. And it is by this Character of natural Equity, that we diſtinguiſh the Law of Nature from that which is called the poſitive Law, that is to ſay, that ſort of Arbitrary Laws which are enacted by thoſe who are veſted with the Legiſlative Authority in every State *i*.

We ſhall confine our ſelves here to this Reflection which has been made on theſe different kinds of Laws, all which come under the general Name of Law. For what has been ſaid may ſuffice to ſatisfy the Reader, why we have not followed in this Plan the Diſtinctions of the *Roman* Law. And ſeeing there are divers ſorts of Laws which are differently called by the general Name of Law, as thoſe of the Divine Law, of the Law of Nature, of the Poſitive Law, and many others; and ſeeing we are to treat here of the Publick Law, Order requires that we ſhould give juſt Ideas of the Nature, and of the Character of the Laws of which it is compoſed; and that we ſhould diſtinguiſh them more particularly.

Having thus drawn this general Plan of the Order of the Society of Mankind, and having ſeen in this Plan the Situation of the Matters of the Publick Law, which are to be treated of in this Book; it is neceſſary to take a nearer view of the Detail and Order of theſe Matters. And in order to give this view, it is neceſſary in the firſt Place to conſider in general, that as the Publick Law is nothing elſe but a Syſtem of the Rules, which reſpect the general Order of the Government and Policy of a State; the firſt Object which offers itſelf in this Syſtem is this Government it ſelf, and this Policy; as to which it is neceſſary before all things to ſee what is the Neceſſity thereof, and what ought to be the Uſe of it: for it is upon this Foundation, that all the Rules of the Publick Law are built.

The Deſign of God in linking Men together in Society, in order to unite them by the Spirit of the two primary Laws, as has been already explained in the forementioned Treatiſe of Laws, implied the Neceſſity of a Subordination *l* among them, which ſhould place ſome of them over the others. For this Society forms a Body of which every one is a Member; and as the Body is compoſed of divers Members, ſo there is a Subordination not only of all the Members under

utuntur. Nam quod quiſque populus ipſe ſibi jus conſtituit, id ipſius proprium civitatis eſt vocaturque jus civile, quaſi jus proprium ipſius civitatis. *l. 9. in prin.*

We are to underſtand the Word Civitas *in this laſt Text, not of a ſingle Town or Corporation, but of a Nation or People. For that Word is taken in this ſenſe in ſome of the beſt* Latin *Authors, and we often find it uſed in this Senſe in the Commentaries of* Julius Cæſar.

h D. l. 9. in f.

i See the eleventh Chapter of the Treatiſe of Laws in the Civil Law in its Natural Order.

l Where no Counſel is, the People fall; but in the Multitude of Counſellors there is Safety, Prov. 11. 14.

the Head, but alſo of the Members among themſelves, according as the Functions of the one depend on the Functions of the others. Thus, ſeeing the Body of the Society is to be compoſed of an infinite Number of different Conditions and Profeſſions neceſſary for the common Good; it is eſſential to the Society that there ſhould be a general Subordination of all the Conditions and Profeſſions under one Power, which ſhould maintain the Order thereof; and that the Conditions and Profeſſions ſhould be ſubordinated one to another, according as their Functions may depend one upon another, or have relation one to the other. And it is the Neceſſity of this Order which requires that of Government, eſpecially in the Condition in which we are, under ſo ſtrong a Biaſs to a Love of our ſelves, to ſerve our own Intereſts, and to gratify our Paſſions; which would overthrow the Order of the Society, if the Authority of the Government did not moderate them, and curb them, by inflicting Puniſhments on thoſe who offer to diſturb the ſaid Order.

But even altho we ſhould ſuppoſe a Society of Men void of Self-Love, yet the Subordination of ſome of them to the others would nevertheleſs be neceſſary among them, for the Things which they would have to treat of together: and the Neceſſity under which they would be of aſſembling together, of placing themſelves, of propoſing Matters, of deliberating, and of executing what ſhould be reſolved on, would require an Order of Subordination among them, which ſhould ſet ſome of them over the others; whether it were by the Nature of their Functions, or by the Difference of Age, or by the Diverſity of Talents, or by the Preference given by a Majority of Votes, or by other Views.

We may add on this Subject of the Neceſſity of a Subordination in all Conjunctions of many Perſons together, which God hath eſtabliſhed with reſpect to Men, in all Places where he has placed more than one Perſon. Thus, when he created Man, he took out of him the Woman, whom he gave him to be a Companion, and a Help meet for him, formed out of one of his own Members, and like unto himſelf *m*, to unite them in the Society of Marriage; and he made the Husband the Head of the Wife, and eſtabliſhed this Subordination between them, even before they had loſt the Innocence of their Creation. Thus, in the Union which he had formed by Birth, between Parents and Children, to unite them in the Society of a Family, he hath ſubjected the Children to the Authority of the Parents. Thus, when upon the Increaſe of Families, they aſſembled together in order to compoſe divers People united in different Places, the Subordination of Children to Parents being confined to every Family, God eſtabliſhed over each People Princes who ſhould have the Government of them *n*.

This firſt View of the Neceſſity of Government, diſcovers at the ſame time the Uſe thereof; which is, to eſtabliſh in a State the Dominion of Peace and Juſtice, from whence proceeds the publick Tranquillity, and on which depend the two eſſential Parts of the publick Good, as to temporal Concerns, and which are the End that all thoſe to whom God has committed the Government of a State ought to have before their eyes. The firſt conſiſts in procuring that every thing relating to the Publick be in ſuch order, that on the part of the Government nothing be wanting to particular Perſons that may make their Life eaſy and happy in the Society; which depends on the Aſſurance that every one ought to have of a prompt and ready Protection from Juſtice. The ſecond, which is a Conſequence of the firſt, conſiſts in encouraging in a State Sciences, Arts, Trade, and every thing elſe that may tend to the publick Good; that all ſorts of Perſons may be put in a condition not only of rendring themſelves capable of their Profeſſions, but of perfecting themſelves in them, and of acquitting themſelves with skill and fidelity in the diſcharge of their Functions and Duties.

Theſe Advantages are the Sources of the Happineſs of a State, and ought to be the Fruits of the Government. And in order to render the Government ſuch as the common Good doth require, the firſt Means, and which is the Foundation of the good Uſe and good Effects of the Government, is, that thoſe who are in the higheſt Stations, and in whoſe hands God hath placed the Sovereign Power, ſhould have for the Principle of their Conduct the View of this common Good; and that in order to procure the ſame, and to make it laſting, they ſhould take on one hand the Aſſiſtance of wiſe Counſels, whether it be they themſelves who have the Choice of their Counſellors, or whether the Laws of the State have

m *It is not good that the Man ſhould be alone: I will make him a Help meet for him*, Gen. 2. 18.
n *Over every Nation hath he ſet a Ruler*, Eccluſ. 17. 14.

provided

provided that certain Perſons ſhould be called to give their Advice; and that on the other hand, they ſhould have Forces neceſſary to ſupport Juſtice, and to maintain Peace and the publick Tranquillity. Which requires the Uſe of Arms for two different Ends: One, to contain the Subjects in their Obedience, to puniſh Crimes, and to chaſtiſe as occaſion offers thoſe who by any Attempts ſhould diſturb the Peace and publick Order of the Society; and the other to oppoſe by Force of Arms Strangers who ſhould offer to encroach on the Rights of the State, and that in ſuch a manner as that it ſhould be neceſſary to declare War againſt them in order to bring them to Reaſon.

For the firſt of theſe two Ends, the Uſe of Arms ought to be reſtrained to what may be abſolutely neceſſary for enforcing Obedience to the Orders and Decrees of Juſtice. And it is for this Uſe that Arms are put into the hands of the Governors of Provinces, and other Officers and Miniſters of Juſtice, to whom Force is neceſſary for executing the ſaid Orders, according to the Functions of their Miniſtry.

As to the ſecond of the two Ends for which the Uſe of Arms is required, which is the Neceſſity of the Defence of the State againſt the Attempts of Strangers, there are two ſorts of Forces: One, the Uſe of which is perpetual, which is that of fortified Places in the Sea-Ports, and on the Frontiers, with ſufficient Gariſons to defend them; and the other, which is neceſſary only in Time of War, is that of levying ſuch a Number of Troops as the Occaſion may require.

It is for theſe two Uſes of Forces, that God gives to thoſe who have the Sovereign Power of Government in their hands, the Right of Arms; that they may make Juſtice to reign in their Dominions among their Subjects; and that they may do themſelves Juſtice againſt ſuch Strangers as ſhall oblige them to take up Arms when there are juſt Cauſes for it, and which God puts into their hands as the only way of doing Juſtice between People who live under different Governments, and who are not ſubject to any temporal Power that is common to them. For ſeeing they cannot have between them any common Judge, as has been remarked, who has a Right to give Laws to them, or to decide their Differences, unleſs they themſelves agree to it; and there being none but God alone who is their common Lord and Maſter, but who does not exerciſe his Government in a viſible manner over them; he adminiſters Juſtice between them by the Succeſſes he gives to the War, making Arms to ſerve for the natural Uſe which he has given them, which is to ſupport the Empire of Juſtice. For the Uſe of all Force, in other hands than thoſe of Juſtice, cannot be otherwiſe than criminal; and it becomes juſt in War it ſelf, only when it arms the Hand of Juſtice, becauſe that is the Hand of God, who for this reaſon has taken upon him the Name of the God of Hoſts. So that it is he alone who is taken, or who ought to be taken for Judge by thoſe who, having no common Judge on Earth, are obliged to have recourſe to Arms for the deciſion of their Differences. And altho it does not alway happen that the Event of War decides in favour of thoſe who had Juſtice on their ſide, and that often on the contrary Victory remains to the Oppreſſor; in the ſame manner as it does not always happen, even in the beſt governed States, and under the wiſeſt Princes, and thoſe who apply themſelves with the greateſt diligence to the diſcharge of their Duty, that Juſtice is exactly diſtributed on all Occaſions by thoſe who are intruſted with the Adminiſtration of it; yet there can nothing happen on the part of God but what is juſt, whatever Injuſtice there may be on the part of Man. For it is always the Juſtice of God that governs: And ſeeing he finds in all Men juſt Cauſes for letting them ſuffer Injuſtice, and that no Injuſtice can eſcape the Vengeance which he prepares in its due time for all thoſe who ſhall be found guilty of it, the Events of Wars render Juſtice to Men in this Point, by putting all Parties into that Condition which the Juſtice of God, and his Providence, would have them to abide in. Thus, it is in his providential Government, as extending to the whole Univerſe, and to the end of all Ages, that the only Throne of the Juſtice of this Sovereign Judge is ſeated, who is King of Kings, and Judge of all Men, and the only Judge who reigns for ever, and over all.

If thou ſeeſt the Oppreſſion of the Poor, and violent perverting of Judgment and Juſtice in a Province, marvel not at the matter; for he that is higher than the higheſt regardeth, and there be higher than they, Eccleſiaſtes 5. 8.

For the Kingdom is the Lord's; and he is the Governor among the Nations, Pſalm 22. 28.

It is eaſy to diſcover, by what has been already ſaid in this Preface, the Relation which all the Matters of the Publick Law have to the Order of Society; ſo that it does not ſeem neceſſary that we ſhould enlarge any further thereon, ſince the bare reading of every one of them in this Book will be ſufficient for judging of the Connexion which they have to the Order of Society. It remains then only that we ſhould diſtinguiſh here the Matters of the Publick Law.

a. Diſtinction of the Matters of the Publick Law into four Parts.

Seeing the Matters of the Publick Law are of divers ſorts, and pretty numerous; and that according to the different manners of conſidering them under divers Views, they may be divided into ſeveral ſorts of Diſtinctions, out of which it is free for us to make a Choice, and to divide them into more or fewer Parts; we have thought that we might make uſe of this Liberty to chuſe one Diſtinction, which ſeems to reduce all theſe Matters, under a ſimple and natural Order, into four Parts, which ſhall make as many Books.

The firſt ſhall comprehend the Matters which relate to the Government and general Policy of a State, and that which compoſes the Order thereof.

The ſecond ſhall be of the Functions of the Perſons appointed to maintain the ſaid Order, Officers of Juſtice, and others who partake of the publick Functions.

The third ſhall contain the Matters which have relation to the Reſtraint and Puniſhment of thoſe who trouble the ſaid Order by wicked Attempts againſt the Prince, againſt the State, or who diſturb in any other manner the publick Tranquillity, and the Quiet of Families, by the ſeveral ſorts of Crimes and Offences that are committed.

The fourth, which will be a Conſequence of the ſecond and third, will take in the Rules of the Adminiſtration of Juſtice, which compoſe the Order of Judicial Proceedings. And this comprehends two Parts of the ſaid Order: One, which concerns the Inſtruction and Judgment of Civil Cauſes; and the other, which relates to the Inſtruction and Judgment of Criminal Matters.

In the firſt Book we ſhall explain the Neceſſity and the Uſe of Temporal Government, and the Obedience that is due to the Powers who exerciſe this Government. And in treating of this Matter, we ſhall examine the Queſtion, Which of the two ſorts of Government is the moſt natural and moſt uſeful, whether Monarchy, or a Commonwealth. We ſhall afterwards treat of the Power, of the Rights, and of the Duties of thoſe who have the Supreme Government in their hands; of the Functions and Duties of the Perſons who are called to be of their Council; of the Uſe of the Forces neceſſary in a State for maintaining the Order of it within, and for defending it againſt all Enemies from without, and of the Military Government; of the Revenue neceſſary to preſerve the State in good Order, and of the Functions and Duties of thoſe who are concerned in collecting and managing the publick Cuſtoms and Impoſts; of the Demeſnes of the Prince; of the means to procure plenty of every thing in a State, and to prevent the Dearth of Things that are moſt neceſſary; of Fairs and Markets; of the Policy in relation to the Uſe of the Seas, the Rivers, the Bridges, the Market-Places, the Highways, and other publick Places; of Navigation, of Foreſts, of Hunting, and Fiſhing; of the ſeveral Orders and Degrees of Perſons who compoſe a State, of Corporations in general, of thoſe of Towns and other Places; of Univerſities, Colleges, and Academies for the Inſtruction of Youth, and for teaching Sciences and Arts both Liberal and Mechanick; of Hoſpitals. And towards the Cloſe of the ſaid firſt Book we ſhall explain in the laſt Title of all, what relates to the Uſe of the temporal Sword with regard to the Church.

In the ſecond Book, we ſhall treat of Officers in general, and of other Perſons who partake of the publick Functions; of the ſeveral ſorts of Offices; and alſo of the Dignity, Authority, Rights, Privileges and Ranks of Officers in general; of the Functions and Duties of the Officers of Juſtice, of Advocates, and others who are any way ſubſervient in the Adminiſtration of Juſtice.

In the third, we ſhall explain the ſeveral ſorts of Crimes and Offences, their Nature, their Characters, their Diſtinctions, according as they tranſgreſs differently the Duties towards God, towards the Prince, towards the Publick, towards particular Perſons; and the different kinds of Puniſhment which the Offenders and their Accomplices may deſerve.

In the fourth Book, the firſt Part of the Order of Judicial Proceedings ſhall take in the Rules of the ſaid Order for the Inſtruction of Civil Cauſes; ſuch as the Demands which are made by the Parties in Judgment, the Intervention of Parties in Cauſes begun by others, the Diſtinctions of the ſeveral ſorts of Sentences, the Production of Titles, the Proofs of Facts which are conteſted, the Deeds and Writings of the Parties, the Ways of obtaining a Redreſs againſt Sentences of Inferior Courts, Appeals, Decrees of the Supreme Courts from which there lies no Appeal, and the Ways of procuring the ſame to be revoked or annulled.

The ſecond Part of this Order of Judicial Proceedings ſhall contain the Rules of proceeding in Criminal Proſecutions; ſuch as Complaints, Accuſations and Denunciations, Informations and Decrees, the Contumacy of Parties refuſing to appear, the ſeizing and impriſoning Offenders, the Examination and confronting of Witneſſes, Torture, Sentences of Condemnation or Abſolution, the Enlargement of Priſoners, Appeals, Acts of Grace, Pardons, and Preſcription of Crimes.

3. *Three Matters preliminary to the four Parts of the Publick Law.*

It muſt be remarked on this Plan of the Matters of the Publick Law, that they have this in common with thoſe of the Private Law, which has been treated of in the Book of the *Civil Law in its Natural Order*; that they ought all of them to be preceded by three Matters which are equally a part of the Publick Law and of the Private Law, and are preliminary both to the one and to the other, to wit, that which reſpects the Nature and Spirit of the Rules, the Diſtinctions of Perſons, and the Diſtinctions of Things. And ſeeing theſe three Matters have been explained under ſo many Titles, which compoſe the Preliminary Book of the *Civil Law in its Natural Order*, it is needleſs to repeat any part thereof in this Place; and it may be preſuppoſed that the Reader who has a mind to read this Book of the *Publick Law*, has already peruſed, or will peruſe that Preliminary Book, where he will eaſily diſcover the relation which the Rules explained there have to the Publick Law. Thus, for example, that which concerns the ſeveral Diſtinctions of Laws into divine, human, natural, arbitrary, written, not written, the Ways of interpreting them, and the Caſes in which it is neceſſary, in order to have the right Interpretation of them, to have recourſe to the Sovereign, relates not only to the Matters of the Private Law, but hath alſo its Uſe in the Matters of the Publick Law, which is compoſed of all theſe ſeveral kinds of Laws, as will appear throughout the whole Detail of this Book. Thus, for the Diſtinctions of Perſons, they relate not only to the Capacity or Incapacity of Engagements, and to the other Matters of the Private Law, as has been explained in the Title of Perſons, but they have likewiſe their Uſe in the Publick Law: As, for example, what relates to the Capacity or Incapacity of Perſons for publick Offices, the greater or leſſer Severity in the Puniſhment of Crimes according to the Qualities and Ages of the Perſons, the Acts which Perſons may or may not do in a Court of Juſtice, the Matters relating to Confiſcations, Aliens, Baſtardy, and other Matters of the Publick Law. Thus, for the Diſtinctions of Things, the Uſe of theſe Diſtinctions is not confined to the Matters of the Private Law; but there are many Things which have ſuch a relation to the Publick Law, that their chief Uſe, and almoſt the only Uſe of them, is for the Publick, ſuch as the Seas, Rivers, Sea-Ports, the Highways, the Streets, the publick Market-Place, the Houſes and other Places deſtined for publick Uſes. And there are likewiſe many Things which cannot go to the Poſſeſſion and Uſe of particular Perſons, but by Ways and upon Conditions which are regulated by the Publick Law; ſuch as Mines, Treaſures, the Uſe of Hunting, Fiſhing, and others of the like nature.

We may add to the Remark which we have juſt now made on the Diſtinctions of Rules, of Perſons, and of Things, that ſeeing the Publick Law reſpects the general Order of the Society of Mankind, and that there has been laid down in the Treatiſe of Laws a Plan of this Society, in order to give a more perfect Knowledge of the Laws which regulate the ſame, of the Perſons who compoſe it, and of all the Things which are for their Uſe: And ſince the ſaid Plan contains a great number of Principles which are eſſential to the Order of this Society, and to every thing that goes towards the forming of the ſaid Order; the Reader will not miſpend his Time in reading over the ſaid Treatiſe of Laws, with a particular View to apply what is therein contained to the Matters and Rules of the Publick Law.

It remains only that we ſhould acquaint the Reader with the manner in which we ſhall treat of the Matters which are to compoſe this Book. And he is deſired to take notice in the firſt place, that he is not to expect to ſee here all the particular Rules of every individual Matter. For we find it neceſſary to leave out a great many of them, and to confine our ſelves to thoſe which may agree with the Deſign which we propoſed to our ſelves in making choice of the Rules, which is the ſame that we have followed in the Book of the *Civil Law in its Natural Order*. And in order to give a more diſtinct Idea of the Rules which are to be inſerted in this Book, and of thoſe which are to be left out of it, it is neceſſary to remark that in all the Matters of the Publick Law, as well as in thoſe of the Private Law, two ſorts of Rules are to be diſtinguiſhed: One is of the Rules which are of the Law of Nature, and which, being neceſſary Conſequences of the Principles of Juſtice and Equity, are unchangeable, and the ſame at all times, and in all places. And the other is of the Rules which are eſtabliſhed by thoſe who have the Power and Authority to make Laws, and which are called Arbitrary Laws, which may be eſtabliſhed, aboliſhed, or changed, according as occaſion requires, and at the Will and Pleaſure of the Lawgiver. As to the Nature and Uſe of theſe two kinds of Rules, the Reader may conſult what has been ſaid of this Matter in the eleventh Chapter of the *Treatiſe of Laws*. We ſhall only juſt mention here what has been there proved, That it is thoſe Natural Rules which are the Object of the Underſtanding, and that it is in the Knowledge of them that the true Science of the Law does conſiſt; whereas the Arbitrary Laws are only the Object of the Memory. Which makes this Difference between theſe two kinds of Laws, That as for the Arbitrary Laws, ſeeing they are all of them written either in the Ordinances, or in the Cuſtoms, the Study thereof is eaſy, and requires almoſt no reaſoning, unleſs it be to explain the obſcure and ambiguous Expreſſions that may occur therein. For as to the other ſorts of Difficulties which occaſion thoſe Queſtions that are called Queſtions of Law, they depend on the Rules of the Law of Nature, as has been explained in the ſame place. But the Study of the Laws of Nature demands that they ſhould be ſet every one in their proper Light, and all of them placed in the Order which they have from their Connexion with one another, and with their Principles. Thus, as we have endeavoured in the Book of the *Civil Law in its Natural Order*, to place there in their due Order and proper Light the Natural Rules relating to the Private Law, ſo we ſhall endeavour in this Book of the *Publick Law*, to rank in the ſame Method and Order the Natural Laws which relate to the Publick Law; and we ſhall leave out the Arbitrary Laws which are in the Ordinances and Cuſtoms, except it be ſome few, which it may be neceſſary to take in, as ſhall be remarked hereafter.

4. *Some Account of the Manner in which the Matters of this Book are to be treated of.*

We are obliged likewiſe to acquaint the Reader in the ſecond place concerning the ſame Subject of the Diſtinction of Natural and Arbitrary Laws, that there is this Difference between the Publick and the Private Law, That whereas in the Private Law there are but few Arbitrary Laws, there is an infinite number of them in the Publick Law; ſo that the Reader will find a great many more of theſe Arbitrary Laws left out in this Book, than there are omitted in the Book of the *Civil Law in its Natural Order*. But this Difference, as to the Omiſſion of more or fewer of the Arbitrary Laws, is of no moment as to what is neceſſary and eſſential for poſſeſſing the Science of the Publick Law and of the Private Law, which conſiſts in the Knowledge of the Natural Laws.

We muſt acquaint the Reader in the third place, of an important Difference there is between the Publick Law and the Private Law, as to what concerns the Natural Laws of the one and the other, and which conſiſts in this, That as for the Natural Rules of the Private Law, we find them all almoſt in the Body of the *Roman* Law; and altho they be not ranked there in their due Order and proper Light, yet we have been able in the Book of the *Civil Law in its Natural Order* to quote Texts out of the *Roman* Law upon the greateſt part of the Articles, whether it be that the ſaid Texts do exactly agree with the Rule explained in the Article, or whether they comprehend only one part of it; and that we have been obliged to give to the Rules their full Extent by the Principles gathered from the Law of Nature. But as for the Publick Law, it comprehends an infinite number of the Rules of the Law of Nature, which are not collected either in the *Roman* Law, or any where elſe; and of which a great number is taken from the Divine Law, or are Conſequences deduced from the Natural Principles

of Juſtice and Equity; ſo that there will be in this Book a great number of Articles drawn from theſe Sources, and on which there will not be one Text cited out of the *Roman* Law, but on many Articles we ſhall cite the Paſſages of Holy Scripture on which the ſaid Articles are founded.

We ought in fine to inform the Reader, that altho in purſuance of our firſt Deſign as to this Book we ought to have left out all the Arbitrary Laws in general, yet we have been ſhould inſert ſome of the Laws of this kind, becauſe of the Connexion which they have with the Law of Nature, and of the Neceſſity of knowing them. Thus, for example, it is an Arbitrary Rule of the Ordinances in the Matter of Proofs, which forbids the receiving of Proof by Witneſſes alone when the Contract exceeds the Sum of one hundred Livres: But this Rule being an Exception of great Importance, and of frequent Uſe to the Natural Rule which allowed of Proofs by Witneſſes without any Diſtinction, the Connexion between this Exception and the ſaid Rule, and the Conſideration of its frequent Uſe, induced us to inſert it here. And there are alſo ſome other Arbitrary Rules, which the like Conſiderations will oblige us to mention in the ſame manner, and to join them to the Rules of the Law of Nature. But for the other Arbitrary Rules which are not of the like Uſe, we ſhall forbear mentioning them. And in order to give a general Idea of the Characters which diſtinguiſh the Natural Laws which ſhall be comprehended in this Book, and the Arbitrary Laws which ſhall be left out of it, the Reader may form to himſelf this Idea by Examples of the Laws of theſe two kinds in every one of the four Parts of the Publick Law.

Thus, in the firſt Part, which relates to the Order of Government, there is a very great Number of Rules of the Law of Nature, which are the principal and moſt eſſential Rules thereof; ſuch as thoſe which concern the Authority, the Rights, the Duties of thoſe who have the Adminiſtration of the Government in their hands, the Obedience which is due to them and to their Miniſters, the Functions and Duties of the ſaid Miniſters, the Uſe of the Forces neceſſary for maintaining the publick Tranquillity, and for defending the State againſt the Attempts of Enemies, the Order of the Military Government, that of the Management of the Revenue, the Diſtinctions of the ſeveral Orders of Perſons, their Functions and their Duties, the general Policy as to Things which belong to the publick Uſe, the Government of Towns and other Corporations, of Univerſities, of Hoſpitals, of Arts, of Trade, the Protection of the Laws of the Church: For all theſe ſorts of Rules are within the Deſign of this Book. But in theſe very Matters there is an infinite Number of Arbitrary Laws, which are not to be inſerted here; as, for example, thoſe which regard the Detail of ſeveral inferior Rights of the Prince, the Diſtinctions of ſome Functions which he diſtributes differently to his Miniſters, and to thoſe whom he calls to aſſiſt in his Councils for divers ſorts of Affairs, the particular Rules relating to the reſpective Offices and Service to be performed in the War, for the Artillery, for Proviſions, for Forage, and other neceſſary Precautions for ſeveral Purpoſes; the particular Regulations about ſeveral ſorts of Impoſts, and the manner of levying the publick Taxes; the Statutes of Companies of Trades for the Standard and Quality of their Work, the Regulations of Univerſities for the Time and Manner of their Studies, and other Matters of the like nature.

Thus, in the ſecond Part of this Order, it is agreeable to the Law of Nature that there ſhould be in a State divers Officers for the different Functions that may be neceſſary for the publick Good; for ſince the Sovereign cannot apply himſelf to every thing, it is neceſſary that he ſhould have under him Perſons to whom he may intruſt the Functions which he himſelf cannot perform. Which makes it neceſſary that there ſhould be eſtabliſhed divers ſorts of Officers of Juſtice, of the Policy, of the Revenue, and others; and that every one of them ſhould have the Characters either of Dignity or Authority ſuitable to their Miniſtry, and that they ſhould diſcharge their Duties; which takes in a great number of Rules of Natural Equity, which ought to be placed in this Book. But there are to be found in the ſame Matters other Arbitrary Rules, which ought to be left out; ſuch as thoſe which diſtinguiſh all the ſeveral ſorts of Functions which are allotted to the different ſorts of Officers, which regulate their Salaries and Perquiſites, which aſcribe unto them certain Rights, certain Privileges, and others of the like nature.

Thus, in the third Part of the ſame Order, the Law of Nature requires that Crimes ſhould be puniſhed, and that the Puniſhments ſhould be proportioned to the Quality of the Crimes and Offences. And it is alſo by the Rules of the Law of Nature, that we ought to diſtinguiſh the different Characters of the ſeveral ſorts of Crimes and Offences which render them more or leſs heinous, and that in every kind we ought likewiſe to diſtinguiſh the particular Circumſtances of each Crime, which may determine the Puniſhment thereof to be more or leſs rigorous. And theſe ſorts of Rules are the Subject-matter of this Book. But it would not be proper to collect here the different Rules or Arbitrary Cuſtoms, which relate to the manner of putting Criminals to the Torture, which is called the *Queſtion*; the Regulations for ſecuring the Perſons of Offenders, the ſeveral ſorts of Puniſhment which are practiſed in different Places, and other Matters of the like kind.

Thus, in the fourth and laſt Part, the Law of Nature demands that Juſtice ſhould be duly adminiſter'd, that Law-Suits ſhould be well inſtructed and decided; that for the whole Detail of what may be neceſſary for duly inſtructing and deciding a Law-Suit, there ſhould be a ſtated Order for all Judicial Proceedings, to be obſerved in all Caſes: In which Order there are many particular Rules which are of Natural Equity, ſuch as that of hearing both Parties, of taking Proofs of Matters of Fact, of granting certain Delays, and others of the like nature. And theſe ſorts of Rules ſhall be explained in this fourth Part. But we ſhall not inſert here a great many Arbitrary Laws; ſuch as thoſe which regulate the manner of citing the Parties, the Delays after Citation, the manner of drawing up Sentences and Decrees, the Formalities of ſeveral Proceedings, the manner of Appeals, and others of the like kind, and the ſeveral ways of proceeding in the different Inſtances.

We could not well omit making all theſe Reflexions, in order to explain the Deſign which we propoſed to our ſelves in this Book, and to give a general Idea of the Nature and Order of the Matters to be treated of therein, and of the Characters which diſtinguiſh the Rules which are to be comprehended in it from thoſe which we have thought proper to leave out.

As to the Diſtinction of the Rules, the Reader may be able to judge by the laſt Reflexions which we have juſt now made, that it would not have been proper to have inſerted in this Book the infinite number of Arbitrary Laws, without which one may be fully Maſter of the Science of the Publick Law, and of which there are ſeveral Collections, where they may all be ſeen. And he will be convinced more and more by the reading of this Book, that ſuch a Medley would have been troubleſome, diſagreeable, and full of Inconveniencies.

As to what concerns the Nature and Order of the Matters, the Reader may have been able to judge of them by the Diſtinctions that have already been made; and he may ſtill do it more eaſily by the View which he will have of them in the following Table.

A TABLE of the Titles contained in the Four Books of the *Publick Law.*

BOOK FIRST.

Of the Government and general Policy of a State.

Title I. *Of Government.*
II. *Of the Power, Rights, and Duties of thoſe who are veſted with the Sovereign Authority.*
III. *Of the Council of the Prince, and of the Functions and Duties of thoſe who are Members of it.*
IV. *Of the Uſe of the Forces neceſſary for the Defence of the State, and of the Duties of thoſe who ſerve in the Army.*
V. *Of the Revenue, and of the Functions and Duties of thoſe who have any Office or Imployment about it.*
VI. *Of the Demeſnes of the Sovereign.*
VII. *Of the Means to procure plenty of all things in a State; of Fairs and Markets, and of Regulations to prevent the Dearth of things that are moſt neceſſary.*
VIII. *Of the Policy relating to the Uſe of the Seas, Rivers, Sea-Ports, Bridges, Streets, Market-Places, High-Ways, and other publick Places; and of what concerns Foreſts, Hunting, Fowling and Fiſhing.*
IX. *Of the ſeveral Orders of Perſons who compoſe a State.*

Remarks on the following Titles.

X. *Of the Clergy.*
IX. *Of the Perſons whoſe Condition engages them in the Profeſſion of Arms, and of their Duties.*
XII. *Of Commerce.*
XIII. *Of Trades and Handicrafts.*
XIV. *Of Husbandry, and the Care of Cattel.*
XV. *Of Communities in general.*
XVI. *Of the Corporations of Towns, and other Places, of Municipal Offices, and of the Domicil of every Perſon.*
XVII. *Of Univerſities, Colleges, and Academies for the Inſtruction of Youth.*
XVIII. *Of Hoſpitals.*
XIX. *Of the Uſe of the Temporal Power in what regards the Church.*

BOOK SECOND.

Of the Officers and other Perſons who are employed in the publick Functions.

Title I. *Of the ſeveral ſorts of Offices and other Charges.*
II. *Of the Authority, Dignity, Rights and Privileges of Officers.*
III. *Of the Duties in general of thoſe who execute Offices.*
IV. *Of the Duties of Officers of Juſtice.*
V. *Of the Functions and Duties of ſome other Officers of Juſtice beſides Judges, and who are ſubſervient in the Adminiſtration of Juſtice.*
VI. *Of Advocates.*
VII. *Of Arbitrators.*

BOOK THIRD.

Of Crimes and Offences.

Title I. *Of Hereſy, Blaſphemy, Sacrilege, and other Impieties.*
II. *Of High Treaſon.*

Title

Title III. *Of Rebellion againſt the Orders and Decrees of Courts of Juſtice.*
IV. *Of unlawful Aſſemblies, taking up of Arms, and uſing of force.*
V. *Of Duels.*
VI. *Of Embezlement of the Publick Money.*
VII. *Of Extortions and other Miſdemeanours committed by Officers.*
VIII. *Of counterfeiting the King's Coin.*
IX. *Of Aſſaſſinates, Murders, Poiſoning, of Parricides, and other Attempts againſt the Life of other Perſons; of Self-Murder, and expoſing of Children.*
X. *Of Theft and Robbery, and fraudulent Bankrupcies.*
XI. *Of Forgery.*
XII. *Of Adultery.*
XIII. *Of Attempts made upon the Chaſtity of any Perſon.*
XIV. *Of Injuries and Defamatory Libels.*
XV. *Of the ſeveral Tranſgreſſions of the Rules of the Policy of the State.*
XVI. *Of Aſſociates and Accomplices in Crimes and Offences.*
XVII. *Of Crimes and Offences committed by Communities.*
XVIII. *Of the Puniſhment of Crimes and Offences.*

BOOK FOURTH.

Of the Order of Judicial Proceedings.

PART FIRST.

Of the Inſtruction of Civil Cauſes.

Title I. *Of the ſeveral ſorts of Demands and Actions in Courts of Juſtice.*
II. *Of the Inſtruction of Cauſes in the ſeveral Inſtances in general, whether the Proceedings be upon Appearance of the Parties, or by Default; and of Delays.*
III. *Of the Proceedings which ought to precede certain Inſtances.*
IV. *Of the Incidents which happen in the Inſtruction of Cauſes in the ſeveral Inſtances.*
V. *Of Interlocutory Sentences.*
VI. *Of Interventions.*
VII. *Of the Production of Titles and other Writings.*
VIII. *Of the ſeveral ſorts of Proofs of Facts which are conteſted.*
IX. *Of the written Pleadings of the Parties.*
X. *Of Peremptions.*
XI. *Of Sentences, of their Execution, and of Coſts.*
XII. *Of the Ways of obtaining a Redreſs againſt Sentences.*
XIII. *Of Proceedings in Appeals.*
XIV. *Of Decrees of the ſupreme Courts from whence there lies no Appeal, and of the Ways of procuring them to be reverſed or annulled.*

SECOND PART.

Of the Inſtruction of Criminal Proſecutions.

Title I. *Of Accuſations, Complaints and Denunciations.*
II. *Of Informations and Decrees.*
III. *Of Contumacy.*
IV. *Of the ſeizing and impriſoning of Offenders.*
V. *Of the Examination of Perſons accuſed.*
VI. *Of the repeating and confronting of Witneſſes.*
VII. *Of Torture.*
VIII. *Of Sentences of Condemnation or Abſolution, and the Enlargement of Priſoners for a time.*
IX. *Of Appeals.*
X. *Of Acts of Grace, Pardons, Abolitions and Preſcriptions of Crimes.*

A TABLE of the Titles of the Four Books of the *Publick Law*, and of their Sections.

BOOK FIRST.

Of the Government and general Policy of a State.

TITLE I.

Of Government.

Sect. I. *Of the Neceſſity and Uſe of Government.*
II. *Of the Obedience due to Governours.*

TITLE II.

Of the Power, Rights and Duties of thoſe who are veſted with the Sovereign Authority.

Sect. I. *Of the Power of the Sovereign, and what ought to be the Uſe thereof.*
II. *Of the Rights of thoſe who have the Sovereign Authority.*
III. *Of the Duties of thoſe who are clothed with the Sovereign Authority.*

TITLE III.

Of the Council of the Prince, and of the Functions and Duties of thoſe who are Members of it.

Sect. I. *Of the Functions of Officers, Miniſters, or others who are bound to give Princes Counſel or Advice.*
II. *Of the Duties of Officers, Miniſters, or others who are bound to give Counſel or Advice to Princes.*

TITLE IV.

Of the Uſe of the Forces neceſſary for the Defence of the State, and of the Duties of thoſe who ſerve in the Army.

Sect. I. *Of the Uſe of Forces within a Kingdom.*
II. *Of the Uſe of Forces without the Kingdom, of Military Diſcipline, and of the Duties of thoſe who are in the Service.*

TITLE V.

Of the Revenue, and of the Functions and Duties of thoſe who have any Office or Imployment about it.

Sect. I. *Of the Neceſſity of Taxes, and of their kinds.*
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III. *Of the Aſſeſſments of particular Perſons.*
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Sect. I. *Of the different sorts of Dignity and Authority annexed to Offices.*
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THE

THE *PUBLICK LAW*; BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK I.

Of the Government and General Policy of a State.

THERE is no Body who is not thoroughly perſuaded of the Conſequence of good Order in a State, and who does not ſincerely wiſh to ſee that State well regulated in which he is obliged to paſs his Life. For every one comprehends and feels within himſelf by Experience and by Reaſon, that the ſaid Order concerns and regards him in ſeveral Manners. So that Self-Love is ſufficient to inſpire this Sentiment into all thoſe who are not of ſeditious or rebellious Tempers, or engaged in other irregular Courſes which Order and Juſtice do not allow of. But altho there be nothing more natural to every Man than to conſider in the Publick Good the Share which he himſelf has in it, and that this Conſideration ought to have the Effect of engaging all ſorts of Perſons without Exception, to contribute on their part to the Support of it; yet we ſee on the contrary that nothing is more frequent than to find even ſome of thoſe who by their Employments are engag'd to apply themſelves to this Publick Good, who ſhew by their Conduct that they are either very little influenced by, or very little inſtructed in the Principle which ought to engage them to ſuch a Duty.

Every Body knows that the Society of Mankind forms a Body of which every one is a Member: and this Truth which the Scripture teacheth us, and which the Light of Reaſon makes clear

and evident *a*, is the Foundation of all the Duties which reſpect the Conduct of every Member towards all the other Members in particular, and towards the Body in general. For theſe ſorts of Duties are nothing elſe but the Functions which are proper to the Engagements under which every one happens to be by the Rank which he holds in this Body.

It is from this Principle that we are to draw, as from the Fountain, all the Rules of the Duties both of thoſe who govern, and of thoſe who are ſubject to the Government. For it is by the Situation every one holds in the Body of the Society, that God, of whom he holds his Place, preſcribes to him, by calling him to that Station, all his Functions and all his Duties. And as he enjoins to all the exact Obſervance of the Precepts contained in his Law, and which are the common Duties of all ſorts of Perſons; ſo he preſcribes to every one in particular the Duties which are peculiar to his State and Condition, by the Rank which he holds in the Body of which he is a Member, which implies the Functions and Duties of every one of the Members towards all the others, and towards the Body.

If we examine upon this Principle which is ſo certain, ſo plain and ſo natural, the Conduct of particular Perſons, as to what concerns their Duties towards the Publick, and the Conduct of thoſe whoſe Profeſſion obliges them to promote the publick Good, and to maintain Order in the State; we ſhall find that all the ſaid Members are ſo far from conſidering themſelves under this Obligation, and from directing to this end the Functions which their Rank demands of them, that the greater part conſider only themſelves, without any regard to the Body of which they are Members, and regulate all their Conduct without any View of the Order or Publick Good of the ſaid Body. But every one places his All in himſelf, and his Self-Love directing the whole Conduct of his Life to his own particular Advantage, he conſecrates to it the entire uſe of the Rights, the Duties, and the Functions which he ought to exerciſe only as being a Member of the common Body, and he turns them even againſt the Good of the ſaid Body, if he thinks that his own particular Good requires that he ſhould make this bad uſe of them, or he quite abandons them, if he finds that he cannot draw from them ſome Profit or Advantage to himſelf. Thus, we ſee an infinite number of Perſons, who inſtead of giving to the Dignity annexed to the publick Charges in which they are placed, its natural Uſe, which is to give Authority to their Miniſtry, by procuring Reſpect and Obedience from thoſe who are ſubject to their Juriſdiction, uſe their Authority to no other purpoſe than to diſplay their Ambition, and to draw to their Perſons the Honour and Reſpect which is due only to the Rank which they hold. Thus, we ſee ſome who make no other uſe of the Authority of their Offices, which are deſtined for the Support of Juſtice, than as a Handle to exerciſe Injuſtice and Violence, and to oppreſs thoſe who ought to be protected by that Authority. Thus, the greater part exerciſing their Miniſterial Functions only with a view to the Honour, Profits, and other Advantages which accrue to them thereby, they act and are in effect only as dead Members, when their Self-Love diſcovers no other Advantage to be reaped from their Functions beſides the Publick Good.

It appears ſufficiently by this firſt Reflection, what is the Foundation of all the Duties of thoſe who ought to contribute to the Publick Order; and that ſince this Order cannot ſubſiſt but by the Concurrence of the Functions of all the Members who compoſe the Body of the Society, the Depravation or Corruption in the Diſcharge of the ſaid Functions by the Members, or their bare ceaſing to perform them, produces in the Society as it were a Diſtemper which troubles and diſturbs the Order of it. Seeing therefore it is upon the Foundation of this Truth, *That the Society forms a Body of which every one is a Member*, that the different Rules concerning the Duties of thoſe who compoſe this Society are built, and that the ſaid Duties are the moſt eſſential Part of the Matters of the Publick Law; we have been obliged to begin the particular detail of theſe Matters by this Reflection on the ſaid Foundation, which will be of uſe in all the ſubſequent Parts of this Book, where we ſhall explain the Functions and Duties of the ſeveral ſorts of Perſons whoſe Imployments may have any manner of relation to the Publick Order.

a Dominus membrorum ſuorum nemo videtur. *l.* 13. *ff. ad leg. Aquil.* But now hath God ſet the Members every one of them in the Body, as it hath pleaſed him. 1 *Cor.* 12. 18.

TITLE I.

Of the Government and General Policy of a State.

Divers ſorts of Governments.

ALTHO every State hath its peculiar Manner of Government, and there be in all States ſome Laws or Uſages which diſtinguiſh the Names, the Number and the Power of thoſe who are placed in the higheſt Stations; yet there is this common to all of them, that the general Order is maintained in them by a ſuperior and ſovereign Power, whether it reſide in one or in many Perſons.

They call thoſe Monarchies, or Monarchical States, where the Sovereignty reſides in one Perſon alone, to whom they give in general the Name of Prince: and they give the Name of Republicks to thoſe States where the Sovereignty reſides in many Perſons.

The Monarchical States are of ſeveral ſorts, Empires, Kingdoms, and others under divers Names: Many of them are Hereditary, and others are Elective. Among the Hereditary Monarchies there are ſome which deſcend only to the Heirs Male; and in others the Daughters ſucceed for want of Male-Iſſue. We may reckon among the Monarchical States, divers States which under the Names of Dutchies, Counties, Marquiſdoms, and other the like Names, form Principalities of which the Dukes, the Counts, the Marquiſſes, are Sovereigns; and altho they hold their Sovereignties and Principalities as Fiefs of other Princes to whom they are Vaſſals, yet they have nevertheleſs a Sovereign Empire over their Subjects. There are even ſome Kingdoms which are held in Fee. There are likewiſe Principalities annexed to Biſhopricks, and which go to the Biſhop by virtue of his Election to the Biſhoprick.

Republicks are alſo of divers ſorts: For there are ſome of them which are called Ariſtocracies, where the Government is in the hands of Perſons of the firſt Rank: And there are others which are called Democracies, in which Perſons of the meaner ſort of the People may be called to the Government. They give likewiſe the Name of Oligarchy to ſome Republicks, where the Government is in the hands of a few Perſons, to diſtinguiſh them from the others where the Government is in the hands of a greater Number. Thus theſe ſeveral Manners of Government in Republicks diſtinguiſh them from one another; but they have all of them this in common, that it is by Election that the higheſt Places in them are filled, whether this Election be made by a certain Body which has the Right of electing, or by Deputies of divers Orders, or by other Ways.

Which of the two Governments ought to be preferred, Monarchy or a Commonwealth.

Of theſe two general Kinds of Government, Monarchical and Republican, the Monarchical is the moſt univerſal and the moſt antient. It is the moſt univerſal, becauſe we ſee that at this Day the whole World is divided into Monarchies, excepting a ſmall number of Republicks; and becauſe we know from the Hiſtories of all Ages, and of all Places, that this ſort of Government hath always been moſt in uſe. And it may be obſerved that all the Republicks which are now extant in *Europe*, where is the greateſt number of them, have all of them put together only a very ſmall Extent of Territory, and that there is not one of them but what has been taken out of a Monarchical Government which went before it. For they have all of them been taken off either from the *Roman* Empire, or from other Monarchical States. And if we look back to the Republick of *Rome*, the moſt flouriſhing Common-Wealth that ever was, we know that it was preceded alſo by a Monarchy.

As to the Antiquity of theſe two Forms of Government, that of Monarchy hath its Origin from the Creation of the World, when it was altogether natural, that one ſingle Family becoming one People, the Paternal Power of the firſt Head of the Family, whoſe Children and Deſcendants compoſed the ſaid People, ſhould be in his Perſon a Right of Government, and that this Unity of Government which was natural in the firſt Beginning of the Society of Mankind ſhould continue in it. Thus we ſee that after the Deluge, which put Mankind into the ſame Condition they were in at the Creation, one only Perſon was the Head of the firſt Society; and when it divided and diſperſed itſelf in order to form many Societies in divers Countries, each Society retained this Manner of Government. We may likewiſe obſerve, that in the Holy Scriptures, which are the only Writings

wherein we have the Hiſtory of many Ages from the Creation of the World, before thoſe other Ages of which we have ſome Veſtiges in the other Books, there is not the leaſt mention made of Republicks. But we ſee there, that Monarchical States were every where in uſe, and ſo multiplied, that in the ſmall Extent of Territory which environed the State of the *Jews*, there was reckoned a great number of Kings, every one of which could have but very narrow Dominions. And in the ſucceeding Ages, we ſee from the ſame Holy Writings, and from other Books, that almoſt all the Governments of the Univerſe have been Monarchical.

It would ſeem that we might gather from this Antiquity of the Monarchical Government, from its Origin, which it derives from the Paternal Government, and from its Duration in all Ages over the whole World, that it is the moſt natural Government, and that it is the Government which the Generality of People have judged to be the moſt uſeful. And altho it be true, that the Multitude is not always of the moſt reaſonable Opinion, yet this Truth is reſtrained to two ſorts of Opinions and Sentiments, in which the Plurality is often ſubject to Error. One ſort is of the Opinions in Matters the Knowledge whereof depends on the Principles of Sciences, that are known but to a few Perſons, and of which the Truths are hidden, and often contrary to what appears to the Senſes, which the greater part of Mankind make the Rule of their Judgments. And the other ſort is of the Sentiments which are inſpired into us by the Corruption of our Hearts, the Biaſs of Self-Love, and the Impreſſions of the Paſſions; for ſeeing we are all born with an Inclination to Evil, and that but few Perſons attain to that degree of Perfection as to govern their Actions by the Views of Truth and of Juſtice; the Multitude goes aſtray and wanders in the Sentiments which proceed from the Heart: and we ſhould judge almoſt always very imprudently, very falſly, and even criminally, if we ſhould judge of the Sentiments and Motions of the Heart according to the Taſte of the Multitude. Thus, for example, we ſhould make a wrong Judgement if we ſhould think that the Love and Purſuit of Pleaſures, of Riches and Honours, were the beſt Courſe, becauſe it is that which the Multitude follows. But in Matters in which the Knowledge of Juſtice and Truth does not depend either on the Study of Sciences, or on the Purity and Uprightneſs of the Heart, and where the Diverſity of Opinions is no ways contrary to Religion nor to good Manners, the Multitude judges almoſt always better than thoſe Perſons who have a mind to diſtinguiſh themſelves from the Croud, and who purſue other Views than thoſe to which natural Inclination leads the Generality of Mankind. For that Inclination is nothing elſe but a Propenſity to follow the Lights which God gives us naturally; and Reaſon is the Principle which he has given us for the Uſe of the ſaid Lights. We ſee likewiſe ſometimes that this Bent of the Multitude to an Opinion, is founded on natural Principles which are not ſo eaſily diſcovered, and which thoſe who lean to the contrary Opinions have not enquired into. The Reader may meet with an Inſtance of this in the Preamble of the third Section of the ninth Title of this firſt Book.

We may add to all theſe Conſiderations, which prove that the Monarchical State being the moſt univerſal and the moſt antient, is the moſt natural and moſt uſeful, that it is likewiſe the moſt conformable to the Spirit of the Divine Law, and to the Government of God himſelf over Mankind. For it was this ſort of Government that God made choice of, when he ſet about forming a People over whom he was to diſplay his Almighty Providence, that he might repreſent another People which he was to gather out of all the Nations of the World, and which was likewiſe to have one only Sovereign, whoſe Reign ſhould reach over all the World, and to all Ages. He began with chuſing and diſtinguiſhing one Family, and eſtabliſhing therein the Perſon who was the Head of the Family as the firſt Sovereign Prince, allowing him likewiſe the Uſe of Arms: the Deſcendants of this firſt Head who compoſed this elect People having been in a Captivity of four hundred Years *a* under the Tyranny of a neighbouring People, where they multiplied to ſuch a degree as to make up more than ſix hundred thouſand Men able to bear Arms. When it was the Will of God to deliver them out of that Captivity, he raiſed up unto them a Deliverer who ſet them free, and who exerciſed over this People all his Life-time the Functions of a Prince under the

a Know of a Surety, that thy Seed ſhall be a Stranger in a Land that is not theirs, and ſhall ſerve them, and they ſhall afflict them four hundred Years. Gen. 15. 13. Acts 7. 6.

viſible Direction of God, who employed that Man alone to execute his Orders in every thing relating to the Government. And ever after, this People had always Leaders, who governed them under the Name of Judges, that is to ſay, according to the Stile of the Holy Scriptures, Princes who had the Government. Thus, during the Lifetime of *Moſes*, and of the Princes his Succeſſors, the Government of the *Jewiſh* Nation was always Monarchical, that is to ſay, in the Perſon of one Man alone; ſo that when *Moſes*, finding it impoſſible for him of himſelf alone to regulate all the Controverſies of the People, choſe out among the Elders the wiſeſt and moſt skilful Perſons to eaſe him in his Function, he reſerved to himſelf the Cognizance of ſuch Difficulties as might be too hard for the ordinary Judges, and might deſerve that he himſelf ſhould hear and determine them *b*. From the beginning of the Government of *Joſhua* his Succeſſor, God told him that he ſhould be with him as he had been with *Moſes*; and he began to act as Chief, he alone having the Government, giving out his Orders to the firſt among the People who were to command under him, and who promiſed him all of them a faithful Obedience, they declaring to him at the ſame time, that the firſt who ſhould fail to obey him in every thing which he ſhould command, ſhould be put to death *c*.

The Government of the Judges was ſucceeded by that of the Kings, by a Change which it is not neceſſary to explain here. For the Queſtion here is not concerning the different Manners in which one Perſon alone may have the Government; but only in general about the Preference of the Government of one Perſon alone to that of a Commonwealth, as being the moſt natural and the moſt conformable to the Government which God himſelf exerciſed over his choſen People. And in effect, after that God had given to this People a King which they had deſired of him, and that he had puniſhed both the People for having deſired a Government different from that which he himſelf had directed, and alſo the King for not having followed all his Orders; yet nevertheleſs he gave unto them a ſecond King, and he himſelf choſe for that Office a Perſon who deſerved that ſingular Commendation of being a Man according to God's own Heart *d*, and whom he render'd worthy to repreſent by his Reign that of the Prince who was to be born of him, and who was to form that heavenly Kingdom, of which the Kingdom of that choſen People was a Type and Figure. And he gave to this ſecond King many Succeſſors of his own Deſcendants, who reigned over the People.

We ſee by this Succeſſion of Monarchies over all the World, and throughout all Ages, and by the Conduct of God towards the *Jewiſh* Nation, that the Monarchical State is the moſt natural and the moſt conformable to that which God himſelf exerciſed over his own People. And it is by this ſame Conduct that God having formed the Society of every State, as a Body of which the Perſons who compoſe it are ſo many Members, he has eſtabliſhed in every State a Head *e* to govern it, and to be in his ſtead, as a Father in a Family, and who by the Unity of the Government imitates and repreſents the Government of his Providence, and contains the Members of that Body of which he is Head within the Bonds and Ties which ought to form the Order of the Society which unites them.

It ſeems to follow from theſe Truths, that the Monarchical State is the moſt natural, and the moſt uſeful. And likewiſe we ſee, that the Inconveniencies which cannot fail to ariſe in all Things wherein the Conduct of Men has any ſhare, are naturally leſs in Monarchies than in Commonwealths. Thus, in a Monarchy the Subjects do not dream of aſpiring to the Dignity of Sovereign; and we find there much fewer Cabals and Factions. For the Ambition of particular Perſons having for its Bounds the Rank of a Subject, it never goes the Length of an Attempt in any one to raiſe himſelf to the Dignity of Sovereign, and to diſturb the State by Se-

b And the Cauſe that is too hard for you, bring it unto me, and I will hear it, Deut. 1. 17.

c Whoſoever he be that doth rebel againſt thy Commandment, and will not hearken unto thy Words in all that thou commandeſt him, he ſhall be put to death, Joſhua 1. 18.

d He raiſed up unto them David *to be their King, to whom alſo he gave Teſtimony, and ſaid, I have found* David *the Son of* Jeſſe, *a Man after mine own Heart, which ſhall fulfil all my Will*, Acts 13. 22.

The Lord hath ſought him a Man after his own Heart, and the Lord hath commanded him to be a Captain over his People, becauſe thou haſt not kept that which the Lord commanded thee, 1 Sam. 13. 14.

e Over every Nation hath he ſet a Ruler, Eccluſ. 17. 14.

ditions

ditions and Civil Wars. But in a Commonwealth many Perſons being capable of pretending to the higheſt Stations, and the Way being open to them by Election, Cabal and Party have often times a greater Share in the Elections than Merit. And thoſe who aim at the firſt Places, never fail to make Cabals that they may ſucceed in their Deſign. And if they want Occaſions and Conjunctures for employing Force, they endeavour to gain Voices by Bribes, by Promiſes, by Threatenings as to thoſe whom they think they can influence by ſuch means, and by other ways, which cauſe Diviſions in Families, corrupt thoſe who have the Right of electing, and raiſe to the Government the worſt of Subjects. Thus theſe unjuſt Elections are likewiſe attended with the Inconvenience of Envies, Jealouſies, Diviſions, Enmities, and make that Submiſſion to thoſe who get into the Places of the Government by theſe unfair ways more irkſome, and ſometimes more odious. The Elections that are made even in the faireſt manner, do not hinder thoſe who think they have more Merit than the Perſons raiſed over their Heads to the Government, from looking on them with a jealous Eye, and do not prevent divers bad Conſequences which attend Popular Elections, and which are directly oppoſite to the publick Good, which ought to be the Fruit of Government. We ſee likewiſe in Commonwealths, that thoſe who are in the higheſt Stations having their own proper Intereſt, and that of their Families, ſeparate and diſtinct from the Intereſt of the State, the publick Good is in danger of being poſtponed to their own private Advantage, on all Occaſions where their Preferments may be uſeful to promote their particular Intereſts. Whereas in a Monarchy the Sovereign Power being in the hands of one only Perſon, who ought to have one only View, and one only Intereſt, that of the Good of the State, which he ought to look upon as his own proper Intereſt, nothing divides it. And this Unity, which doth not hinder the Uſe of good Counſels, makes the Reſolutions more ſteady, more ſecret, and more adapted to the Good of the State, and facilitates the Execution of them, rendring it more expeditious, more powerful, and more abſolute by the Union of all the Forces, and of every thing which belongs to the Execution in the Perſon of the Sovereign, in whom reſides the Fulneſs and Unity of the Government.

Beſides theſe Advantages which are natural to Monarchical Government, we may take notice of one more that is common to almoſt all the Monarchies that are in being, and which is not to be met with in the greateſt part of Commonwealths. Every body knows that in order to procure and to preſerve the Good of a State, it is neceſſary that due Care ſhould be taken that it may abound with all Things which may contribute to the Neceſſities and Conveniences of Life for all ſorts of Perſons who are Members of it; that the People may live there in Peace, and in Safety againſt all Attempts from Neighbours and Enemies; that Juſtice may reign in it abſolutely, and without controul; that the Art of War, Sciences, Arts, Trade may flouriſh there by the Multitude of Perſons who cultivate them, and by diſtributing Rewards to the Trades and Profeſſions of ſuch Perſons as have done ſingular Services to the Publick; that the publick Revenue be ſo regulated as that it may be ſufficient for the Expences which all thoſe Things demand, which are neceſſary for the common Good of the State. From whence it follows, that the larger a State is, the more it has all theſe Advantages, and it hath them in a leſs Degree, in proportion to the Narrowneſs of its Bounds. For in a ſmall Territory all ſorts of Things are in leſs plenty, and the Inhabitants have not the Helps neceſſary for procuring them elſewhere: Skilful and able Perſons are to be found there in a much ſmaller Number: There is but little Aſſiſtance to be had from the publick Revenue: The Inhabitants are greatly expoſed to the Inſults of Strangers, and the moſt inconſiderable Attempts againſt them are enough to overturn the State. Seeing therefore it is for the Good of a State that it flouriſh and ſupport it ſelf by its Wealth and by its Strength, which cannot be done without an Extent of Territory that may be able to ſupply it with every thing that is neceſſary, we may venture to ſay that theſe Advantages have always been, and are ſtill naturally peculiar to all the great Monarchical States, ſuch as we ſee at this Day in the far greateſt part of the World; and that they are wanting in almoſt all the Commonwealths that are now in being, for they are confined to a narrow Extent of Territory, and their ſmall Force expoſes them to the Inſults of their Neighbours, and obliges them to implore

plore the Protection of other Princes, which may ſome time or other bring them under the Subjection of a foreign Dominion, and be attended with troubleſome Conſequences. And that which cauſes this ſmall Extent of Territory in Republicks, and deprives them of the Advantages which great States have, is becauſe the Government of Republicks is natural only to a ſmall People, who ſeparate and diſtinguiſh themſelves from others by their peculiar Manners, that they may reunite themſelves by Ties which link thoſe who are Members of their Society more cloſely together, and be aſſociated under a Government which is more agreeable to their Inclinations; ſo that this Union is not ſo eaſily formed among many People. But the great States have been formed either by the Increaſe of the firſt People who got firſt poſſeſſion of a Country, or by Conqueſts which have enlarged its firſt Boundaries; and ſome States, eſpecially thoſe of *Europe*, were large Portions taken out of the *Roman* Empire, when it was diſmember'd. And all theſe Ways, and the others which may have given Birth and Increaſe to all the great Monarchies, have had this Conſequence of putting them in a Condition not to fear the Attempts of one another, and of procuring in every one of them plenty of every thing that may be for the Good and Support of a State.

We muſt not urge as an Inſtance againſt theſe Remarks on the Advantages of Monarchical Government, the Grandure of the Commonwealth of *Rome*; for we are to conſider as the Body of that Commonwealth only *Rome* it ſelf, or the People of *Rome*, who, having made themſelves Maſters of other Nations, did not look upon them to be Parts of their Commonwealth, but only as States ſubject to their Dominion. And as for the Inconveniences which Commonwealths are liable to, the Commonwealth of *Rome* fell in a few Ages into the greateſt of thoſe that have been taken notice of, having been brought to its end by the Ambition of the Authors of the laſt Civil Wars, in which the Conqueror made himſelf Maſter of the Commonwealth, and converted it into a Monarchy *f*.

We may add to theſe Reflexions on the Advantages of Monarchies, thoſe of *France*, which, of all the States of the World, is that wherein the ſaid Advantages do moſt abound, by its extent into ſeveral large Provinces, by its Situation in the moſt temperate Climate, and bordering on the two Seas; by its producing every thing that is either good or neceſſary for human Life; by the Multitude of its Springs, Rivulets, and Rivers proper for Navigation, in order to have an eaſy Communication between the ſeveral Provinces; by its lying near ſeveral neighbouring States; by the Politeneſs of the Nation, which produces many great Genius's and Great Men in all ſorts of Profeſſions; by its Riches, and its great Forces. And likewiſe there never was known a State which had ſo long and firm a Duration with ſo many Advantages over and above others.

It ſeems that we may gather from all theſe Reflexions, that Monarchical Government ought to be preferred to that of a Republick; and that it follows from ſome of the Reaſons of the ſaid Preference, that among Monarchies the Government of thoſe which are Hereditary is more natural, more uſeful, and attended with fewer Inconveniences than that of Elective Monarchies. For whereas in Hereditary Monarchies it is God himſelf who ſeems to diſpoſe more viſibly of the Government, by calling to it Princes by their Birth; Elections are liable to great Inconveniences, whether it be by the Choice of the Perſons, in which it is eaſy to be deceived, or by Cabals and Factions. And the Reign of Elective Princes, even thoſe whoſe Election has been carried on in the faireſt way, has its Inconveniences of Diviſions in the Election, of long Interreigns which expoſe the Country to Factions and to other bad Conſequences, of want of Obedience to an Authority that is not ſo abſolute, of Slowneſs in the Diſpatch of the publick Affairs, and other bad Conſequences. So that of all the States, the moſt natural, and the moſt perfect, is that of Hereditary Monarchies, which deſcend only to the Male Iſſue.

It is not neceſſary that we ſhould anſwer here the Objections of the Inconveniencies which happen in Monarchies, when the Sovereigns chance to be incapable of ſupporting the Weight of the Government, whether it be becauſe of their Minority, or becauſe of ſome Defects they may labour under, or even becauſe of Vices which may incline them to make a bad Uſe of their Power. We all know that there is in every thing divers ſorts of Inconveniencies, that

f Evenit ut neceſſe eſſet Reipublicæ per unum conſuli. *l.* 11. *ff. de orig.*

that there is nothing upon Earth so good and so perfect as to be quite free from all manner of Inconvenience, and that the best Establishments have their Imperfections; so that these Objections prove nothing at all. For besides that the Inconveniencies of Republican Governments are more frequent, and as great, or rather greater than those of Monarchies, when the matter is to judge of the Usefulness of a Government, and of all other sorts of Things, we ought to consider the Nature thereof in it self, and to judge that to be the best which hath naturally the Characters of the greatest Good. And as for the Inconveniencies which may happen in Monarchies by reason of any Vice or Defect in the Prince, they are an Effect of the Providence of God, which we ought to bear patiently, in the same manner as the bad Successes of the justest Wars, and the other Chastisements which come from the Hand of God. For it is to him alone that the Events of Things are reserved, and no human Prudence is able to ascertain them to be good; and it is in his Hand that Governments are, and the Wills of those who govern*g*. And even in States where the Governors have the greatest Wisdom and Application, whether it be in Monarchies or Commonwealths, there is no preventing an infinite number of Injustices committed by those to whom the Sovereign or the Republick are obliged to intrust that which those who are in the highest Stations of the Government are not able to do by themselves. And these Injustices are often more criminal than those which might proceed from the Sovereign himself. And in a word, God himself hath forewarned us, not to be surprized if we see Iniquity seated in the Throne of Justice. For if those who are set over others do not take care to maintain Justice in their Dominions, God has reserved it to himself to manifest his Power in the Severity of the Punishment which he prepares for the Injustices of those Princes who shall not have taken his Law for their Rule, and who shall not have reigned according to his Spirit *h*.

g The King's Heart is in the hand of the Lord, as the Rivers of Water: He turneth it whithersoever he will, Prov. 21. 1.

h If thou seest the Oppression of the Poor, and violent perverting of Judgment and Justice in a Province, marvel not at the matter: For he that is higher than the highest regardeth, and there be higher than they. Moreover, the Profit of the Earth is for all: The King himself is served by the Field, Eccles. 5. 8, 9.

For Power is given you of the Lord, and Sovereignty from the Highest, who shall try your Works, and search out your Counsels. Because being Ministers of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the Counsel of God, horribly and speedily shall he come upon you; for a sharp Judgment shall be to them that be in high Places. For Mercy will soon pardon the meanest, but mighty Men shall be mightily tormented. Wisd. of Sol. 6. 3, 4, 5, 6.

Be wise now therefore, O ye Kings; be instructed ye Judges of the Earth. Serve the Lord with Fear, and rejoice with Trembling. Kiss the Son, lest he be angry, and ye perish from the Way, when his Wrath is kindled but a little: Blessed are all they that put their Trust in him, Psal. 2. 10, 11, 12.

What has been said hitherto of the Advantages of Monarchical Government, and of that among the rest of its Conformity to the Government which God himself exercised over the *Jewish* Nation, ought not to have this effect, That because all these Considerations seem to prove that the Monarchical Government is the most natural, the most useful, and the most conformable to the Conduct of God, we ought from thence to conclude that the Government of Commonwealths is contrary to the Order of Nature, and opposite to the Spirit of God; since not only hath he not made a general Law ordaining this only kind of Monarchical Government to be established in all Countries, but he has even approved the Government of Republicks, having made no manner of Alteration in those Republicks which he has enlighten'd with the Light of his Gospel. For his Apostles and their Successors lived peaceably in all States, under the Government which they found established in them, and without meddling with their Form of Government, whether it was Monarchical or Republican, they taught the reciprocal Duties both of those who govern, and of those who are subject to the Government; having looked upon all the rest which concerns the Quality and the Title of those who govern, whether they be Princes, or others, as a Temporal Matter, subject to divers sorts of Temporal Policies, every one whereof may suit with the Gospel, especially seeing that even in the Matters of the Spiritual Policy of the Church, its Discipline is different in divers Places, and even in the same Places it hath been subject to Changes.

The Reasons why we have thought fit to examine this Question here.

We could not forbear, before we should proceed to the Detail of this Matter of Government, to consider this Question, Which of the two Governments is the most useful. For although

tho it may ſeem that every Nation is prepoſſeſſed as to this Queſtion, and gives it in favour of the Government to which they themſelves are ſubject, and that this Queſtion may appear to be a mere Curioſity; yet it is of Importance on one part to know the Truth in this matter, and on the other part to know what are the Duties of thoſe who happen to live under one of theſe two ſorts of Government, which is, or which they believe to be the leaſt advantageous; for there are many Perſons who would prefer to the Government under which they themſelves live that of the other kind. And we may be able to judge by all the Reflexions which have been made, both on the one and the other Form of Government, that altho it appear that Monarchy is the beſt of Governments, yet ſeeing both the Forms agree with Religion, and are conſequently agreeable to the Order of God, that we may perform under either of them all our Duties; and that we ought for this Reaſon to live peaceably under that Form of Government where our Lot has caſt us, it was neceſſary to examine this Queſtion; that whilſt we gave the Preference to Monarchy before a Commonwealth, we might declare at the ſame time, what is very true, that the Reaſons of this Preference are of no other uſe than to ſatisfy thoſe who ſhall reliſh them; and to inform others, that the Liberty of their Sentiments on this Queſtion, which no body can take from them, does not free them from the Neceſſity of obeying ſincerely the Government under which it is their Lot to live, be it Monarchy or a Commonwealth; and that every Attempt to diſturb the Peace and common Good of either the one or the other Form of Government, is a Crime whoſe Heinouſneſs cannot be ſufficiently puniſhed. Theſe Truths agree perfectly well with all that has been ſaid on this Queſtion: So that the natural Concluſion to be gathered from thence is, That they who live in a Monarchical State may very juſtly believe that theirs is the beſt Form of Government; and that thoſe who live in a Commonwealth, and who would prefer Monarchy to their Republican Government, are nevertheleſs bound to yield perfect Obedience to the Commonwealth; and that all of them without diſtinction, whether they reaſon on this Queſtion, or whether they do not think at all of it, and whatever Opinion they may be of, are equally obliged to pay Obedience to the Government under which they live, purſuant to the Rules which ſhall be explained under this Title; which we ſhall divide into two Sections, which ſhall comprehend all that we thought could well be digeſted into Rules on this Subject: One Section ſhall be of the Neceſſity and Uſe of Government; and the other of the Obedience due to Governors.

SECT. I.

Of the Neceſſity and Uſe of Government.

The CONTENTS.

1. *Cauſes of the Neceſſity of a Government.*
2. *Paternal Authority the firſt kind of Government.*
3. *The Diſtinction of Imployments demands a Government.*
4. *The Multitude of Families, which is neceſſary in a State, requires alſo a Government.*
5. *Another Cauſe of the Neceſſity of Government, for the puniſhing thoſe who diſturb the publick Order.*
6. *It is from God that Sovereigns derive their Authority.*
7. *The Uſe of Government.*

I.

1. *Cauſes of the Neceſſity of a Government.*

ALL Men being equal by their Nature, that is to ſay, by Humanity which makes their Eſſence, it does not make any one of them dependant on the others *a*. But in this Equality of Nature they are diſtinguiſhed by other Principles which render their Conditions unequal, and form among them Relations and Dependencies which regulate the different Duties of every one toward the others, and render the Uſe of a Government neceſſary to them; as will appear by the Articles which follow.

a I my ſelf am a mortal Man, like to all, and the Offspring of him that was firſt made of the Earth. And when I was born, I drew in the common Air, and fell upon the Earth, which is of like nature; and the firſt Voice which I uttered was crying, as all others do. For there is no King that had any other Beginning of Birth. For all Men have one Entrance into Life, and the like going out. Wiſd. of Solomon. Chap. 7. ver. 1, 3, 5, 6.

Quod ad jus naturale attinet, omnes homines æquales ſunt. *l.* 32. *ff. de reg. jur.*

II.

2. *Paternal Authority the first kind of Government.*

The first Distinction which subjects some Persons to others, is that which is made by Birth, between Parents and Children. And this Distinction makes a first kind of Government in Families, where the Children owe Obedience to their Parents who are the Heads of the Families *b*.

b Honour thy Father with thy whole Heart, and forget not the Sorrows of thy Mother. Remember that thou wast begot of them; and how canst thou recompense them the Things that they have done for thee? Eccluſ. 7. 27, 28.

Children obey your Parents in all Things. Coloſ. 3. 20.

III.

3. *The Distinction of Imployments demands a Government.*

The ſecond Distinctions of Persons, is that which is made among all Men by the Neceſſity of the divers Imployments that are neceſſary to form the Society, and to unite them all in a Body, of which every one is a Member *c*. For as God has render'd neceſſary to every Man the Aſſiſtance of many others for ſeveral Wants, ſo he has diſtinguiſhed their Conditions and Imployments for the reſpective Uſes of all theſe Wants, aſſigning to every one of them their Place where they ought to apply themſelves to their Functions. And it is by theſe Differences of Imployments and Conditions, depending the one upon the others, that are formed the Ties which compoſe the Society of Men; as the Conjunctions of the ſeveral Members compoſe the Body. And this renders the Uſe of a Head neceſſary for uniting and governing the Body of the Society, which theſe ſeveral Imployments ought to form, and for maintaining the Order of the Correſpondencies which are to ſupply the Publick with the Uſe of the different Functions due from every one according to his Situation, which makes his Engagement *d*.

c But now hath God ſet the Members, every one of them in the Body, as it hath pleaſed him. And if they were all one Member, where were the Body? But now are they many Members, yet but one Body. 1 Cor. 12. 18, 19, 20.

For he hath made the Small and Great. Wiſd. of Sol. 6. 7.

d Abide in thy Labour. Eccluſ. 11. 21.

IV.

4. *The Multitude of Families, which is neceſſary in a State, requires alſo a Government.*

The ſame Cauſe which demands this Variety of Profeſſions for compoſing the Order of a State, demands alſo the aſſociating of many Families together, that they may increaſe and multiply, and bring up Perſons fit for all Imployments, and perpetuate the Duration of them. And the Wants of thoſe Families, which imply the Uſe of thoſe very Imployments, depend on an infinite Detail of Ties and Engagements of the one to the other, which render the Order of a Government neceſſary *e*.

e By theſe were the Iſles of the Gentiles divided in their Lands, every one after his Tongue, after their Families, in their Nations. Gen. 10. 5.

V.

5. *Another Cauſe of the Neceſſity of Government, for puniſhing thoſe who diſturb the publick Order.*

This is likewiſe a Conſequence from all theſe Principles, that ſeeing all Men are not inclined to perform all their Duties, aud that on the contrary many are prone to Wickedneſs; it was neceſſary, for maintaining the Order of their Society, that Injuſtices and all Attempts to diſturb the ſaid Order ſhould be repreſſed; which could not be done but by an Authority given to ſome Perſons over the others, and which made the Uſe of a Government neceſſary *f*.

f But if thou do that which is evil, be afraid; for he beareth not the Sword in vain: For he is the Miniſter of God, a Revenger to execute Wrath upon him that doth evil. Rom. 13. 4.

VI.

6. *It is from God that Sovereigns derive their Authority.*

This Neceſſity of a Government over Men whom their Nature makes all equal, and who are not diſtinguiſhed one from the other but by the Differences which God puts between them by their Conditions, and by their Profeſſions, ſhews that it is on the Divine Order that Government depends; and as there is none but God alone that is the Natural Sovereign of Men *g*, ſo it is likewiſe from him that they who govern derive all their Power and Authority, and it is God himſelf whom they repreſent in their Functions *h*.

g For the Lord is our Judge, the Lord is our Lawgiver, the Lord is our King, he will ſave us. Iſa. 33. 22.

h He ſet a Ruler over every People. Eccluſ. 17. 17.

For Power is given you of the Lord, and Sovereignty from the Higheſt. Wiſd. of Sol. 6. 3.

By me Kings reign, and Princes decree Juſtice. Prov. 8. 15.

I will not rule over you, neither ſhall my Son rule over you: The Lord ſhall rule over you. Judges 8. 23.

Thine is the Kingdom, O Lord, and thou art exalted as Head above all. 1 Chron. 29. 11. *In thine hand is Power and Might, and in thine hand it is to make Great, and to give Strength unto all.* Ibid. 12.

It

It may be remarked on what is ſaid in this Article, that it is from God that Sovereigns derive their Power, that it is one of the Ceremonies in the Coronation of the Kings of *France*, for them to take the Sword from off the Altar, thereby to denote that it is immediately from the Hand of God that they derive the Sovereign Power, of which the Sword is the principal Emblem.

See on the ſame Subject the Preamble of the following Title.

VII.

7. The Uſe of Government.

We ſee clearly enough by theſe Cauſes of the Neceſſity of a Government, what the Uſe of it is; and that in general it is to maintain the publick Order in the whole Extent of the ſeveral Parts whereof it conſiſts, to keep the particular Subjects in peace, and to puniſh the Attempts of thoſe who diſturb the Peace and Tranquillity of the State, to procure that Juſtice be adminiſter'd to all who are under a neceſſity of ſuing for it, and to take care of every thing that may be neceſſary for the common Good of a State *i*.

i That we may lead a quiet and peaceable Life. 1 Tim. 2. 2.

SECT. II.

Of the Obedience due to Governors.

The CONTENTS.

1. *Obedience due to Governors.*
2. *Obedience to the ſupreme Head.*
3. *This Obedience is a Duty of Conſcience.*
4. *Obedience to the Miniſters of the Sovereign.*
5. *Wherein conſiſts the Obedience to Government.*
6. *The Extent and Limits of this Obedience.*

I.

1. Obedience due to Governors.

SEEING Government is neceſſary for the publick Good, and that it is God himſelf who hath eſtabliſhed it, it is conſequently neceſſary alſo that thoſe who live under its Juriſdiction, be ſubject and obedient to it. For otherwiſe it would be God whom they would reſiſt; and Government, which ought to be the Band of Peace and Union, from whence the publick Good of a State is to ariſe, would be an Occaſion of Diviſion and Troubles, which would end in the Ruine of the State *a*.

a Let every Soul be ſubject unto the higher Powers. For there is no Power but of God: The Powers that be, are ordained of God. Whoſoever therefore reſiſteth the Power, reſiſteth the Ordinance of God. Rom. 13. 1, 2.

II.

2. Obedience to the ſupreme Head.

The firſt Duty of Obedience to Government, is that of obeying thoſe who are placed in the higheſt Station, whether they be Monarchs, or others who are Heads of the Body that is formed by the Society, and to obey them in the ſame manner as the Members of the natural Body obey the Head to which they are united *b*.

b Submit your ſelves to every Ordinance of Man for the Lord's ſake, whether it be to the King, as Supreme. 1 Pet. 2. 13.

III.

3. This Obedience is a Duty of Conſcience.

This Obedience ought to be conſidered, with reſpect to him who is veſted with the Government, as the Power of God himſelf, who hath eſtabliſhed him as his Vicegerent here on Earth. Thus, it is not out of fear of the Weight of the Authority wherewith the ſupreme Governor is clothed, and of the Puniſhments due to Diſobedience, nor in conſideration of the Advantage which we may reap by our Obedience, that we ought to obey, but out of a ſincere Will to perform an eſſential Duty. For altho the Meanneſs of the Motives of fear of Puniſhment, and of Self-Intereſt, does not deſtroy the publick Order, provided the Obedience be otherwiſe entire, yet it is nevertheleſs imperfect for accompliſhing the Duty of him who ought to obey; becauſe this Duty is in him an Engagement which binds his Conſcience, without any regard to his particular Intereſt *c*, which Self-Love may ſuggeſt as a Motive for his Actions.

c For Rulers are not a Terror to good Works, but to the Evil: Wilt thou then not be afraid of the Power? Do that which is good, and thou ſhalt have Praiſe for the ſame. For he is the Miniſter of God to thee for good: But if thou do that which is evil, be afraid; for he beareth not the Sword in vain; for he is the Miniſter of God, *a Revenger to execute Wrath upon him that doth evil. Wherefore ye muſt needs be ſubject,* not only for Wrath, but alſo for Conſcience ſake. *Rom.* 13. 3, 4, 5.

IV.

4. Obedience to the Miniſters of the Sovereign.

Seeing the Government implies a great many particular Functions, which the Sovereign alone is not able to perform; and beſides thoſe which are peculiar to himſelf, and which he does not intruſt to other Perſons, there are many Functions which he commits to divers ſorts of Officers, Miniſters, or others who have a ſhare in the Government; the ſame Duty of Obedience to

the Sovereign obliges us likewiſe to pay obedience to thoſe Perſons to whom he commits the ſaid Functions *d*.

d Submit yourſelves to every Ordinance of Man for the Lord's ſake, whether it be to the King as ſupreme, or unto Governours, as unto them that are ſent by him for the Puniſhment of evil Doers, and for the Praiſe of them that do well. 1 Peter 2. 13, 14.

V.

5. Wherein conſiſts the Obedience to Government.

The Obedience to Government comprehends the Duties of obſerving the Laws, of doing nothing that may be contrary to them, of executing what is commanded, of abſtaining from what is forbidden, of bearing the publick Charges, whether they oblige the Subjects to the Performance of ſome Functions, or to ſome Contributions: and in general every one is obliged not only not to tranſgreſs in any thing againſt the publick Order; but to contribute towards it every thing that may particularly be incumbent on him *e*.

e Let every Soul be ſubject unto the higher Powers. Rom. 13. 1.

Render therefore to all their Dues; Tribute to whom Tribute is due, Cuſtom to whom Cuſtom, Fear to whom Fear, Honour to whom Honour. Rom. 13. 7.

This is a Conſequence of the preceding Articles.

VI.

6. The Extent and Limits of this Obedience.

Since this Obedience is neceſſary for maintaining the Order and Peace which ought to be formed by the Union of the Head and Members who compoſe the Body of the State, it makes it an univerſal Duty to all the Subjects in general, and in all Caſes, to obey the Orders of the Sovereign, without leaving any Perſon at liberty to make himſelf Judge of the Order he is commanded to obey. For otherwiſe every one would be Maſter, by having a right to examine what is juſt, and what is not: and this Liberty would encourage Seditions. Thus, every particular Subject owes Obedience even to Laws and Orders that may perhaps be in themſelves unjuſt, provided that on his part he can execute and obey them without Injuſtice *f*. And the only Exception which can diſpenſe with a punctual and exact Obedience, is limited to the Caſes where one cannot obey without diſobeying the Divine Law *g*.

f Put them in mind to be ſubject to Principalities and Powers, to obey Magiſtrates, to be ready to every good Work. Tit. 3. 1.

Fear God, honour the King. Servants, be ſubject to your Maſters with all Fear, not only to the Good and Gentle, but alſo to the Froward. For this is thank-worthy, if a Man for Conſcience toward God indure Grief, ſuffering wrongfully. 1 Pet. 2. 17, 18, 19.

Altho theſe laſt Words reſpect only the Obedience of Slaves to their Maſters, yet they are applicable to the Obedience due to Princes, and they are commonly applied to it. For, as it is ſaid in the Article, we muſt obey even unjuſt Orders, if we can do it without partaking in the Injuſtice.

g We ought to obey God rather than Men. Acts 5. 29.

TITLE II.

Of the Power, Rights, and Duties of thoſe who have the ſupreme Authority.

THE Power of the Sovereign Authority ought to be proportioned to the Miniſterial Function, and to the Rank which is held in the Body of the Society of Men who compoſe a State, by him who being the Head of it, ought there to ſupply the Place of God. For ſeeing it is God who is the ſole natural Governour of Men, their Judge, their Lawgiver, their King *a*; there can be no lawful Authority of one Man over others, but what he derives from the Hand of God. Thus the Power of Sovereigns being a Branch of the Power of God, it is as it were the Arm and the Force of Juſtice, which ought to be the Soul of the Government, and which alone hath the natural Uſe of all Authority over the Minds and Hearts of Men; for it is over theſe two Faculties of Man that Juſtice ought to have its Empire.

The Authority of Juſtice over the Mind of Man, is nothing elſe but the Force of Truth over Reaſon and over good Senſe; and the Authority of Juſtice over the Heart of Man is nothing elſe but the Force of its attractive Power which begets a Love thereof in the Heart. But becauſe all Minds and all Hearts do not ſuffer themſelves to be guided by the Light and Charms of Truth and Juſtice, and that many reject them, and give themſelves up to commit Injuſtice; the Divine Providence has thought fit to order, that Juſtice ſhould have other Arms beſides Light to lighten the Mind, and Charms to touch the Heart, and that it ſhould reign in another manner over thoſe who

a The Lord is our Judge, the Lord is our Lawgiver, the Lord is our King. Iſaiah 33. 22.

reſiſt

reſiſt its natural Empire, which ought to regulate the Conduct of every Perſon.

It is in this manner that God, who is Juſtice and Truth itſelf, reigns over Men; and it is after this manner that he would have thoſe to whom he entruſts the Reins of Government to uſe the Power which he gives them, that they may render their Government amiable to thoſe who love Juſtice, and terrible to thoſe who not being Lovers of Juſtice attempt to reſiſt it.

According to theſe Principles, which are the natural Foundation of the Authority of thoſe who govern, their Power ought to have two eſſential Characters: One is to ſupport Juſtice, to which the ſaid Power owes entirely its being; and the other is to be as abſolute as the Empire of Juſtice ought to be, that is to ſay, the Empire of God himſelf, who is Juſtice, and who will reign by them, as he will have them to reign by him *b*; which is the reaſon why the Scripture gives the Name of Gods to thoſe to whom God commits the Right of judging, which is the firſt and the moſt eſſential of all the Functions of Government *c*. For ſince this Right is natural only to God, it is him whom we ought to conſider in the Perſon of thoſe to whom he commits the Divine Function of governing and judging Men: And it is indeed the Judgment of God which they ought to render *d*, ſeeing it is his Place which they ſupply, and his Power which he has given them by advancing them to the Government, which they can hold of none elſe but him. And this he ſhewed in a particular manner in his Government of the *Jewiſh* Nation under *Moſes*, under the Judges, and under the Kings, he himſelf having choſen *Moſes*, the Judges, and their firſt Kings. And altho the Choice which God makes always of the Perſons whom he intends to put into the firſt Place of the Government, be not manifeſted by an expreſs Order, as it was in the Government of the *Jewiſh* People during thoſe firſt times; yet it appears by theſe Examples, that it is God who in all ſorts of States diſpoſes of the Government. And no body can be ignorant, how that as God is the Maſter of all Events, ſo he has in his hands the Direction of thoſe which make the Sovereign Power to paſs from one hand to another, whether it be by Succeſſion, Election, or other ways. So that it is from him that even the Princes who are Infidels derive their Power *e*.

Since therefore Princes derive their Power from God, and that he puts it into their hands only as an Inſtrument of his Providence and of his Conduct over thoſe States, whoſe Government he commits to them; it is evident they ought to make ſuch an uſe of this Power as may anſwer the Ends which the ſaid Divine Providence intends they ſhould propoſe to themſelves; and that the ſenſible and viſible manner in which their Authority is to be exerciſed, ought to be only the Work of the Will of God, who hiding from our Eyes his own univerſal Government of the World, is pleaſed to manifeſt by the Miniſtry of Princes that part of it which he delegates to them over the People who are their Subjects. It is this Will of God, the Government of which they ought to render viſible by the means of this Power committed to them, which ought to be the Principle and Rule of the Uſe they ſhould make of the ſaid Power, ſeeing it is an Inſtrument of the divine Will, and is entruſted to them only for this end.

This is without doubt the Foundation and the firſt Principle of all the Duties of Sovereign Princes, which conſiſts in ſetting up the Kingdom of God, that is to ſay, in governing all things according to his Will, which is no other than Juſtice. Thus, it is the Reign of Juſtice which ought to be the Glory of the Reign of Princes.

It follows from this firſt Principle, that all the ſeveral Steps of the Government of Princes ought to have the eſſential Character of Juſtice which they are obliged to ſupport and maintain, and that having for this end a coercive Power put into their hands throughout the whole Extent of their Dominions, the Body of the State ought to feel that its Head is animated with the Love of Juſtice, the Empire of which he is bound to eſtabliſh: And the Head himſelf, who ſhould animate and govern this Body, ought not to propoſe to himſelf any other View in this divine Miniſtry, beſides that of imploying his Authority to reduce to a dutiful Submiſſion to this Empire of

b By me Kings reign, and Princes decree Juſtice. Prov. 8. 15.

c Pſal. 81. 1, 6. John 10. 34, 35. Exod. 22. 8.

d Ye ſhall not reſpect Perſons in Judgment, for the Judgment is God's. Deut 1. 17. *Take heed what ye do; for ye judge not for Man, but for the Lord.* 2 Chron. 19. 6.

e Thou couldſt have no power at all againſt me, except it were given thee from above. John 19. 11.

Juſtice

Juſtice ſuch of his Subjects as refuſe to ſubmit to it willingly, and to render it abſolute as much as in him lies, that his People enjoy Peace and Tranquillity, which are the Fruits of it.

It is by this Love of Juſtice, that Princes render themſelves amiable to their People, whom they govern with an Authority ſo much the more abſolute the more natural it is, and when it is the divine Order which is the Principle of their Authority, and which regulates the uſe of it. It is the good uſe of this Miniſtry that gains Princes the Love and Veneration of their Subjects who delight in Peace and Tranquillity, and which makes them to be dreaded by thoſe who are of reſtleſs and turbulent Spirits. It is this good Uſe of the Miniſtry which makes Princes, ſeeing they are not able of themſelves, how good and wiſe ſoever they may be, to adminiſter Juſtice to their Subjects on all the particular Occaſions which occur, to apply themſelves to the finding out all poſſible Ways of filling the Offices with Perſons who are moſt likely to uſe the Authority which they are obliged to delegate to them, in the manner and way that they themſelves ought to uſe their own Authority, and who for a right diſcharge of the Truſt committed to them have both the Capacity and Probity that their Functions may demand.

It is alſo by the means of this Love of Juſtice that Princes ought to be ſenſible, that their Power ſhould be abſolute over their Subjects, only in order to procure an univerſal Obedience, which may contain them all in Order and Peace; and their Power ought to be employed only for this end. Thus thoſe whom God raiſes to this Dignity have the Power to make Laws and Regulations that are neceſſary for the publick Good; to nominate and appoint Officers neceſſary for the Adminiſtration of Juſtice, and for all the other Uſes which the publick Good may demand.

The Dominion therefore of Sovereigns whom God exalts to this Rank being founded on God's own Dominion, which he delegates to them for the Functions of the Government which he puts into their hands; it is by him that they reign, and conſequently it is according to his Law that they ought to reign.

It appears ſufficiently by this Account of the Origin of the Power of thoſe who have the Sovereign Authority, and by the eſſential Characters of the ſaid Power, what the Uſe is which they ought to make of it, what are their Rights, and what are their Duties. For it is upon theſe Foundations, and by theſe Principles that we are to judge thereof; and this ſhall be the ſubject Matter of three Sections. The firſt ſhall be of the Uſe of this Power; the ſecond of the Rights which are the Conſequences thereof; and the third of the Duties of thoſe who exerciſe it.

SECT. I.

Of the Power of the Sovereign, and what ought to be the uſe of it.

The CONTENTS.

1. *The Conjunction of Authority with Force, makes the Power of the Prince.*
2. *Obedience due to Authority, without the uſe of Force.*
3. *Two Uſes of Forces, one within the Kingdom, and the other without.*
4. *Forces neceſſary within the Kingdom.*
5. *Forces neceſſary in caſe of Danger from without.*
6. *The Forces ought to be proportioned to the Wants of a State.*
7. *Wherein conſiſts the good uſe of Forces.*

I.

THE Power of the Sovereign implies an Authority to exerciſe the Functions of the Government, and to make uſe of the Force that is neceſſary for the ſaid Miniſtry *a*. For Authority without Force would be deſpiſed, and almoſt uſeleſs: and Force without a lawful Authority, would be no other than Tyranny; as it happens when an Uſurper occupies the Throne *b*, or when a lawful Prince attempts to make Conqueſts on his Neighbour without ground for a juſt War. But when the Force accompanies the good Uſe of Authority, the Reign of the Prince is the Reign of Juſtice, and he diſpels all Injuſtices by his bare Preſence *c*.

1. *The Conjunction of Authority with Force, makes the Power of the Prince.*

a For he beareth not the Sword in vain: for he is the Miniſter of God, a Revenger to execute Wrath upon him that doth Evil. Rom. 13. 4.

b Many Kings have ſat down on the Ground, and one who was never thought of hath worn the Crown. Eccluſ. 11. 5.

c A King that ſitteth on the Throne of Judgment, ſcattereth away all Evil with his Eyes. Prov. 20. 8.

II. Au-

II.

2. Obedience due to Authority, without the uſe of Force.

Authority alone without any other Force, would be ſufficient to govern Perſons who know their Duty, and are willing to perform it. For altho it ſhould happen to be ſeparated from its Force, yet the Subjects are bound nevertheleſs to ſubmit to it, and to pay Reſpect and Obedience to it; and they incur the Puniſhment of Rebellion if they are diſobedient *d*. Thus the rebellious Inſolence of *Shimei* againſt *David* when he was bereaved of his Forces, was a Crime of High Treaſon, which the Clemency of that Prince induced him heartily to forgive, in ſo far as concerned the Injury done to his own Perſon, altho in that reſpect he might have puniſhed him; but this Clemency gave way afterwards to the juſt Severity which ſo great a Crime deſerved. And *David*, who was willing to die without revenging himſelf, but not without doing Juſtice in his own Lifetime, commanded his Succeſſor to take care that that Crime might not go unpuniſhed *e*.

d Wherefore ye muſt needs be ſubject, not only for Wrath, but alſo for Conſcience ſake. Rom. 13. 5.

e See 2 *Sam.* 16. 5. ch. 19. ver. 18. 1 *Kings* 2. the 8th, 40th, and following Verſes.

III.

3. Two Uſes of Forces, one within the Kingdom, and the other without.

As there are two Uſes of the Power of the Sovereign, both of them neceſſary for the publick Tranquillity; one which conſiſts in containing the Subjects in a dutiful Obedience, and in repreſſing Violences and Injuſtices; and the other in defending the State againſt the Attempts of Enemies; ſo this Power ought to be accompanied with the Forces neceſſary for theſe two Uſes *f*.

f That we may lead a quiet and peaceable Life. 1 Tim. 2. 2.

IV.

4. Forces neceſſary within the Kingdom.

The firſt of theſe two Uſes of Forces for maintaining the publick Tranquillity within the Kingdom, comprehends the Forces that are neceſſary for the Security of the Sovereign himſelf againſt Rebellions, which would be frequent if Force were not joined with Authority; as alſo the Forces requiſite to contain the Subjects in peace among themſelves, and to repreſs the Attempts which any of them may make againſt their Fellow-Subjects, and likewiſe againſt the Publick, and to put in execution the Orders of the Sovereign, and all the ſeveral things that may be neceſſary for the Adminiſtration of Juſtice. Thus, this firſt uſe of Forces being perpetual, as are the occaſions that may require it; the Order of Government demands, that the Sovereign have always the Forces that are neceſſary for the maintenance of Juſtice; which conſiſts in Officers, and other Miniſters ſet over thoſe Functions, with the Uſe of Arms, as occaſion may require *g*.

g This is a Conſequence of the preceding Article.

V.

5. Forces neceſſary in caſe of danger from without.

The Uſe of Forces for defending the State againſt the Attempts of Enemies is alſo perpetual, becauſe the Danger of ſuch Attempts is always to be feared, and the want of Forces may expoſe the Kingdom to it. And theſe Forces conſiſt in fortified Places on the Frontiers, in Gariſons to defend them, and in Troops either already on foot, or ready to be raiſed on occaſion *h*.

h This is a Conſequence of the third Article.

VI.

6. The Forces ought to be proportioned to the Wants of a State.

It follows from theſe different Uſes of the Forces neceſſary to the Power of the Sovereign, that they ought to be proportioned to the Wants and Abilities of the States. Thus theſe Forces ought to be greater in time of War than of Peace, and leſſer for maintaining Order in a quiet peaceable State, than for ſuppreſſing Tumults and Commotions in a time of Sedition *i*.

i As the time ſhall be appointed. 1 Macc. 8. 25.

VII.

7. Wherein conſiſts the good uſe of Forces.

We may reckon among the Forces neceſſary in a State, the Wiſdom of the Prince who regulates the Uſe of them by a good Counſel, and who makes the Succeſs of his Arms to depend on the Aſſiſtance of Heaven, by the Juſtice of his Undertakings. For the greateſt Armies without the hand of God, are but Weakneſs; and with the Divine Aſſiſtance the ſmalleſt Armies are victorious *m*.

m Wiſdom is better than Strength. Wiſdom of Solomon, 6. 1.

Wiſdom is better than Weapons of War. Eccleſ. 9. 18.

For the Victory of Battle ſtandeth not in the multitude of an Hoſt, but Strength cometh from Heaven. 1 Maccab. 3. 19.

SECT.

SECT. II.

Of the Rights of thoſe who have the Sovereign Authority.

SINCE the Rights of Sovereigns are derived to them by a Conſequence of the Power which they hold of God, as hath been explained in the Preamble of this Title, they can have no other Rights but ſuch as have nothing in them contrary to the Uſe which God requires them to make of the ſaid Power; and it is for this reaſon that he enjoins them to ſtudy his Law, that they may there learn both their Power and their Duty, of which the Spirit of this Divine Law ought to be the Rule *a*. This ſhews in what Senſe we ought to take that Expreſſion in the Scripture, where *Samuel* ſpeaking to the People who had demanded a King ſuch as thoſe of other Nations, and giving them to underſtand, by the Order of God, what would be the Rights of that King; he enumerated the tyrannical Injuſtices which the King whom they demanded might exerciſe over them, giving thereunto the Name of the Rights of the King, as if thoſe Injuſtices were really and truly a Right *b*.

a And it ſhall be when he ſitteth upon the Throne of his Kingdom, that he ſhall write him a Copy of this Law in a Book, out of that which is before the Prieſts, the Levites. *And it ſhall be with him, and he ſhall read therein all the days of his Life; that he may learn to fear the Lord his God, to keep all the Words of this Law, and theſe Statutes, to do them. That his Heart be not lifted up above his Brethren, and that he turn not aſide from the Commandment to the right hand or to the left; to the end that he may prolong his Days in his Kingdom, he and his Children in the midſt of* Iſrael. Deuter. 17. 18, 19, 20.

And ſaid unto him, Behold, thou art old, and thy Sons walk not in thy ways: now make us a King to judge us like all the Nations. But the thing diſpleaſed Samuel, *when they ſaid, Give us a King to judge us: And* Samuel *prayed unto the Lord. And the Lord ſaid unto* Samuel, *Hearken unto the Voice of the People in all that they ſay unto thee; for they have not rejected thee, but they have rejected me, that I ſhould not reign over them. ——Shew them the manner of the King who ſhall reign over them. And* Samuel *told all the Words of the Lord unto the People that asked of him a King. And he ſaid, This will be the manner of the King that ſhall reign over you: He will take your Sons, and appoint them for himſelf, for his Chariots, and to be his Horſemen, and ſome ſhall run before his Chariots. And he will appoint him Captains over thouſands, and Captains over fifties, and will ſet them to ear his Ground, and reap his Harveſt, and to make his Inſtruments of War, and Inſtruments of his Chariots.* 1 Sam. 8. 5, 6, &c.

It is evident that this Expreſſion coming from the ſame Spirit of God, who had commanded that all Kings ſhould ſtudy his Law in order to make it the Rule of their whole Conduct, and who had laid down this Injunction with a view to thoſe very Kings whom he had foretold that this People would afterwards demand *c*; he did not grant unto them Rights directly oppoſite to the Law which he had enjoined them to follow as their Rule. But thoſe Tyrannical Injuſtices were called the Rights of the King for this reaſon, becauſe that as the Legal Rights of Sovereigns are exerciſed by virtue of their Power, ſo the Injuſtices which Kings might commit by abuſing this Power, would have the Character of a Right by reaſon of the Neceſſity under which the Subjects would be of ſubmitting to them, as has been ſhewn in the laſt Article of the ſecond Section of the firſt Title; which would have, with reſpect to them, the Effect of a lawful Right; ſince they could not ſhake off the Yoke of the Princes Power, altho on the part of the Prince this bad Uſe of his Power would be manifeſt Tyranny.

c Deuter. 17. 14.

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17. *The*

17. *The Right of coining Money.*
18. *And of prohibiting all other Coin except that which the Prince allows to be current.*
19. *The Right in Mines.*
20. *The Right to ſet off his Power by Marks of a ſenſible Grandure.*
21. *A Right to have Guards for their Perſons.*
22. *A Right to have many Officers for their Houſhold.*
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24. *The Right of raiſing the neceſſary Supplies.*
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26. *A Right to levy Troops for the War, and to provide for the Expences which the War may require.*
27. *A Right to oblige thoſe to take up Arms who are bound to that Service.*
28. *A Right to regulate the Expences of the State according to the Wants thereof.*
29. *Four ſeveral ſorts of Revenues independent of the Neceſſity of the Expences.*
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I.

1. The firſt Right of the Sovereign is the Exerciſe of his Authority for the Publick Good.

The firſt Right, and that on which depend all the other Rights of the Perſons whom God raiſes to the Sovereign Authority, is the Power of adminiſtring the Government, with the uſe of the Authority and Forces in which his Power conſiſts, and of employing his ſaid Power for the ſupport of Juſtice, and for maintaining the publick Tranquillity in the Dominions committed to his Care *a*.

a For he is the Miniſter of God to thee for Good. Rom. 13. 4.
See the third Article of the third Section.

II.

2. The Right of making War, Treaties of Peace, and others with Strangers.

The firſt Right implies two Rights in general; one is concerning every thing without the Kingdom which may have any relation to the Good of the State; and the other reſpects every thing within the Kingdom which may tend to the ſame Good. Thus with reſpect to things without the Kingdom, the Sovereign has right to make War againſt thoſe who make any Attempt, or commit any Injuſtice, either againſt the State, or againſt himſelf who is Head of it, if the Reparation of the ſaid Injuſtice demands the uſe of Arms. And this Right conſiſts likewiſe in a Power to make Treaties of Peace, or other Treaties, according as Occaſion requires, with other Princes and States, either for keeping up Alliances with them for a mutual defence of each other, or Correſpondencies for Trade, or other Ties and Engagements for other Purpoſes; which implies the Right of ſending to Foreign Princes Ambaſſadors or Reſidents *b*. Thus within the Kingdom the Sovereign has a Right to exerciſe his Power for the ſeveral Purpoſes explained in the following Articles.

b This is a conſequence of the firſt Article, and of the Motive for the uſe of Arms for maintaining the State in Safety againſt any Attempts that might diſturb the Peace and Tranquillity thereof. See what has been ſaid in the Preface concerning the Uſe of War. *No body is ignorant of the multitude of Proofs which we have in Scripture of the Power which Princes have to make War, and of the Examples of Princes of the greateſt Sanctity who have undertaken and carried on Wars.*

III.

3. The Right to make Laws.

Among theſe Rights of the Sovereign as to things within the Kingdom, the firſt is that of adminiſtring Juſtice, which ought to be the Foundation of the publick Order, whether he adminiſter the ſame in Perſon, on ſuch Occaſions as may require his Preſence in Judgment, or cauſes it to be adminiſtred by thoſe to whom he delegates this Right. And this Adminiſtration of Juſtice implies the Right of making Laws and Regulations that are neceſſary for the publick Good *c*, of cauſing them to be duly obſerved and executed, as alſo the other preceding Laws which are not abrogated; of giving to all the Laws their Vigour and juſt Effect, and of adjuſting the Difficulties which may ariſe in the Interpretation of the Laws and Regulations; when the Difficulties are ſuch as exceed the Bounds of the Power of the Judges, and make it neceſſary to have recourſe to the Authority of the Lawgiver *d*.

c By me Kings reign, and Princes decree Juſtice. By me Princes rule, and Nobles, even all the Judges of the Earth. Prov. 8. 15, 16.

d De his quæ primo conſtituuntur, aut interpretatione, aut conſtitutione optimi principis certius ſtatuendum eſt. *l.* 11. *ff. de legib.*

Si enim in præſenti leges condere ſoli imperatori conceſſum eſt, & leges interpretari ſolo dignum imperio eſſe oportet. *l. ult. C. eod.*

Legis interpretationem culmini tantum principali competere, nemini venit in dubium: cum promulgandæ quoque legis auctoritatem fortunæ ſibi vindicet eminentia. *Nov.* 143. Inter æquitatem juſque interpoſitam interpretationem, nobis ſolis, & oportet, & licet inſpicere. *l.* 1. *C. eod.* Leges ſacratiſſimæ, quæ conſtringunt hominum vitas, intelligi ab omnibus debent, ut univerſi præſcripto earum manifeſtius cognito, vel inhibita declinent, vel permiſſa ſectentur. Si quid vero in iiſdem legibus latum fortaſſis obſcurius fuerit, oportet id ab imperatoria interpretatione patefieri, duritiamque legum, noſtræ humanitati incongruam, emendari. *l.* 9. *C. de leg. & conſt. pr.*

By the Ordinance of Moulins, *Art.* 1. *and that of* 1667. *Tit.* 1. *Art.* 3. *it is ordained, that the Parliaments, and the other Courts of Juſtice, ſhall make their Remonſtrances to the King, touching whatever ſhall be found in the Ordinances contrary to the Good or Conveniency of the Publick, or which may require Interpretation, Explanation or Mitigation.*

If in the giving Judgment upon Law Suits which ſhall be depending in any of our Courts of Parliament, or other Courts of Juſtice, there ariſes any Doubt or Difficulty touching the Execution of any Articles of our Ordinances, Edicts, Declarations and Letters Patents, we forbid them to interpret the ſame; but require and enjoin them in ſuch Caſes to apply themſelves to us, that they may learn from us what our Intention and Meaning is touching the ſaid Matters. Ordinance 67. Title 1. Art. 7.

[In *England*, when any Doubt or Difficulty ariſes concerning the Interpretation of a Law, or Conſtruction of a Statute, which the Judges are not able to reſolve and determine, recourſe in that caſe is had to the King in Parliament, where the King, by the Advice and with the Conſent of the Lords and Commons in Parliament aſſembled, exerciſes the Legiſlative Power, by enacting new Laws and Statutes, and explaining what is found to be doubtful and ambiguous in old ones. *Lex Angliæ ſine Parliamento mutari non poteſt.* Coke 2. Inſt. p. 97.618. 4 Inſt. chap. 1. pag. 25. Bracton de legibus Angliæ, lib. 1. cap. 1, 2.]

IV.

4. *The Right to protect Religion.*

The Right of cauſing the Laws to be duly obſerved, and of maintaining in the State the general Order and Policy thereof by the Adminiſtration of Juſtice, and the good Uſe of the Sovereign Power, gives to the Prince a Right to employ his Authority for procuring a due Obſervance of the Laws of the Church, of which he ought to be *the Protector, the Guardian, and the Executor*; that by the Aſſiſtance of his Authority Religion may reign over all the Subjects, and that the Policy of the Church being ſupported by that of the State, both of them may concur in maintaining the State in Peace and Tranquillity, which ought to be the Effect of their Union *e*.

e The Kings of France *ſtile themſelves* Protectors, Guardians, Conſervators and Executors *of what the Church teaches and enjoins.* See the Ordinance of *Francis* I. in *July* 1543. See the tenth Chapter of the Treatiſe of Laws in the firſt Tome of the *Civil Law in its Natural Order*. See the ninth Article of the third Section.

[*The Kings of* England *enjoy the Title and Stile of* Defender of the Faith, *and* Supreme Head of the Church of *England*; *and it is under their Authority, and by their particular Permiſſion, that the Clergy aſſemble themſelves in Convocation, to make Laws or Canons in relation to Matters Spiritual. And they are prohibited under ſevere Penalties to aſſemble without the King's Writ, or to enact any Laws or Conſtitutions without his eſpecial Aſſent.* Stat. 26 Hen. 8. cap. 1. 35 Hen. 8. cap. 3. Coke 4. Inſt. pag. 344. Stat. 25 Hen. 8. cap. 19. entitled, *The Submiſſion of the Clergy.*]

V.

5. *The Right to appoint Officers, to regulate their Functions, and to ſuppreſs Offices.*

Seeing the Sovereign Authority regards the univerſal Order and Policy of the State, and the Publick Good, and extends to every thing neceſſary to compoſe the ſaid Order, and to form the general Policy for the Adminiſtration of Juſtice, for the Government of the Army, for the Management of the Revenue, and for every thing which may demand the Uſe of Authority, the Sovereign hath therefore the Power of filling up the Offices and Imployments that are neceſſary for all theſe different Parts of the Publick Order and Policy, with Perſons who may exerciſe the Functions thereof, and of aſſigning to every one of them their proper Functions, and giving them the Dignity, the Authority, or the other Characters that are proper for the Functions committed to their Charge. Which implies a Right to erect Offices which may be of neceſſary uſe to the Publick Good; to ſettle the Rights and Functions thereof; and alſo the Right to ſuppreſs ſuch Offices as appear to be uſeleſs and burdenſom to the State *f*.

f Moreover thou ſhalt provide out of all the People able Men, ſuch as fear God, Men of Truth, hating Covetouſneſs, and place ſuch over them, to be Rulers of thouſands, and Rulers of hundreds, Rulers of fifties, and Rulers of tens; and let them judge the People at all Seaſons. And it ſhall be, that every great Matter they ſhall bring unto thee, but every ſmall Matter they ſhall judge. Exod. 18. 21, 22.

So I took the chief of your Tribes, Wiſemen, and known, and made them Heads over you, Captains over thouſands, and Captains over hundreds, and Captains over fifties, and Captains over tens, and Officers among your Tribes. And I charged your Judges at that time, ſaying, Hear the Cauſes between your Brethren, and judge righteouſly between every Man and his Brother, and the Stranger that is with him. Deuter. 1. 15, 16. 2 Kings 18.

VI.

6. *Right of granting Diſpenſations.*

The Power of making Laws implies that of granting certain Diſpenſations which the Laws do allow of; and it is one

one of the Rights of the Sovereign to grant Diſpenſations of this kind. Thus, for example, it is one of the Rules for the Appointment of Officers, that they ſhould be of the Age regulated by Law: but ſince there may be Perſons whoſe Birth, Virtue, and Capacity may ſo diſtinguiſh their Merit, as to recommend them to Offices before they have attained the Age required for exerciſing them; it is for the publick Good, that the Sovereign ſhould diſpenſe with this Rule in their particular Caſe, and it is only he alone that has this Power *g*.

g The ſame Power is neceſſary for diſpenſing with a Law, as for making it.

Ætatis venia Principale beneficium. *l.* 2. *C. de his qui ven. æt. impetr.*

Altho the Diſpenſation of Age mentioned in this Text be for another Uſe, yet it may be applied to the Rule explained in this Article.

[In *England*, the King has Power to grant Diſpenſations in many particular Caſes, which are expreſly reſerved to him by the Statute; ſuch as the holding Plurality of Livings, and other Caſes, which it would be too tedious to enumerate here. *Stat.* 25 *Hen.* 8. *cap.* 21. But as to the Power of diſpenſing with the Law in general, where it relates to the Publick Good, or to the Property of private Perſons, it is held to be the antient Fundamental Law of this Realm, that all Diſpenſations of this kind, without the Conſent of Parliament, are void. *Hujuſmodi vero Leges Anglicanæ & Conſuetudines, Regum authoritate, jubent quandoque, quandoque vetant, & quandoque vindicant & puniunt tranſgreſſores: quæ quidem cum fuerint approbatæ conſenſu utentium, & Sacramento Regum confirmatæ, mutari non poterunt nec deſtrui* ſine communi conſenſu & conſilio eorum omnium quorum conſilio & conſenſu fuerunt promulgatæ. *Bracton de Legibus Angliæ, lib.* 1. *cap.* 2. This Matter, touching the Power of diſpenſing with the Laws, is very learnedly diſcuſſed by Dr. *Stillingfleet*, late Biſhop of *Worceſter*, in his *Eccleſiaſtical Caſes*, *Part* 2. *chap.* 3. and by my Lord Chief Juſtice *Vaughan*, in his Reports, in the Caſe of *Thomas* verſ. *Sorrel. Vid. Coke's* 3 *Inſt. cap.* 86.]

VII.

7. *Right of granting Privileges.*

It is alſo owing to the Order of Juſtice and Policy that there has been eſtabliſhed in the beſt regulated States divers Privileges, which are nothing elſe but Exceptions from the general Rules in favour of ſome Perſons. Thus, for example, it is but juſt that the Inventors of new Things, which are of ſingular Uſe to the Publick, and who are deſirous to reap ſome Advantage from their Inventions, ſhould have the Privilege of being the ſole Traders in the Things which they communicate to the Publick, and that this Privilege ſhould be granted them during a certain Time, to be to them in lieu of a Reward for the Merit of ſo great a Service, to recompenſe the Pains and Charges they have been at, and to ſerve as an Example to excite others who are capable of rendring the like Services. And there are divers ſorts of other Privileges, which are Benefits and Favours to be obtained only from the Sovereign *h*.

h This is the Conſequence of the precedent Article. Nulli ſit liberum, nulli permiſſum, ut novum aliquid urbis incolæ in urbe ſuſtineant: ſed in honorem æternæ urbis corporatis indulta ſuffragia valere præcipimus. *l. un. C. de privil. Corp. urb. Rom.*

Privatas poſſeſſiones noſtras ab univerſis muneribus ſordidis placet immunes eſſe; neque earum conductores, neque colonos ad extraordinaria munera vel ſuperindictiones aliquas conveniri. *l.* 1. *C. de priv. Dom. Aug. v. Tit. ff. de priv. vet.*

VIII.

8. *The Right to recompenſe the ſeveral Merits of Subjects with Titles of Honour, and Penſions out of the Publick Money.*

As it is conducive to the general Order of Juſtice, and to the good Government of a State, that the Services and other Merits of Subjects who may contribute to the Publick Good ſhould be rewarded either by Titles of Honour, or by other Favours, which coming from the hand of the Sovereign may be the more remarkable; ſo it is the Sovereign alone who has the Right to diſtribute theſe kinds of Favours. Thus, it is he alone who can ennoble the Perſons who, not being born in the Rank of Nobility, have render'd themſelves worthy of that Honour. Thus, he may inſtitute and create Orders which may give a Dignity, and a Rank of Honour to thoſe on whom he confers the ſame, granting unto them particular Marks of this Favour, to be worn either about their Perſons, or in their Coats of Arms, and which may procure them the Eſteem and Reſpect that may be due to the ſaid Dignity. Thus, the Sovereign may, in favour of Perſons of Quality, and in conſideration of their Services, annex Titles of Honour unto Lands held in Fee. Thus, he may aſſign Penſions out of the Publick Revenue to thoſe who by ſome ſingular Service may have merited this Recompence and Mark of Honour *i*.

i This is a Conſequence of the Right of Government, and of the Adminiſtration of Juſtice.

[Of antient Time there were Feudal Baronies in *England*, as in other Countries; but at this Day there are none. *Coke's* 4 *Inſt. pag.* 5.]

IX.

9. *The Right of naturalizing Strangers.*

Beſides theſe ſorts of Benefits and Favours which are diſpenſed only by the Sovereign, there are many others which the Good of the State renders neceſſary, and which can be derived only from him. Thus, when a Foreigner

reigner is desirous to fix his Habitation in a Kingdom, and there to enjoy the Liberty and the Rights which are peculiar to those who are Subjects thereof, and which the Subjects of other Kingdoms have no Title to; they are placed in the Number of the Members of the State, of which they are desirous to become Subjects, by the Favour of the Prince, which is granted in *France* by Letters of Naturalization, which are obtained from the King, and which are called so, because those who obtain them are reputed by the effect of the said Letters to be as natural-born Subjects of *France* *l*.

l Natales antiquos, & jus ingenuitatis, non ordo præstare decurionum, sed a nobis peti potuit. *l.* 1. *C. de jur. aur. annul.* Aureorum usus annulorum beneficio principali tributus, libertinitatis quoad vivunt imaginem, non statum ingenuitatis præstat. Natalibus autem antiquis restituti liberti, ingenui nostro constituuntur beneficio. *l.* 2. *eod.*

Altho these Laws have no precise relation to the Right of Naturalization, yet they may be applied to it. See the fourth Article of the fourth Section of the sixth Title.

[*The Law of* England *makes a Difference between* Naturalization *and* Denization. *Naturalization is, when an Alien born is naturalized by Act of Parliament; and an Alien so naturalized is to all Intents and Purposes as a natural-born Subject of* England, *and enjoys the same Liberties and Privileges in all respects. Denization is, when an Alien is enfranchised, or made Denizen, by the King's Letters Patent; who is not entitled to all the Privileges which those Aliens enjoy who are naturalized by Act of Parliament. For if he who is made Denizen by Letters Patent had Issue in* England *before his Denization, that Issue is not inheritable to his Father: But if his Father be naturalized by Parliament, such Issue shall inherit. And there are many other Differences between them.* Coke's 1 Inst. fol. 8. a. 129. a.]

X.

10. *The Right to legitimate Bastards.*

The Legitimation of Bastards is likewise one of the Rights which peculiarly belong to the Sovereign, who alone may, by Letters of Legitimation, remove the Obstacles and the Incapacity under which Bastards lie, by reason of the Defect in their Birth, which excludes them from certain Honours, and certain Offices, of which they are made capable by the Benefit of this Legitimation *m*.

m Ab imperio hoc percipientibus, ut in uno eodemque, hoc quod agitur, sit donum patris & principis: Id est, dicere, naturæ simul & legis. *Nov.* 74. *c.* 2. §. 1.

These Words are taken out of the seventy fourth Novel, where mention is made of a Manner of Legitimation which was in use in the Roman *Law; when a Father who had only Bastard Children did ordain by his Testament, that they should be his lawful Successors. This Disposition had its effect, if the said Children did obtain the Confirmation thereof by Letters from the Prince.*

The Effect of the Legitimation of Bastards is limitted to the removing of the Inpacities mentioned in this Article, and does not extend to the giving them the Right of Succession, as many have thought, and as is even regulated by some Customs in France. *For such an Use of Legitimation would be repugnant to Equity and good Manners; and it would be unjust and indecent, that a Bastard, legitimated by the Letters of the Prince, should be admitted to share with Children begotten in lawful Wedlock the Succession of their Father or Mother, and that he should claim a Right to the Successions of the Children and Relations of his Father or Mother. For all these Successions are appropriated by Nature, and by the Laws, to those to whom a lawful Birth gives the Title of Children and Relations; and the Vice of an unlawful Birth cannot be so defaced as to put the Bastard into the natural Condition of a Son or lawful Relation, to the Prejudice of those who are really such.* See the third Article of the fifth Section of the fifth Title, and the Remark that is there made on it.

[This Power of legitimating Bastards has been very rarely exercised in *England*; and when it has been exercised, it has been always by Authority of Parliament. Our Chronicles mention one Instance of this kind in the twentieth Year of the Reign of *Richard* the Second, when *John* of *Gaunt*, Duke of *Lancaster*, caused to be legitimated in a Parliament then held the Issue which he had by *Katherine Swinford* before he married her. *Seldeni Dissertatio ad Fletam, cap.* 9. Long before this, at a Parliament held at *Merton* the twentieth Year of the Reign of *Henry* the Third, it had been attempted by the Bishops of *England* to have it enacted by a general Law, that all such as were born before Matrimony should be legitimate, and made capable of succeeding to Inheritances, as well as the Children born after Matrimony, in conformity to the Civil and Canon Law in this Particular. But all the Earls and Barons with one Voice answered, That they would not change the Laws of the Realm, which to that Time had been used and approved. And so the Law in *England* remains to this Day. *See the Stat.* 20 *Hen.* 3. *cap.* 9. *Coke* 2 *Inst. pag.* 96, 97. *Selden ad Fletam, cap. eod. Bracton de Legibus, lib.* 5. *cap.* 19.]

XI.

11. *Divers Acts which demand the Authority of the Sovereign in the Administration of Justice.*

All these kinds of Rights are natural Consequences of the Power of those who are vested with the Sovereign Authority; and there may be others, which the peculiar Laws of every State reserve in the same manner solely to the Sovereign. Thus, in *France* it is the King alone, who is reputed to be present in all his Courts of Judicature, and who gives to the Sentences and Decrees of the said Courts the Authority and the Form that is necessary for their being put in Execution, and it is in his Name that they are sped. Thus, in the matter of Restitutions and Rescissions of Contracts which are founded on Acts of Fraud or Violence, on Wrong, on Minority, Letters are obtained from the King for relieving those Persons who have just Cause of Complaint from the Contracts of which they do complain; and the Judges are required by

12. *The Right to regulate the Punishment of Crimes.*

the

the ſaid Letters, which are directed to them for that purpoſe, to reinſtate the Parties in the ſame Condition they were in before the ſaid Contracts, if there appears to be juſt Cauſe for reſcinding them. And in the Courſe of the Adminiſtration of Juſtice, and Deciſion of Law-Suits, whether in the firſt Inſtance, or in Appeals, the Parties procure the like Letters for ſeveral Purpoſes, which are Matters belonging to the Order obſerved in Judicial Proceedings, which it is not our Buſineſs to explain in this place. We ſhall only obſerve here, that theſe ſorts of Letters, as alſo many of thoſe which contain Grants of Privileges, and ſome others which have been mentioned in the foregoing Articles, do not require that the Prince himſelf ſhould take particular Cognizance of them, altho they demand his Authority, and that it be in his Name that they are ſped: But the diſpatching of ſuch Letters is left to the proper Officers, to whom the Sovereign gives that Power, and to whom he commits the ſaid Functions; and the Judges, to whom the ſaid Letters are directed, are obliged to take Cognizance of the Truth of the Facts which the Parties have alledged in order to obtain them, if the Favours which the ſaid Letters grant have no other Foundation beſides the Truth of the Facts alledged *n*.

n Univerſa reſcripta, ſive in perſonam precantium, ſive ad quemlibet judicem manaverint, quæ vel adnotatio, vel quævis pragmatica ſanctio nominentur; ſub ea conditione proferri præcipimus, *ſi preces veritate nitantur*. Nec aliquem fructum precator oraculi percipiat impetrati, licet in judicio adſerat veritatem, niſi quæſtio fidei precum imperiali beneficio monſtretur inſerta. Nam & vir magnificus quæſtor, & viri ſpectabiles magiſtri ſcriniorum, qui ſine præfata adjectione qualecunque divinum reſponſum dictaverint: & judices, qui ſuſceperint, reprehenſionem ſubibunt. *l.* 7. *C. de diverſ. reſcr. & prag. ſanct. V. T. h. T.*

According to our Uſage in France, *we muſt diſtinguiſh between the Letters of Naturalization, thoſe of Legitimation, which have been mentioned in the two foregoing Articles, thoſe which contain certain Privileges, together with others of the like Nature, and the Letters which are mentioned in this Article. Thoſe of the firſt ſort are diſpatched in the Great Chancery, and the others, which are commonly called Letters of Juſtice, or Judicial Writs, iſſue out of the Chanceries of the reſpective Parliaments, and other Juriſdictions.*

XII.

12. *The Right to regulate the Puniſhment of Crimes.*

Seeing the Adminiſtration of Juſtice renders the Uſe of Laws for the Puniſhment of Crimes neceſſary, it is a part of the Authority of the Sovereign to have Power to eſtabliſh new Puniſhments, and to make them either ſeverer or milder, according as the Frequency and Conſequences of the Crimes may require *o*.

o Evenit, ut eadem ſcelera in quibuſdam provinciis gravius plectantur: ut in Africa meſſium incentores; in Myſia vitium: ubi metalla ſunt, adulteratores monetæ. *l.* 16. §. *pen. ff. de pœnis.*

Nonnunquam evenit, ut aliquorum maleficiorum ſupplicia exacerbentur, quoties nimium multis perſonis graſſantibus, exemplo opus ſit. *d. l.* §. *ult.*

There are many Ordinances which have enacted Puniſhments for Crimes.

XIII.

13. *Power to remit the Puniſhments of Crimes.*

The Power which the Sovereign has to inflict Puniſhments, and to make them ſeverer or milder, implies that of granting particular Pardons to thoſe who are accuſed of Crimes, if there be any good Conſiderations which may induce him to it. Thus, he may commute and mitigate the Puniſhment of a condemned Perſon, by inflicting one that is milder. Thus, before Condemnation, he may remit the Puniſhment, if the Circumſtances make the Neceſſity of puniſhing the Crime to ceaſe; as, if it is Homicide committed involuntarily, and in the defence of the Life of the Party accuſed. And there are alſo Caſes where ſome particular Conſiderations may oblige the Sovereign to paſs an Act of Oblivion of the Crime, either on account of Services which the Criminal has already render'd to the State, or which he may render hereafter, or for other Cauſes. And he may alſo diſcharge from Puniſhment thoſe who have been already condemned, and reſtore them to their former State and Condition *p*.

p Cum ſalutatus eſſet a Gentiano, & Advento, & Opilio Macrino præfectis Prætorio, clariſſimis viris; item amicis, & principalibus officiorum & utriuſque ordinis viris, & proceſſiſſet; oblatus eſt ei Julianus Licinianus ab Opilio Ulpiano tunc legato in inſulam deportatus, tunc Antoninus Auguſtus dixit, *Reſtituo te in integrum provinciæ tuæ*; & adjecit, ut autem ſcias quid ſit in integrum reſtituere, honoribus, & ordini tuo, & omnibus cæteris te reſtituo. *l.* 1. *C. de ſent. paſſ. & reſt.*

Generalis indulgentia noſtra, reditum exulibus ſeu deportatis tribuit. *l.* 7. *eod. V. T. h. T.*

XIV.

14. *Power to permit or prohibit the Aſſemblies of Communities and Corporations.*

Seeing it is for the Order and good Government of a State, that not only Crimes, but every thing elſe which may diſturb the publick Tranquillity, or any way endanger it, ſhould be repreſſed, and that for this Reaſon all Aſſemblies of many Perſons in one Body are unlawful, becauſe of the Danger from thoſe

thoſe Aſſemblies which may meet for no other end but to concert ſome Enterprize againſt the Publick, even thoſe Aſſemblies which have nothing in view but what is juſt and lawful, cannot be formed without the expreſs Approbation of the Sovereign, after he is fully ſatisfied of their Uſefulneſs, and Tendency to the publick Good. Which makes it neceſſary to obtain leave to eſtabliſh Corporations and Communities, Eccleſiaſtical or Temporal, Regular or Secular, and of all other kinds whatſoever, Chapters, Univerſities, Colleges, Monaſteries, Hoſpitals, Companies of Trades, Fraternities, Common Councils of Cities and other Places, and all others which aſſemble together many Perſons, for what end ſoever it be. And it is only the Sovereign who can grant this Leave, and approve the Communities and Corporations to whom the Right of aſſembling themſelves together may be granted *q*.

q Mandatis principalibus præcipitur præſidibus provinciarum, ne patiantur eſſe (collegia, ſodalitia) neve milites collegia in caſtris habeant. *l.* 1. *ff. de colleg. & corp.*

In ſumma autem, niſi ex ſenatuſconſulti auctoritate, vel Cæſaris, collegium vel quodcunque tale corpus coierit: contra ſenatuſconſultum, & mandata, & conſtitutiones collegium celebrat. *l.* 3. §. 1. *eod.*

Neque ſocietas, neque collegium, neque hujuſmodi corpus paſſim omnibus habere conceditur. Nam & legibus & ſenatuſconſultis, & principalibus conſtitutionibus ea res coercetur. Paucis admodum in cauſis conceſſa ſunt hujuſmodi corpora: ut ecce vectigalium publicorum ſociis permiſſum eſt corpus habere: vel aurifodinarum, vel argentifodinarum, & ſalinarum. Item collegia Romæ certa ſunt quorum corpus ſenatuſconſultis atque conſtitutionibus principalibus confirmatum eſt: veluti piſtorum & quorumdam aliorum, & navicularіorum. *l.* 1. *ff. quod cuj. un. nom.*

XV.

15. *The Right to give to Communities the Liberty of poſſeſſing Goods, and holding them in Mortmain.*

It is a Conſequence of the Right of permitting the Erection of Communities and Corporations, to permit them likewiſe to poſſeſs Goods moveable and immoveable for their Uſe *r*. And this Permiſſion is particularly neceſſary for the Poſſeſſion of Immoveables. For ſeeing the ſaid Communities are perpetual, their Immoveables become unalienable, and cannot any more change their Maſter. So that the Prince, and the Lords of the Manor, of whom the ſaid Immoveables were held in Fee, upon condition of paying a certain Acknowledgment at every Change of Maſter by Sale, or otherwiſe, according to the Titles or the Cuſtoms, loſe the ſaid Right in Lands which paſs to Communities. And the Prince has moreover a further Intereſt in ſuch Alienations, becauſe of the Service which the Poſſeſſors of Lands held in Fee of the Crown owe him, when he ſummons his Vaſſals to attend him in his Wars. Thus, Communities cannot poſſeſs Immoveables but by the Permiſſion of the Prince, and at the Charge of ſatisfying him for the Intereſt which he has therein, and the Lords of Manors for their reſpective Intereſts. And this Permiſſion is granted by Letters which are called a Licence of Mortmain.

r Quibus autem permiſſum eſt corpus habere collegii, ſocietatis, ſive cujuſque alterius eorum nomine, proprium eſt, ad exemplum reipublicæ, habere res communes. *l.* 1. §. 1. *ff. quod cuj. univ. nom.*

†

XVI.

16. *The Right to permit Fairs and Markets.*

As Towns and other Places cannot form Aſſemblies under pretext of conſulting about their Affairs, without having firſt obtained a Right ſo to do from the Sovereign; ſo neither can they hold Fairs and Markets without leave from the Prince *s*.

s Qui exercendorum mercatuum aut nundinarum licentiam, vel veterum indulto, vel noſtra authoritate meruerunt. *l.* 1. *C. de nund. & mercat.* Nundinis impetratis a Principe. *l.* 1. *ff. de nund.*

XVII.

17. *The Right of coining Money.*

The Neceſſity of ſettling the Price of all Things that are in Commerce, and of which it is neceſſary to make an Eſtimate, whether it be for Sale, letting them to Hire, or for all other ſorts of Commerce, and the ſeveral Wants of Mankind, hath render'd the Uſe of Money neceſſary to the Publick, that is to ſay, the Uſe of ſome Matter which may have an eaſy Currency from one Hand to another, and which may ſtand inſtead of the Value of the Things of which it is neceſſary to pay the Eſtimation. And this required the Authority of the Sovereign for making choice of this Matter, and for giving it its preciſe Value, which may in one or more Pieces make up all ſorts of Values, from the loweſt to the higheſt. Thus, the Right of making choice of this Matter, the coining it into Money, the Regulations which fix the Weight of it, its Size, Figure, and Value, and which give it Currency in a State, belongs only to the Sovereign. For it is he alone that can oblige his Subjects to receive for the Price of Things the Money which he makes current, and which he authorizes by his Image, or other

other Mark that is ſtamped upon it. It is this Right which is called the Right of coining Money, and which implies that of raiſing or lowering the Value of it, of crying down the old Species and coining new, according as the Circumſtances of the Times, the Plenty or Scarcity of the ſaid Matter, the Wants of the State, or other Cauſes may give occaſion to the ſaid Changes *t*.

t Si quis nummos falſa fuſione formaverit, univerſas ejus facultates fiſco noſtro præcipimus addici. In monetis etenim tantum modo noſtris, cudendæ pecuniæ ſtudium frequentari volumus; cujus obnoxii, majeſtatis crimen committunt. Si quis ſuper cudendo ære, vel reſcripto aliquo, vel (etiam) adnotatione noſtra ſibi arripuerit facultatem, non ſolum fructum propriæ petitionis amittat, verum etiam pœnam quam meretur excipiat. *l.* 2. *&* 3. *C. de falſ. monet.*

u [*In* England *it has been ordained of antient time, that no King of this Realm ſhould change his Money, nor impair, nor amend the ſame, nor coin other Money, except of Gold or Silver, without Aſſent of Parliament.* Coke 2 Inſtit. pag. 576. Coke 3 Inſtit. pag. 17.]

XVIII.

18. *And of prohibiting all other Coin except that which the Prince allows to be current.*

It is a Conſequence of this Right of the Sovereign to coin Money, that there can be no other Money current in his Dominions, but what is coined by his Order, or the Coin of another State which he allows to be current in his Territories. Thus all coining of Money, altho it be equal as to the Value and Weight of the Matter to that which has the Image of the Sovereign, is a capital Crime; and with much greater Reaſon is it a capital Crime to coin falſe Money, or Money that is adulterated, and to clip and file the current Coin of the Nation *u*.

u Quoniam nonnulli monetarii adulterinam monetam clandeſtinis ſceleribus exercent: cuncti cognoſcant neceſſitatem ſibi incumbere, hujuſmodi homines inquirendi, ut inveſtigati tradantur judici, facti conſcios per tormenta illico prodituri, ac ſi digni, ſuppliciis addicendi. *l.* 1. *C. de falſ. mon.*

[*By the Law of* England *the forging of the King's Coin is High Treaſon. And likewiſe if any Perſon for Lucre or Gain ſake, ſhall by any Art, Ways, or Means whatſoever, impair, diminiſh, falſify, ſcale, or lighten the King's Money, the ſame is declared by Act of Parliament to be High Treaſon.* Coke's 3 Inſtit. p. 16, 17. *This Puniſhment did at firſt extend only to the King's Money coined within the Realm; and therefore if a Man had counterfeited the Money of another Kingdom, tho it were current within the Realm, it was not Treaſon, until it was ſo declared by Parliament. But forging or counterfeiting of Foreign Money, which is not current within the Realm, is Miſpriſion of Treaſon; and the Offender forfeits as for Concealment of High Treaſon.* Coke ibid. p. 17.]

XIX.

19. *The Right in Mines.*

The Neceſſity of Metals, not only for Money, Arms, and Artillery, but for an infinite number of other Wants and Conveniences, many of which relate to the Publick Intereſt, renders the ſaid Matters, and thoſe of other Minerals, ſo uſeful and neceſſary in a State, that the Order of Government requires that the Sovereign ſhould have over the Mines which produce the ſaid Matters, a Right independent of that of the Proprietors of the Places where the ſaid Mines lie. And moreover it may be ſaid, that the Right of the Proprietors in its firſt Origin was confined to the uſe of their Lands for ſowing them, planting, and building, or for other the like Uſes; and that their Titles did not ſuppoſe a Right to the Mines which were unknown, and which Nature deſtines for the Uſe of the Publick, by the Want which a Kingdom may have of the Metals and other particular Matters that are dug out of Mines. Thus the Laws have regulated the Uſe of Mines, and leaving to the Proprietors of the Lands that which appeared to be juſt, they have likewiſe ſettled a Right for the Sovereign in the ſaid Mines *x*.

x Perpenſa deliberatione duximus ſanciendum, ut quicumque metallorum exercitium, velit affluere, is labore proprio, & ſibi, & reipublicæ commoda comparet. Itaque ſi qui ſponte conduxerint, eos laudabilitas tua octonos ſcrupulos in balluca quæ græce χεράμμιον appellatur, cogat exolvere. Quidquid autem amplius colligere potuerint, fiſco potiſſimum diſtrahant, a quo competentia ex largitionibus noſtris pretia ſuſcipiant. *l.* 1. *C. de metal. & met.*

Ob metallicum canonem, in quo propria conſuetudo retinenda eſt quatuordecim uncias balluæ pro ſingulis libris conſtat inferri. *l.* 2. *eod.*

Cuncti qui per privatorum loca ſaxorum venam laborioſis effoſſionibus perſequantur, decimas fiſco, decimas etiam Domino repræſentent: cætero modo proprlis ſuis deſideriis vindicando. *l.* 3. *eod.*

See the ninth Article of the firſt Section of the ſixth Title.

[By an Act of the Parliament of *England*, 5° *&* 6° *Gul. & Mar. cap.* 6. it is enacted and declared, that all Perſons Subjects of the Crown of *England*, Bodies Politick or Corporate, having any Mine or Mines within the Kingdom of *England* or *Wales*, wherein any Ore is diſcovered or wrought in which there is Copper, Tin, Iron, or Lead, ſhall and may enjoy the ſaid Mine or Mines, or Ore, notwithſtanding they ſhall be pretended or claimed to be a Royal Mine or Mines: Provided, that their Majeſties, their Heirs and Succeſſors, and all claiming any Royal Mines under them, may have the Ore of ſuch Mines, paying to the Owners of the ſaid Mines the Rates ſettled by the ſaid Act of Parliament.]

XX.

20. *The Right to ſet off his Power by Marks of a ſenſible Grandure.*

We ought to place in the number of the Rights which the Law gives to the Sovereign, that of having all the Marks of Grandure and Majeſty neceſſary for ſetting off the Authority and Dignity of

of a Power of ſo great an Extent and Elevation, and for imprinting a Veneration for it on the Minds of all the Subjects. For altho they ought to conſider in the Power of the Sovereign the Power of God which ſubjects them to that of the Sovereign, and to reverence it without any regard to the ſenſible Marks of Grandure that may happen to be annexed to it; yet as God accompanies with a viſible Splendour his own Power, which diſplays it ſelf both on the Earth and in the Heavens, as it were upon a Throne and in a Palace, the Magnificence whereof ſtrikes the Beholders into Admiration; and as when he exerciſed his auguſt Power of a Lawgiver, he publiſhed his Law with Prodigies which imprinted ſuch a Reſpect and Terrour on the Minds of the Spectators, that they were not able to behold the Glory thereof; he is willing that in proportion to the Share of this Power which he communicates to Sovereigns, it ſhould be ſet off in their Hands by Marks which are proper for procuring to them the Reſpect of the People. Which cannot be otherwiſe done than by that Pomp which appears in the Magnificence of their Palaces, and in the other Marks of a ſenſible Grandeur with which they are environed, and which God himſelf has allowed the Uſe of to Princes who have reigned according to his Mind *y*.

y And God ſaid to Solomon, *Becauſe this was in thine Heart, and thou haſt not asked Riches, Wealth, or Honour, nor the Life of thine Enemies, neither yet haſt asked long Life; but haſt asked Wiſdom and Knowledge for thy ſelf, that thou mayeſt judge my People, over whom I have made thee King: Wiſdom and Knowledge is granted unto thee, and I will give thee Riches and Wealth, and Honour, ſuch as none of the Kings have had that have been before thee, neither ſhall there any after thee have the like.* 2 Chron. 1. 11, 12. 1 Kings 3. 11, 12. *And* Solomon *determined to build a Houſe for the Name of the Lord, and a Houſe for his Kingdom. And* Solomon *told out threeſcore and ten thouſand Men to bear Burdens, and fourſcore thouſand to hew in the Mountain, and three thouſand and ſix hundred to overſee them. And* Solomon *ſent to* Hiram *the King of* Tyre, *ſaying, As thou didſt deal with* David *my Father, and didſt ſend him Cedars to build him an Houſe to dwell therein, even ſo deal with me.* 2 Chron. 2. 1, 2, 3.

XXI.

21. *A Right to have Guards for their Perſons.*

It follows from this Uſe of the Grandure neceſſary to Princes, that altho they ought not to ſet their Hearts upon it, but ought rather to elevate them to a Zeal for the Glory of God; yet they have a Right, for the good of the Publick, to make uſe of the Marks neceſſary for diſplaying this Grandure. Thus it is very juſt and reaſonable that they ſhould have Soldiers for the Guard of their Perſons and of their Houſes, and that they ſhould allow likewiſe the Uſe of Guards to thoſe who ſupply their Place in the Government of the Provinces *z*.

z That his Heart be not lifted up above his Brethren. Deut. 17. 20.

And Solomon *gathered together Chariots and Horſemen; and he had a thouſand and four hundred Chariots, and twelve thouſand Horſemen, whom he beſtowed in the Cities for Chariots, and with the King at* Jeruſalem. 1 Kings 10. 26.

XXII.

22. *A Right to have many Officers for their Houſhold.*

It is for the ſame Uſe that the Service of their Houſes obliges them to have for their Domeſticks a great number of Officers of different ſorts for divers Uſes, and that the ſaid Officers are commanded by others whoſe Offices are among the chief Offices of the State, and which are conferred on Perſons of the firſt Rank *a*.

a So King Solomon *was King over* Iſrael. *And theſe were the Princes which he had*; Azariah *the Son of* Zadok, *the Prieſt*; Elihoteph *and* Ahiah, *the Sons of* Shiſha, *Scribes*; Jehoſhaphat, *the Son of* Ahilud, *the Recorder*; *and* Benoiah, *the Son of* Jehojada, *was over the Hoſt*; *and* Zadok *and* Abiathar *were the Prieſts*; *and* Azariah, *the Son of* Nathan, *was over the Officers*; *and* Zabud, *the Son of* Nathan, *was principal Officer, and the King's Friend*; *and* Ahiſhar *was over the Houſehold*; *and* Adoniram, *the Son of* Abda, *was over the Tribute. And* Solomon *had twelve Officers over all* Iſrael, *which provided Victuals for the King and his Houſhold*; *each Man his Month in a Year made Proviſion.* 1 Kings 4. 1, 2, *&c.*

And when the Queen of Sheba *had ſeen the Wiſdom of* Solomon, *and the Houſe that he had built and the Meat of his Table, and the ſitting of his Servants, and the Attendance of his Miniſters, and their Apparel, his Cup-Bearers alſo, and their Apparel, and his Aſcent by which he went up into the Houſe of the Lord, there was no more Spirit in her.* 2 Chron. 9. 3, 4.

XXIII.

23. *The Demeſne of the Prince.*

It is likewiſe a Conſequence of the Grandure of the Sovereign, eſpecially in Hereditary Monarchies, that the Prince ſhould have a Demeſne peculiar to the Crown, conſiſting of Lands and of Rights which yield Revenues to him, and that he ſhould have Power to give out of this Demeſne Portions to his Children, according as the Laws of the State may have provided in that Matter. Thus in *France* the King takes out of his Demeſne a Patrimony for his Male-Children, which is commonly called an Appennage, of which Notice ſhall be taken in another Place *b*.

b See the Title of the Prince's Demeſne, and in that Title the fourteenth Article of the firſt Section.

XXIV.

XXIV.

24. *The Right of raiſing the neceſſary Supplies.*

For the Uſe of many of the Rights of the Sovereign which have been juſt now explained, and for the Exerciſe of his Power in the ſeveral Wants of the State in Peace and in War, it is juſt that the Sovereign ſhould have the Right of drawing from the State itſelf the Supplies which its Wants render neceſſary *c*: As will appear more fully in the Articles which follow.

c Wherefore ye muſt needs be ſubject, not only for Wrath, but alſo for Conſcience ſake. For, for this Cauſe pay you Tribute alſo: For they are God's Miniſters, attending continually upon this very thing. Render therefore to all their Dues, Tribute to whom Tribute is due, Cuſtom to whom Cuſtom, Fear to whom Fear, Honour to whom Honour. Rom. 13. 5, 6, 7. *See the fourth Title.*

[In *England* it has been received as a perpetual ſtanding Law ever ſince the Reign of *Edward* I. that no Subſidy, Tax, Impoſition, or other Aid or Charge whatſoever, is to be impoſed or levied upon the Subject without Conſent of Parliament. *Stat. de tallagio non concedendo, edit. anno* 34 *Edw.* I. 3 *Car.* I. *cap.* 1. *Coke* 2. *Inſt. pag.* 532, 533.]

XXV.

25. *Different occaſions for Taxes.*

In the time of Peace it is neceſſary to keep in repair the Fortifications of ſtrong Towns, to maintain the Gariſons, and to ſubſiſt the other Troops that are neceſſary for the defence of the Kingdom, and Safety of the Prince's Perſon; to ſupply the other Expences neceſſary for his Houſhold; to pay the Wages of the ſeveral ſorts of Officers; to repair and keep in good condition the Highways, the Bridges, the Cauſeys; to render the Uſe of the Sea-Ports ſafe and commodious; to facilitate the Navigation of the Rivers; and to provide for all the other Charges of the State. Which gives to the Sovereign a Right to demand from the Subjects the Money that is neceſſary for all theſe Uſes *d*.

d See the Paſſage cited on the preceding Article.

XXVI.

26. *A Right to levy Troops for the War, and to provide for the Expences which the War may require.*

In time of War it is neceſſary to have Troops, both Cavalry and Infantry, Horſes, Arms, Artillery, Ammunition, Convoys for Proviſions, Ships of War, if it be a Kingdom that borders on the Sea, and every thing that the Quality of the War may require. This implies the Right to levy Soldiers, to fortify more and more the ſtrong Places, or to build new Fortreſſes according as the Occaſion may require; and in general to provide every thing that may be neceſſary for ſupporting the War, and defraying the Charges of it out of the Publick Money *e*.

e This is alſo a Conſequence of the twenty fourth Article.

XXVII.

27. *A Right to oblige thoſe to take up Arms who are bound to that Service.*

The Right of levying Soldiers comprehends that of obliging not only thoſe to take up Arms who by their Military Offices are bound to it, but alſo thoſe who by particular Engagements may be bound to ſerve in the Wars *f*. Thus in *France* all Gentlemen, and all thoſe who hold Fiefs in chief, or Meſne-Fiefs, are tied to this Service. For the Gentry have the ſaid Quality with this Burden, and all Vaſſals owe this Service on account of their Fiefs, which are either held immediately of the Crown, as the firſt and greateſt Fiefs are, or are held of theſe greater Fiefs, as Meſne-Fiefs. So that the King has a right to oblige the Vaſſals and Gentry to take up Arms; which is done by an Order which is called an Order for aſſembling the Ban and Arrier-Ban.

f In the Roman *Empire they obliged all Perſons to take up Arms whom they found proper for it, and they were choſen by Officers named* Conquiſitores, *who were the Perſons who made that choice which they called* Delectus; *and it was a Crime to refuſe the Service when they were called to it. But this Election was only practiſed in Caſes of Neceſſity; and ſeeing the Troops were uſually ſufficiently filled with Soldiers who liſted themſelves voluntarily, they moderated the Puniſhment of thoſe who declined to ſerve when called to it.* Gravius autem delictum eſt detrectare munus militiæ quam adpetere. Nam & qui ad delectum olim non reſpondebant, ut proditores libertatis in ſervitutem redigebantur. Sed mutato ſtatu militiæ receſſum à capitis pœna eſt. Quia plerumque voluntario milite numeri ſupplentur. *l.* 4. §. 10. *ff. de re milit.*

And the Lord ſent thee on a Journey, and ſaid, Go, and utterly deſtroy the Sinners, the Amalekites, *and fight againſt them, until they be conſumed.* 1 Sam. 15. 18.

[In *England*, in caſe of any Inſurrection within the Kingdom, or fear of an Invaſion from abroad, the King directs the Militia of the Kingdom to be aſſembled, in order to ſuppreſs the ſaid Inſurrection, and repel the ſaid Invaſion. The Militia is under the Direction of Commiſſioners of Lieutenancy named by the King for the ſeveral Counties, Cities, and Places of the Kingdom. And the manner of aſſembling the ſaid Militia, and aſſeſſing the Subjects towards the Charge of the ſame, is particularly laid down in *Stat.* 13 & 14 *Car.* II. *cap.* 3. By which Statute it is expreſly provided, that none that have advanced a Month's Pay, ſhall be charged with any other Month's Payment till they are reimburſed. For which reaſon, it has been neceſſary in the late Reigns, when there has been occaſion to raiſe the Militia of the Kingdom, to have an Act of Parliament for that purpoſe, directing the Militia to be raiſed for that Year, tho the Month's Pay formerly advanced be not repaid.]

XXVIII.

28. *A Right to regulate the Expences of the State according to the Wants thereof.*

The Right which the Sovereign has to demand of his Subjects the Monies that are neceſſary for the different Wants which have been juſt now explain'd, extends to the regulating the ordinary Expences in the time of Peace, and to the regulating alſo the extraordinary Expences in the time of War, and to the taking care that Funds be provided ſufficient for defraying the ſaid Charges, either by laying on Impoſts, or by other ways. Thus Taxes upon Land, the Exciſe, and other Subſidies, are Aids which the Subjects owe to their Sovereign, and which by conſequence he has a Right to demand of them according as the Exigencies of the State may require *g*.

g See the twenty fourth Article of this Section, and the fourth Title of this Book.

XXIX.

29. *Four ſeveral ſorts of Revenues independent of the Neceſſity of the Expences.*

Beſides theſe Funds of publick Taxes and Impoſts levied upon the Subjects, which ought to be leſſer or greater according to the Wants of the State, the Sovereign has likewiſe other ſorts of Rights to Goods which belong to him naturally as being Head of the Body of the State, and without any regard to the publick Wants *h*. Which comprehends four ſeveral Rights, which ſhall be explained in the following Articles.

h See the Articles which follow, and the ſecond, third, fourth, and fifth Sections of the Title of the Prince's Demeſne.

XXX.

30. *Forfeitures.*

The firſt of theſe Rights is that of the Forfeiture of the Goods of Perſons condemned to Puniſhments, which ought to have this Conſequence, ſuch as are at this day in *France* the Puniſhment of Death, of Condemnation to the Gallies for ever, and of perpetual Baniſhment out of the Kingdom. For thoſe who lie under ſuch a Sentence being incapable of poſſeſſing any thing, and deſerving moreover this Puniſhment of having their Goods confiſcated, they are juſtly deprived of the Goods which they poſſeſſed. For which reaſon theſe Goods being without an Owner, do belong to the Publick, and go to the Sovereign who has a Right to all ſuch Goods. And we muſt place in the ſame Rank the Fines or Pecuniary Mulcts inflicted on Offenders, over and above what they are condemned to give as an Alms to the Poor, and for a Reparation of the Civil Intereſt of the Parties concerned. Theſe Pecuniary Mulcts are what they call in *France* the King's Fines, which are adjudged to the King, either out of the forfeited Goods, when the Forfeiture belongs to the Lord of the Mannor, and not to the King, or out of the Goods which remain to the Perſon that is condemned, and who has not incurred the Pain of Forfeiture *i*.

i Deportati nec earum quidem rerum quas poſt pœnam irrogatam habuerint, hæredem habere poſſunt; ſed & hæ publicabuntur. *l.* 2. *C. de. bon. dam.*

See the ſecond Section of the Title of the Prince's Demeſne.

XXXI.

31. *The Right to vacant Goods that have no Owner, and to the Succeſſions of thoſe who die without Heirs.*

The ſecond of theſe Rights is that which entitles the Sovereign to all Goods that are vacant, that is to ſay, which are found to be without any Owner; ſuch as the Goods of thoſe who die without leaving any Relation behind them, and without making a Teſtament: for the want of Heirs in thoſe Perſons makes their Succeſſions to paſs to the Prince. And there are likewiſe other ſorts of vacant Goods, as ſhall be explained in the third Section of the Title of the Prince's Demeſne *l*.

l Succeſſorium Edictum idcirco propoſitum eſt, ne bona hæreditaria vacua ſine Domino diutius jacerent, & creditoribus longior mora fieret. E re igitur prætor putavit, præſtituere tempus his, quibus bonorum poſſeſſionem detulit, & dare inter eos ſucceſſionem: ut maturius poſſint creditores ſcire utrum habeant, cum quo congrediantur, an vero bona vacantia fiſco ſint delata, an potius ad poſſeſſionem bonorum procedere debeant, quaſi ſine ſucceſſore defuncto. *l.* 1. *ff. de ſucceſſ. edict.* Inteſtatorum res qui ſine legitimo hærede deceſſerint, fiſci noſtri rationibus vindicandas. *l.* 1. *C. de bon. vacant.*

See the third Section of the ſixth Title of the Prince's Demeſne.

XXXII.

32. *The Right of Succeſſion to the Eſtates of Aliens.*

The third of theſe Rights is that by which the King acquires the Goods of Strangers who die within his Dominions without having been naturalized, and without leaving behind them Heirs who are natural born Subjects. For ſince no Perſon is capable of ſucceeding to them, their Eſtates are in the ſame Condition as the Eſtates of Perſons dying without Heirs, and do belong to the King *m*.

m See the fourth Section of the ſixth Title of the Prince's Demeſne.

XXXIII.

33. *The Right of Succeſſion*

The fourth and laſt of theſe Rights is that of Succeſſion to Baſtards, which entitles

to Baſtards who die inteſtate, and without Children.

entitles the King to the Goods of Baſtards who die without leaving behind them Children begot in lawful Wedlock, or making a Teſtament. For ſeeing they can have no lawful Heir, their Succeſſion falls into the Condition of that of Perſons dying without Heirs *n*.

n See the fifth Section of the ſixth Title of the Prince's Demeſne.

XXXIV.

34. How theſe four ſorts of Rights and Revenues may be applied.

It is to be obſerved that theſe four ſorts of Rights in *France* have this belonging to them in common, That the King diſpoſes in three different manners of that which he happens to acquire by any one of theſe ſeveral Titles. For if it be Lands he acquires, he may incorporate them into his Demeſne by the ways which are preſcribed for that purpoſe, and which ſhall be explained in their proper place: thus, there are Lands annexed to the Crown by Confiſcations. Or the King may make a Grant of them to Perſons whom he has a mind to gratify, or to reward, for ſome paſt Services. And as for the Fines and other Goods which conſiſt in Money, he may either give them away, or he may comprize all theſe ſorts of Profits within the Farms of the Demeſnes, and leave them to the Farmers thereof. For all theſe ways of conveying to the Prince theſe ſeveral ſorts of Goods, do not render them inalienable till after they are annexed to the Demeſne, as ſhall be explained when we come to treat thereof *o*.

o See the twenty ſecond, twenty third, twenty fourth, and twenty fifth Articles of the firſt Section of the ſixth Title of the Prince's Demeſne.

SECT. III.

Of the Duties of thoſe who are veſted with the Sovereign Authority.

The CONTENTS.

1. *The firſt Duty of the Sovereign, is to acknowledge that he holds his Power of God.*
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4. *Another Rule, The Love of Juſtice.*
5. *Another Rule, Freedom of Acceſs for Complainants, and Care to repreſs Violence.*
6. *Another Rule, To make choice of good Miniſters, and of good Officers.*
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8. *Another Rule, To uſe Precaution for finding out the Truth.*
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10. *Another Duty, Prudence in granting Privileges and Exemptions, and in inflicting Puniſhments.*
11. *A Duty in reſpect of Strangers.*
12. *A Duty in the Management of the Revenue.*
13. *A Summary of the Duties of the Sovereign.*
14. *In what Senſe the Sovereign is ſaid to be above the Law.*

1. The firſt Duty of the Sovereign, is to acknowledge that he holds his Power of God.

THE firſt and moſt eſſential of all the Duties of thoſe whom God exalts to the ſupreme Government of a Kingdom, is to own and acknowlege this Truth, That it is from God that they derive all their Power; that it is his Place which they fill; that it is by Him that they ought to reign, and from Him that they are to have that Wiſdom and Underſtanding which are requiſite for the Art of governing. And they ought to make theſe Truths the Principles of all the Rules of their Conduct, and the Foundation of all their Duties *a*.

a See the ſixth Article of the firſt Section of the firſt Title.

Thou haſt made me King over a People, like the Duſt of the Earth in Multitude. Give me now Wiſdom and Knowledge, that I may go out and come in before this People. 2 Chron. 1. 9, 10.

Give therefore thy Servant an underſtanding Heart, to judge thy People, that I may diſcern between Good and Bad. 1 Kings 3. 9.

Give me Wiſdom, that ſitteth by thy Throne. Wiſd. of Sol. 9. 4. See the Preamble of this Title.

I will ſend thee a Man out of the Land of Benjamin, *and thou ſhalt anoint him to be Captain over my People* Iſrael, *that he may ſave my People out of the hand of the* Philiſtines. 1 Sam. 9. 16.

II.

2. They ought to ſtudy the Rules of Government in the Holy Scriptures.

The firſt Conſequence which naturally ariſes from theſe Principles is, That Sovereigns ought to know that which God demands of them in the Station where he has placed them, and what Uſe they ought to make of the Power which he has given them. And it is of him that they are to learn it, by reading his Law, which he has expreſly commanded them to ſtudy, having laid down therein the Rules which they ought to know, in order to their governing well *b*.

b And it ſhall be when he ſitteth upon the

Throne of his Kingdom, that he ſhall write him a Copy of this Law in a Book, out of that which is before the Prieſts the Levites. And it ſhall be with him, and he ſhall read therein all the Days of his Life; that he may learn to fear the Lord his God, to keep all the Words of this Law, and theſe Statutes, to do them. Deut. 17. 18, 19.

The Book of the Law ſhall not depart out of thy Mouth, but thou ſhalt meditate therein Day and Night, that thou mayeſt obſerve to do according to all that is written therein: For then thou ſhalt make thy way proſperous, and then thou ſhalt have good Succeſs. Joſh. 1. 8.

III.

3. *The firſt Rule is, to uſe their Power for the Support of Juſtice.*

The firſt Rule which the Law of God lays down touching the Duties of the Sovereign, is a Conſequence of this Truth, That it is of God that he holds his Power: And the ſame Divine Law which teaches Princes this Truth, and which informs them of the natural Uſe of their Power, commands them not to make thereof an Inſtrument of Pride and Vanity; but to imploy it in ſuch a manner for the Support of Juſtice, as that they may not give their Authority to any other Uſe beſides this; and that they do exerciſe it for this purpoſe as often as occaſion ſhall offer, ſo as that nothing may be capable of diverting them from it. For a Sovereign ought to look upon himſelf as a Father of the People who compoſe the Body of which he is the Head; and to conſider that they are to anſwer to the ſevere Judgment which God will exerciſe againſt thoſe who ſhall have made a bad Uſe of the Power which they held of him *c*.

c That his Heart be not lifted up above his Brethren; and that he turn not aſide from the Commandment to the right Hand, or to the left. Deut. 17. 20.

Hear therefore, O ye Kings, and underſtand; learn ye that be Judges of the Ends of the Earth. Give ear, you that rule the People, and glory in the Multitude of Nations. For Power is given you of the Lord, and Sovereignty from the Higheſt, who ſhall try your Works, and ſearch out your Counſels. Becauſe being Miniſters of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the Counſel of God; horribly and ſpeedily ſhall he come upon you: For a ſharp Judgment ſhall be to them that be in high Places. For Mercy will ſoon pardon the meaneſt; but mighty Men ſhall be mightily tormented. Wiſd. of Sol. 6. 1, 2, 3, *&c.*

IV.

4. *Another Rule, The Love of Juſtice.*

This Duty of Sovereigns, not to imploy their Authority but for the Support of Juſtice, implies that of a great Love for the Juſtice which they are obliged to ſupport and maintain, and of a great Application to know what it is that Juſtice requires, and to enforce the Obſervance thereof *d*.

d Love Righteouſneſs, ye that be Judges of the Earth. Wiſd. of Sol. 1. 1.

Give therefore thy Servant an underſtanding Heart, to judge thy People, that I may diſcern between Good and Bad. 1 Kings 3. 9.

V.

5. *Another Rule, Freedom of Acceſs for Complainants, and Care to repreſs Violence.*

It is a Conſequence of the Love of Juſtice in the Heart of the Prince, that he make himſelf eaſy of Acceſs to receive the Complaints of Perſons who ſuffer ſome Violence, or ſome Injuſtice, whether it be from thoſe who abuſe the Authority of Juſtice, being intruſted by the Prince with the Adminiſtration of ſome Branch thereof, or from thoſe who by their Condition being exalted above others, ſhould make uſe of that Advantage for oppreſſing them *e*.

e Deliver him that is ſpoiled out of the hand of the Oppreſſor, leſt my Fury go out like Fire, and burn that none can quench it. Jer. 21. 12.

Then Samuel *took a Viol of Oil, and poured it upon his Head, and kiſſed him, and ſaid, Is it not becauſe the Lord hath anointed thee to be Captain over his Inheritance?* 1 Sam. 10. 1.

VI.

6. *Another Rule, To make choice of good Miniſters, and of good Officers.*

Seeing the Sovereign cannot by himſelf exerciſe all the Functions in which his Power and Authority are to be imployed for the Support of Juſtice, and that he is obliged to divide among a great Number of Miniſters and Officers thoſe different Functions; the Adminiſtration of the ſovereign Power, which he holds of God, lays another Duty upon him of making a good Choice of the Miniſters and Officers to whom he delegates any part of his Authority. Which obliges him to enquire into the Characters of the Perſons whom he imploys, when it is he himſelf that is to chuſe them; and when the Election is to be made by others, to ſee that they obſerve the ſtanding Rules and Orders of the Kingdom for that purpoſe, and the Regulations which he himſelf may have made for filling up the Offices with Perſons in all reſpects duly qualified for the Imployment, both by their Capacity and their Probity; and to inform himſelf of the good or bad Uſe which they make of the Authority which they have in their hands *f*.

f And he ſet Judges in the Land, throughout all the fenced Cities of Judah, *City by City. And ſaid to the Judges, take heed what ye do: for ye judge not for Man, but for the Lord, who is with you in the Judgment. Wherefore now, let the Fear*

Fear of the Lord be upon you, take heed and do it: for there is no Iniquity with the Lord our God, nor reſpect of Perſons, nor taking of Gifts. 2 Chron. 19. 5, 6, 7.

Have but one Counſellor of a thouſand. Eccluſ. 6. 6.

VII.

7. Another Rule, Free Acceſs for Perſons who are to make Proof of the Truth.

In the Occaſions where the Sovereign himſelf exerciſes his Authority in Perſon, whether it be that the Conſequence of the Affair requires it ſhould be ſo, or that particular Conſiderations oblige him to reſerve to his own Cognizance what he might have committed to other Perſons, whether Miniſters or Officers, he is obliged to make an exact Inquiry into the Truth, and to render himſelf acceſſible to the Perſons who may be able to furniſh him with Proofs of it. Thus, he ought to hear equally both the Complainants and Defendants, and to allow them as much as is poſſible the free Uſe of the Ways which may lead him to the Knowledge of the Truth; that after having diſcovered the ſame, he may decree, and cauſe to be executed, that which ſhall appear to be juſt *g*.

g The King that faithfully judgeth the Poor, his Throne ſhall be eſtabliſhed for ever. Prov. 29. 14.

Hear the Cauſes between your Brethren, and judge righteouſly between every Man and his Brother, and the Stranger that is with him. Ye ſhall not reſpect Perſons in Judgment, but ye ſhall hear the ſmall as well as the great: you ſhall not be afraid of the Face of Man, for the Judgment is God's. Deut. 1. 16, 17.

VIII.

8. Another Rule, To uſe Precaution for finding out the Truth.

Since it often happens that in the Caſes where the Sovereign ought to take cognizance of the Truth, the ſame is ſmothered by the Prevarication of thoſe very Perſons to whom he commits the Care of enquiring into it, or of thoſe who, having the Honour to approach his Perſon, make Reports to him either of Complaints, or of other Affairs, in which they diſguiſe the Truth; it would be prudent in the Prince, and it is his Duty, to moderate the Confidence which he places in all his Miniſters, and in all thoſe who have the Honour to approach him, and of whom he may take Advice, or receive any Teſtimony of the Truth. For it is often prudent in the Prince, eſpecially in Affairs of Importance, and wherein any Miniſter expreſſes a great Earneſtneſs, to conſider that the Truth may be induſtriouſly concealed from him, and to take therefore the proper ways for diſcovering it, leſt by ſuffering himſelf to be impoſed upon by Lying, Impoſture, and Calumny, he ſhould grant his Protection to ſome Injuſtice *h*, and give too ready an ear to Miniſters who are Protectors of Iniquity *i*.

h Then ſhalt thou enquire and make ſearch, and ask diligently: And behold if it be Truth, and the Thing certain, that ſuch Abomination is wrought among you, thou ſhalt ſurely ſmite the Inhabitants of that City with the Edge of the Sword, deſtroying it utterly, and all that is therein, and the Cattle thereof, with the Edge of the Sword. Deut. 13. 14, 15.

And it be told thee, and thou haſt heard of it, and enquired diligently, and behold it be true, and the Thing certain, &c. Deut. 17. 4.

They that ſeek the Lord, underſtand all Things. Prov. 28. 5.

i If a Ruler hearken to lyes, all his Servants are wicked. Prov. 29. 12.

IX.

9. Another Duty, To protect Religion, and the Laws of the Church.

Seeing the Sovereign is the only Perſon who has within his Dominions the Temporal Power in its full Extent, and that he ought to imploy the ſaid Power for the Support of Juſtice and Truth, and that both the one and the other are inſeparable from the Spirit of Religion and the Worſhip of God, of whom he holds his ſaid Power; he ought likewiſe to imploy the ſaid Power for the defence of Religion, and of the Worſhip of God, of whom he holds it; which obliges him to protect and maintain the free Exerciſe of Religion, to give to the Laws of the Church the Aſſiſtance which may be neceſſary to inforce the Obſervance of them. And thus we ſee in *France*, that as to what relates to the *Roman* Catholick Religion, and as to what the Church decrees and determines, the Kings of *France* declare themſelves *Protectors*, *Guardians*, *Conſervators*, and *Executors* of the ſame *l*.

l Ordinance of Francis *the Firſt, of the Month of* July, 1543.

Unam nobis eſſe, in omni noſtræ reipublicæ & imperii vita, in Deo ſpem credimus: ſcientes quia hæc nobis & animæ & imperii dat ſalutem. Unde & legiſlationes noſtras inde pendere competit, & in eam reſpicere: & hoc eis principium eſſe, & medium, & terminum. *Nov.* 109. *in præfat.*

See the fourth Article of the ſecond Section.

X.

10. Another Duty, Prudence in granting Privileges and Exemptions, and in inflicting Puniſhments.

We may reckon among the Duties of thoſe who have the Sovereign Authority committed to them, Prudence in the diſpenſing of Bounties and Rewards which are to diſtinguiſh Merit, procure it to be eſteemed, and to induce others to imitate it. And they ought likewiſe to be very circumſpect in granting Privileges, Exemptions, and other Favours, eſpecially ſuch as might turn

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to the prejudice of other Perſons *m*. And in inflicting Puniſhments and Corrections, they may mitigate the Severity on ſome occaſions, where Wiſdom and Clemency may agree together *n*, not bating any thing of the Severity thereof in the Caſes where the Neceſſity of an Example, and the Dignity of Juſtice demand Firmneſs and Reſolution.

m Merito ait prætor, *qua ex re quid illi damni detur*. Nam quotieſcumque aliquid in publico fieri permittitur, ita oportet permitti, ut ſine injuria cujuſquam fiat. Et ita ſolet princeps quoties aliud novi operis inſtituendum petitur, permittere. *l.* 2. §. 10. *ff. ne quid in loco pub. vel itin. fiat.*

Si quis a principe ſimpliciter impetraverit, *ut in publico loco ædificet*; non eſt credendus ſic ædificare, ut cum incommodo alicujus id fiat: neque ſic conceditur, niſi forte quis hoc impetraverit. *d. l.* §. 16.

n Si vindicari in aliquos ſeverius contra noſtram conſuetudinem pro cauſæ intuitu juſſerimus, nolumus ſtatim eos aut ſubire pœnam, aut excipere ſententiam: ſed per dies triginta ſuper ſtatu eorum ſors & fortuna ſuſpenſa ſit. *l.* 20. *C. de pœn.*

It appears by this Law, that it is prudent for the Prince, when he has been moved to inflict a ſeverer Puniſhment than what is ordinary, to take time to conſider of it, and to ſuſpend in the mean while the Execution thereof, if the Circumſtances will allow of it.

XI.

11. *A Duty in reſpect of Strangers.*

Beſides theſe Duties of the Sovereign which have been explained in the preceding Articles, and which relate to his Conduct within the Kingdom, he has his Engagements with reſpect to Strangers, who are his Neighbours or Allies, whether it be for cultivating a Friendſhip and good Correſpondence with them as much as is poſſible, or for defending himſelf and his Dominions from any Attempts they ſhall make againſt them *o*.

o If it be poſſible, as much as lieth in you, live peaceably with all Men. Rom. 12. 18.

Altho this Text of Scripture relates chiefly to Perſons in a private Capacity, yet the Truth which it teaches is common to Princes.

XII.

12. *A Duty in the Management of the Revenue.*

Seeing many of the Duties of the Sovereign, whether it be within or without his Kingdom, demand the Uſe of Money, and a Right to levy it *p*; this Right implies the Duty of a prudent Conduct in laying on Taxes, and in proportioning them to the Wants of the State, and to the Abilities of the People *q*.

p See the twenty fourth and following Articles of the ſecond Section.

q Neither ſhall he greatly multiply to himſelf Silver and Gold. Deut. 17. 17.

Quod communiter omnibus prodeſt hoc rei privatæ noſtræ utilitati preferendum eſſe cenſemus. Noſtrum eſſe proprium ſubjectorum commodum imperialiter exiſtimantes. *l. un.* §. 14. *C. de cad. toll.*

XIII.

13. *A Summary of the Duties of the Sovereign.*

Theſe general Duties we have juſt now explained, comprehend in their extent the whole Detail of the Duties of thoſe who are veſted with the Supreme Authority. For they extend to every thing that relates to the Adminiſtration of Juſtice, the general Policy of the State, the publick Order, the Tranquillity of the Subjects, the Quiet of Families, the Watchfulneſs about every thing that may contribute to the common Good, the Choice of able Miniſters and ſuch as love Juſtice and Truth, the Nomination of good Officers for the Dignities and Offices which the Sovereign himſelf ought to fill with Perſons who are known to him, and the Obſervance of the Regulations for filling up the other Offices by other ways than his own proper Choice, the diſcerning between the Uſe of Severity or Clemency on the Occaſions where Juſtice may admit of a Mitigation of the Rigour of the Law, a prudent Diſpenſation of Bounties, Rewards, Exemptions, Privileges, and other Favours; a diſcreet Management of the Publick Money; Prudence in his Conduct with regard to Strangers; and in a word every thing that may render the Government agreeable to the Good, terrible to the Wicked, and worthy in all reſpects of the divine Function of governing Men, and of the Exerciſe of a Power, which, being derived from none but from God, is a Branch of the Divine Power itſelf *r*.

r This is a Conſequence of the preceding Articles. Salutem reipublicæ tueri nulli magis credit convenire, nec alium ſufficere ei rei quam Cæſarem. *l.* 3. *ff. de offic. præfect. vig.*

See 2 Chron. 34. *and* Pſal. 100.

XIV.

14. *In what Senſe the Sovereign is ſaid to be above the Law.*

We may add for a laſt Duty of the Sovereign, which is a Conſequence of the firſt, and which likewiſe includes all the others, that altho his Power ſeems to ſet him above the Law, there being no body upon Earth that has a right to call him to an account for his Adminiſtration; yet he ought to obſerve the Laws which relate to him; and he is obliged to do it, not only that he may give a good Example to his Subjects, and render their Duty amiable

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to them; but becauſe he is not diſpenſed with as to his own Duty by virtue of this Power of Sovereign *s*, but on the contrary this Rank obliges him to prefer to his own particular Intereſt the common Good of the State, which he ought in honour to look upon as his own proper Good *t*.

s Digna vox eſt majeſtate regnantis legibus alligatum ſe principem profiteri, adeo de auctoritate juris noſtra pendet auctoritas. Et revera majus imperio eſt ſubmittere legibus principatum. Et oraculo præſentis Edicti, quod nobis licere non patimur, aliis indicamus. *l.* 4. *C. de legib. & conſt. pr.*

Licet enim lex imperii ſolemnibus juris Imperatorem ſolverit, nihil tamen tam proprium imperii eſt, quam legibus vivere. *l.* 3. *C. de teſtam.*

t See the Law quoted on the thirteenth Article.

TITLE III.

Of the Prince's Council, and of the Functions and Duties of thoſe who are called to it.

WE intend to treat under this Title of that which relates in general to the Functions and Duties of thoſe who are called to the Council of Princes, in what ſenſe ſoever that Word be taken, whether it be of ſtanding Councils in ſome States, and ſuch as are compoſed of Officers of whom the Laws of the Kingdom oblige the Prince to take Counſel and Advice, or that he himſelf make choice of the Perſons whom he is pleaſed to call to his Council. For we ought to ſuppoſe that Prudence will direct even Princes who have the moſt upright Intentions, and who are of the greateſt Abilities, as it is indeed their Duty, to take Counſel and Advice in Affairs which they have to regulate, whether it be for the Good of the State in general, or to render Juſtice to particular Perſons *a*: and as on one hand they ought to inform themſelves of the Truth of the Facts which they cannot know of themſelves, and which yet it is neceſſary that they ſhould know; ſo on the other hand it is for their Intereſt, and for the Good of the Publick, that they ſhould take the Aſſiſtance of the Experience and Knowledge of Perſons who are capable to give them good Counſel and Advice *b*.

We have thought proper to explain in this Title that which relates in general to the Functions and Duties of the Perſons, who by their Offices, or by the Will of the Prince, are called to give

a Humanum eſſe probamus, ſi quid de cætero in publica privataque cauſa, emerſerit neceſſarium quod formam generalem & antiquis legibus non inſertam expoſcat, id ab omnibus antea tam proceribus noſtri palatii, quam nobis placuerit, tunc legata dictari. Et ſic ea denuo collectis omnibus recenſeri, & cum omnes conſenſerint tunc demum in ſacro noſtri numinis conſiſtorio recitari; ut univerſorum conſenſus noſtræ ſerenitatis auctoritate firmetur. *l.* 8. *C. de leg. & conſt. pr.* Bene enim cognoſcimus, quod cum veſtro conſilio fuerit ordinatum, id ad beatitudinem noſtri imperii, & ad noſtram gloriam redundare. *d. l. in f.*

The Honour of Kings is to ſearch out a Matter. Prov. 25. 2.

He that walketh with wiſe Men ſhall be wiſe. Prov. 13. 20.

b There was never any Prince in the World who ſtood leſs in need of Counſel than did *Moſes*, of whom it may be ſaid that God himſelf was his Counſel, to whom he had liberty of free Acceſs in all his Straits and Difficulties; and yet nevertheleſs he received agreeably, and followed the Advice which *Jethro* his Father-in-Law gave him touching the manner in which he adminiſter'd Juſtice to the People.

And it came to paſs on the morrow, that Moſes *ſat to judge the People; and the People ſtood by* Moſes *from the Morning unto the Evening. And when* Moſes's *Father-in-Law ſaw all that he did to the People, he ſaid, What is this thing that thou doſt to the People; why ſitteſt thou thyſelf alone, and all the People ſtand by thee from Morning unto Even? And* Moſes *ſaid unto his Father-in-Law, becauſe the People come unto me to enquire of God. When they have a Matter, they come unto me, and I judge between one and another; and I do make them know the Statutes of God and his Laws. And* Moſes's *Father-in-Law ſaid unto him, The thing that thou doſt is not good: Thou wilt ſurely wear away, both thou and this People that is with thee; for this thing is too heavy for thee, thou art not able to perform it thyſelf alone. Hearken now unto my Voice, I will give thee Counſel, and God ſhall be with thee: Be thou for the People to God-ward, that thou mayſt bring the Cauſes unto God. And thou ſhalt teach them Ordinances and Laws, and ſhalt ſhew them the Ways wherein they muſt walk, and the Work that they muſt do. Moreover, thou ſhalt provide out of all the People able Men, ſuch as fear God, Men of Truth, hating Covetouſneſs, and place ſuch over them to be Rulers of thouſands, Rulers of hundreds, Rulers of fifties, and Rulers of tens; and let them judge the People at all Seaſons: And it ſhall be that every great Matter they ſhall bring unto thee, but every ſmall Matter they ſhall judge; ſo ſhall it be eaſier for thyſelf, and they ſhall bear the Burden with thee. If thou ſhalt do this thing, and God command thee ſo, then thou ſhalt be able to endure, and all this People ſhall alſo go to their Place in Peace. So* Moſes *hearkened to the Voice of his Father-in-Law, and did all that he had ſaid.* Exod. 18. 13, 14, 15, *&c. See* Prov. 1. 5. *See* Tob. 4. 19.

Nos autem in conſtitutionum compoſitione multa quidem & alia de iſtis decrevimus: exiſtimavimus autem oportere nunc conſiliis perfectioribus cauſam conſiderantes etiam quædam corrigere, non aliorum ſolum modo, ſed etiam quæ a nobis ipſis ſancita ſunt. Non enim erubeſcimus ſi quid melius etiam horum, etiam, quæ ipſi prius diximus adinveniamus, hoc ſancire, & competentem prioribus imponere correctionem, nec ab aliis expectare corrigi legem. *Nov.* 22. *in Præfat.*

them

them Counſel; or who by the ſame Engagement of their Offices, or otherwiſe, are bound in Duty, and have Opportunity to give them ſome Advice, or to inform them of the Truth of Facts which they are ignorant of, and which it is neceſſary they ſhould know in order to give the proper Directions therein as the Occaſion may require. Thus the Rules which ſhall be explained in this Title regard in general all thoſe Functions and all thoſe Duties, whether the Counſel to be given be concerning Affairs which relate to the Perſon of the Prince, or his Houſhold, or to Affairs of State, ſuch as Declarations of War, Treaties of Peace, general Regulations touching the Policy and Government of the State, and other the like Matters; or whether it be concerning particular Affairs, of what nature ſoever they be, which may deſerve that the Prince himſelf ſhould take cognizance of them.

It is in this general and indefinite Senſe that we intend to treat here of the Council of the Prince. So that the ſubject Matter of this Title reſpects in general all the Perſons, Officers, Miniſters, and others who are about Princes, and who are to give them any Counſel or Advice of what nature ſoever it may be. And this ſhall be the Subject Matter of two Sections; one ſhall contain the ſeveral ſorts of Functions of the ſaid Perſons, and the other the Duties which are the Conſequences of them.

SECT. I.

Of the Functions of Officers, Miniſters, or others who are engaged to give Princes Counſel or Advice.

The CONTENTS.

1. *The Functions of the ſaid Perſons are of ſeveral ſorts.*
2. *There are three ſorts of Functions, according to three ſorts of Affairs.*
3. *There are three other ſorts, according to the three ſorts of Perſons who are to exerciſe them.*
4. *Difference between Counſel and Advice.*
5. *Two ſorts of Counſel and Advice; thoſe which concern the Rights of the Prince, and thoſe which relate to his Functions.*
6. *Difference between Functions annexed to Offices, and others.*
7. *All theſe Functions oblige to proportionable Duties.*

I.

THE Functions of thoſe who have the Honour to be about the Prince, whether it be on account of their Offices, or as being Miniſters, or becauſe he honours them with his Confidence, are different and of ſeveral ſorts, according to their Engagements, and according to the Occaſions, as will appear by the Articles which follow *a*.

1. *The Functions of the ſaid Perſons are of ſeveral ſorts.*

a See all the Articles of this Section.

II.

Theſe Functions may be diſtinguiſhed in general by their Nature into three kinds. The firſt is of thoſe which concern the Perſon of the Prince, his Rights, and his Intereſt. The ſecond is of thoſe which regard the Publick. And the third is of thoſe which relate to the particular Affairs it is neceſſary the Prince ſhould be informed of *b*.

2. *There are three ſorts of Functions, according to three ſorts of Affairs.*

b All the Affairs which can come to the knowledge of the Prince belong to one of theſe three kinds.

III.

We may under another View diſtinguiſh theſe Functions with reſpect to the Perſons who are to exerciſe them; which makes three ſorts of them. The firſt is of thoſe which are proper and natural to the Perſons who have Offices about the Prince. Thus in *France* the Officers of the Crown, the Secretaries of State, and others, have ſeveral Functions of the three kinds explained in the ſecond Article. The ſecond is of the Functions of thoſe Officers, who, altho they are not immediately about the Perſon of the Prince, have notwithſtanding Opportunity, and are bound to inform him of Facts relating to their Charges, and which it is highly important the Prince ſhould know. Thus it is the Function of the Governours of Provinces to acquaint the Prince with what paſſes within their Juriſdiction that may be worthy of his knowledge. Thus it is the Function of Judges to have recourſe to the Prince in Matters which may demand his Cognizance, whether it be for the Reformation of ſome Abuſes, or for other Cauſes. The third is of the Functions of ſuch Perſons as, without any particular Engagement by their Offices, are called to

3. *There are three other ſorts, according to the three ſorts of Perſons who are to exerciſe them.*

to be about the Perſon of the Prince, whether it be that they are imployed as Miniſters of State, or that they are the Prince's Favourites in whom he repoſes a great Confidence, are naturally under an Engagement to give him Counſel or Advice according to the Opportunities and Conveniences which the Honour they have to approach the Prince's Perſon may afford them *c*.

c All Perſons who are called to give Princes Counſel or Advice, are under ſome one of theſe three ſorts of Engagements.

IV.

4. Difference between Counſel and Advice.

It is neceſſary to obſerve this Difference between Counſel and that which we call here Advice; that by Counſel we mean the Sentiments of thoſe who give Counſel, and who recommend what they judge proper to be done in the Matter under Deliberation: and that by Advice is meant the Information or Intelligence which is given to the Prince, of things which he is ignorant of, and which he ought to know, or which it would be convenient that he ſhould know in order to give the neceſſary Directions therein. And this implies the Duty of informing him of the Facts and Circumſtances, of which the Truth may be either concealed or diſguiſed from him *d*.

d It is on the one hand impoſſible for Princes to know by themſelves all the Facts which deſerve their Knowledge, and on the other it is neceſſary they ſhould have Information of them, that they may give proper Directions therein, either by themſelves or by the Vigilancy of their Miniſters. I am not able to bear you my ſelf alone: the Lord your God hath multiplied you——How can I my ſelf alone bear your Cumberance, and your Burden, and your Striſe? Take ye wiſe Men, and underſtanding, and known among your Tribes, and I will make them Rulers over you. *Deut.* 1. 9, 12, 13.

And hardly do we gueſs aright at things that are upon Earth, and with Labour do we find the things that are before us. *Wiſdom of Solomon*, 9. 16.

V.

5. Two ſorts of Counſels and Advices; thoſe that concern the Rights of the Prince, and thoſe which relate to his Functions.

Since it is for the Service of the Prince that it may be neceſſary that Counſel or Advice ſhould be given him, we may under this View diſtinguiſh them into two ſorts, which will comprehend them all. The firſt is of thoſe which concern the Intereſt and the Rights of the Prince, and the ſecond of thoſe which have relation to the Duties which he owes to the State in general, and to his Subjects in particular *e*.

e Whatever may be worthy of the Prince's Knowledge, relates either to his own Rights and Intereſt, or the Affairs of the Publick, or the Concerns of particular Perſons who apply to him for Remedy therein.

VI.

6. Difference between Functions annexed to Offices and others.

Among theſe different Functions of the Perſons who approach the Prince, whether they be Officers or others, ſome are eſſential to the Offices which the ſaid Perſons enjoy, or to the Engagements which they are under by the Prince's Order, and nothing diſpenſes with their Performance thereof on the Occaſions where the ſame may be neceſſary; and other Functions are neceſſary only in ſo far as Prudence may render them uſeful. Thus Officers, and others to whom the Prince commits any Part of the Adminiſtration, or whom he engages in any other ſort of Service, have their Functions regulated by their Imployments, which oblige them to give the Counſel and Advice that properly belongs to their Miniſtry. Thus thoſe very Perſons, and others who have a free Acceſs to the Prince, may have Occaſions of giving Counſel or Advices, which, altho the ſame be not eſſential to their Imployments, may nevertheleſs be of ſo great importance as to require that they ſhould make uſe of the Confidence which the Prince has placed in them to communicate them unto him; but without intruding themſelves too officiouſly upon the Prince; and taking the Precautions which Prudence may ſuggeſt to them, as proper for procuring a good Succeſs in their Application *f*.

f There is this Difference between theſe two ſorts of Functions, that thoſe which are annexed to Offices oblige indiſpenſably, and that the other Functions do not oblige ſo abſolutely, but are to be exerciſed with Prudence and Diſcretion. And Prudence is likewiſe required in the diſcharge of the Functions which are indiſpenſably annexed to Offices, ſo as that they be exerciſed in ſuch a manner as to render them uſeful by taking the Precautions which the Nature of the Affairs and the Circumſtances may require.

VII.

7. All theſe Functions oblige to proportionable Duties.

All theſe ſeveral Functions oblige the Perſons whom they concern to Duties proportioned to their Offices, or other Engagements, as ſhall be explained in the following Section *g*.

g See the following Section.

SECT. II.

Of the Duties of Officers, Miniſters, or others who are engaged to give Counſel or Advice to Princes.

The CONTENTS.

1. *The firſt Rule, to give ſuch Advice and Counſel as is conformable to the Principles of the Duties of Princes.*
2. *To regulate them according to Juſtice and Truth.*
3. *Without Paſſion and without Self-Intereſt.*
4. *Three ſorts of Duties, according to three ſorts of Advices and Counſels.*
5. *Advices and Counſels relating to the Prince.*
6. *Advices and Counſels which reſpect the Good of the State.*
7. *Advices and Counſels which regard particular Perſons.*
8. *Fidelity in informing the Prince of the Truth.*
9. *Integrity in giving Counſel and judging in the Caſes where they are called to it.*
10. *Three different ſorts of Duties of three different ſorts of Perſons who may be about the Prince.*
11. *The Duty of repreſenting the Inconveniences that might attend the Execution of an Order which might have bad Conſequences.*
12. *The Protection of the Weak.*
13. *Fidelity in performing all the Duties in Matters of the ſmalleſt Concern.*
14. *To avoid falſe Wiſdom and falſe Policy.*
15. *Not to turn their Greatneſs into Pride.*

I.

1. The firſt Rule, to give ſuch Advice and Counſel as is conformable to the Principles of the Duties of Princes.

SEEING the Counſels and Advices which Perſons who are about Princes, whether it be on acconnt of their Offices or otherwiſe, may give them, relate to the Conduct which Princes ought to obſerve in the Conjunctures where the ſaid Counſels and Advices may be of uſe: The firſt Rule of the Duty of thoſe Perſons is the ſame with the firſt Rule of the Conduct of Princes, and of their Duties. Thus, as the Duties of a Prince conſiſt in holding the Place of God here upon Earth, and in exerciſing according to his Spirit the Power which he holds of him, as has been explained in its Place; ſo the Duties of thoſe who are about his Perſon conſiſt in inſpiring into the Prince, whether it be by their Counſels or Advices, only ſuch Sentiments as have the Character of the ſame Divine Spirit *a*.

a See the firſt Article of the third Section of the ſecond Title.

II.

2. To regulate them according to Juſtice and Truth.

It follows from this firſt Rule, and from this firſt Duty, that in the Advices and Counſels which are given to Princes, all Wiſdom, all Prudence, all Policy whatſoever, which hath not for its Principle and Foundation Juſtice and Truth, which the Prince ought to ſupport and maintain, and which it is his Buſineſs, his Honour, and his Glory ſo to do, are a Breach of this Duty. Thus all Advices, and all Counſels oppoſite to Truth and Juſtice, whether they be calculated for advancing the Fortune of thoſe who give them, or for favouring ſome Paſſion or ſome Intereſt either of the Adviſers themſelves, or of their Relations or Friends, ruin the Foundations and tranſgreſs the eſſential Rules of the Conduct of Princes, the Maxims of which God will have them to take from the Spirit of his Law, as being the Source of the Wiſdom, the Forces, and Counſels of which they ſtand in need *b*. And thoſe who give Counſel upon any other Principle, or with any other view, cannot but draw upon themſelves the bad Conſequences thereof, and the Vengeance which God prepares for ſuch a Prevarication *c*.

b With him is Wiſdom and Strength, he hath Counſel and Underſtanding. Job 12. 13.

Counſel is mine, and ſound Wiſdom; I am Underſtanding, I have Strength. Prov. 8 14.

There is no Wiſdom, nor Underſtanding, nor Counſel againſt the Lord. Prov. 21. 30.

See the ſecond Article of the third Section of the ſecond Title.

c He leadeth Counſellors away ſpoiled, and maketh the Judges Fools. Job 12. 17.

III.

3. Without Paſſion and without Self-Intereſt.

The firſt Duty which is ſo eſſential and ſo indiſpenſably neceſſary, comprehends all the others, of which the moſt general and that of the greateſt Importance is, for thoſe who give Counſel and Advice to Princes to examine narrowly whether their Paſſions and their Intereſts, or thoſe of the Perſons whom they are deſirous to ſerve, have not too great a ſhare in the Counſels and Advices which they give; that they may take care not to give any Counſel or Advice where their Love for themſelves, or their Friends, does not give way to the Love of Truth and Juſtice, and where

where they do not prefer to the greateſt Fortune, the greateſt Intereſt, and the greateſt Grandure, the Glory and the Duration of the Prince's Reign, which are the natural Conſequences of a Conduct that is founded upon Juſtice and Truth *d*.

d For by Speech Wiſdom ſhall be known, and Learning by the Word of the Tongue. In no wiſe ſpeak againſt the Truth, but be aſhamed of the Error of thine Ignorance. Eccluſ. 4. 24, 25.

If thou followeſt Righteouſneſs, thou ſhalt obtain her, and put her on as a glorious long Robe. Eccluſ. 27. 8.

IV.

4. Three ſorts of Duties, according to three ſorts of Advices and Counſels.

Theſe general Duties contain three kinds of particular Duties, which are to be diſtinguiſhed according to the three kinds of Functions explained in the ſecond Article of the preceding Section. The firſt is of the Duties which relate to the Prince's Perſon, his Rights, and Intereſt. The ſecond is of thoſe which concern the Publick; and the third of thoſe which regard the Affairs of particular Perſons *e*.

e All ſorts of Advices and Counſels that can be given to Princes, may be reduced to theſe three kinds.

V.

5. Advices and Counſels relating to the Prince.

As for the Counſels and Advices in Matters which may relate to the Prince himſelf, the Duties of the Perſons who give them, conſiſt in a ſincere Fidelity, which has nothing in view beſides his true Good, which is inſeparable from Truth and Juſtice, and in a diſcreet uſe of the neceſſity of making it known to him without Diſſimulation and without Flattery; but ſtill with ſuch Prudence and Energy, as to diſcharge the double Duty which they owe him, both that of Reſpect for his Perſon, as alſo that of Zeal for his Service. Thus, for example, if there is any Diſpute concerning an Eſtate, or a controverted Right, between the Prince and any one of his Subjects; ſeeing the Prince is himſelf the natural Judge of it, there being none ſuperior to him that can judge it, and he being the Sovereign Diſpenſer of Juſtice in his own Dominions; it is the Duty of thoſe who give him Counſel to diſtinguiſh two different Intereſts of the Prince: one which has no relation either to his Perſon or his Duties, but only to the Rights in queſtion; and the other, which is his true and eſſential Intereſt, to do Juſtice even in his own proper Cauſe. So that thoſe who are his Counſellors ought to regulate their Sentiments according to what this ſecond and principal Intereſt of the Prince does demand, and to propoſe and back it with that Prudence and Freedom which a Duty of this nature requires *f*.

f Seeing the Prince himſelf is bound to regulate his own Conduct by a Prudence and Diſcretion that are worthy of the Divine Wiſdom, by which he ought to govern; ſo thoſe who are his Counſellors ought to regulate their Conduct by the ſame Spirit in proportion to their Miniſtry. Counſel is mine, and ſound Wiſdom; I am Underſtanding, I have Strength. By me Kings reign, and Princes decree Juſtice. *Prov.* 18. 14, 15.

There came a Man of God to him, ſaying, O King, let not the Army of *Iſrael* go with thee. ——But if thou wilt go, do it, be ſtrong for the Battle: God ſhall make thee fall before the Enemy; for God hath Power to help and to caſt down. 2 *Chron.* 25. 7, 8.

VI.

6. Advices and Counſels which reſpect the Good of the State.

As to the Counſels and Advices which reſpect the Good of the State, as there are Deliberations of divers ſorts, ſo they ought to be proportioned to the ſaid Deliberations. Thus the Duties of ſuch Counſels are different: For if, for example, the Matter be only to give bare Counſel in the Affairs of the Publick, whether they relate to the War, or to the Civil Government, or whether they be other Affairs in which the particular Intereſt of the Perſons who are to give the ſaid Counſel is no ways concerned, they diſcharge their Duties, if being capable of giving good Counſel, they join to the Capacity that is neceſſary a great Application to ſtudy and find out the Good of the Publick, and to make choice of an Expedient that may be uſeful to it. And it rarely happens that in theſe ſorts of Counſels they have occaſion for that Diſintereſtedneſs which would be otherwiſe neceſſary, if the Affairs about which they are conſulted had any Mixture of Intereſt and Paſſion that might counterballance the Publick Good. But in the Conjunctures where this Mixture may chance to be, they ought to join to their Capacity a ſincere and diſintereſted Fidelity, that they may not fall into the enormous Crime of directing their Counſels to the Views of their own Intereſt, and of preferring that to the Good of the Publick *g*.

g This is a conſequence of the three firſt Articles.

VII.

7. Advices and Counſels which regard particular Perſons.

In the Caſes where the Advices or Counſels regard the Affairs of particular Perſons, it is neceſſary to diſtinguiſh two different ſorts of Duties. One reſpects

ſpects that which they who have the Honour to be about the King's Perſon owe to Truth; and the other has relation to what they owe to Juſtice and to Equity, as ſhall be explained in the two Articles which follow *h*.

h See the following Articles.

VIII.

8. *Fidelity in informing the Prince of the Truth.*

Seeing it is not poſſible for Princes, even thoſe of the greateſt Penetration, and who apply themſelves the moſt diligently to their Duties, to have always themſelves a particular Knowledge of the Facts relating to the Affairs which they are to regulate or judge, and which are not handled after the manner of Judicial Proceedings, as Law-Suits are which contain the Proofs of the Facts alledged, but are Affairs of another nature; ſuch as Complaints of Perſons under Oppreſſion, and other Affairs of the like nature; they are obliged to truſt to thoſe who are about them for getting Information of the Truth thereof. Thus it is the Duty of thoſe Perſons to inform themſelves very exactly of the Truth, that they may afterwards lay the ſame before the Prince, without any diſguiſe, and without having any regard either to the Quality of thoſe who complain, or of thoſe who are the Oppreſſors. For as it is the Duty of the Prince to protect thoſe who ſuffer any Violence, and to exerciſe all the other ſorts of Functions of the Sovereign Power which he has in his hands; ſo it is likewiſe the Duty of thoſe who by virtue of the Rank they hold about the Prince are obliged to ſerve him on the ſaid Occaſions, to be faithful on their part in not concealing the Truth in the caſe of any Injuſtice *i*; and to inform him of the Facts which it is neceſſary know, that he may be able to adminiſter Juſtice, and to protect Innocence and Truth.

i Who hold the Truth in Unrighteouſneſs. Rom. 1. 18.

Altho this Paſſage relates to a Prevarication againſt a Duty of another nature than that which is mentioned in this Article, yet it may be very naturally applied to it.

IX.

9. *Integrity in giving Counſel, and in judging in the Caſes where they are called to it.*

When the Truth being ſufficiently known to the Prince, the Duty of informing him of it is fulfilled, it is a ſecond Duty in the Caſes where it is neceſſary to give Counſel concerning Facts that are known, and in all other Caſes where Counſel is to be given to the Prince, to give Counſels that are wholly diſintereſted, and which have for their Principle and Foundation a Zeal for Juſtice. And in the Caſes where thoſe Perſons are to adminiſter Juſtice themſelves to particular Perſons, whether it be by virtue of their Offices, or by order of the Prince; they enter into the Engagements of the Duties of Judges, which are explained in their proper Place *l*.

l See the fourth Title of the ſecond Book.

X.

10. *Three different ſorts of Duties of three different ſorts of Perſons who may be about the Prince.*

As there are three ſorts of Perſons who may be under an Engagement to give ſome Advices or ſome Counſels to the Prince, as hath been explained in the third Article of the firſt Section; ſo the Duties of the ſaid Perſons are different, according to the Difference of their Engagements. The Officers or Miniſters who are of the Prince's Council have their Duties regulated by the Neceſſity of their Functions, which make the liberty of exerciſing them natural to them; and are obliged to give the Prince unbiaſs'd Counſels in every thing that may belong to their Miniſtry, whether it reſpect the Order of Government, or the Adminiſtration of Juſtice, or the Management of the Revenue, or the Eaſe of the People, or other Affairs which regard the Intereſts and Rights of the Prince, and the publick Good, or which concern the Intereſts of particular Perſons. The Officers who, without being of the Prince's Council, are obliged by virtue of their Offices to inform him of the Matters of Fact which it is neceſſary he ſhould know, are bound to acquaint him therewith. And if the Matter be in relation to the Reformation of ſome Abuſes, they ought to inform him of the Conſequence of them, and propoſe to him proper Remedies for redreſſing them. The Perſons who have no other Engagement about the Prince beſides the Honour which he does them by employing them about his Perſon, have their Duty regulated by the Confidence which he repoſes in them, and by the free Acceſs he gives them. Which implies the Obligation of acquainting him ſometimes, as Prudence directs, with the Facts it may be of importance for him to know, ſuch as ſome Oppreſſion which it might be in his power alone to revenge, or other Facts of the like nature *m*.

m See the third and ſixth Articles of the firſt Section.

XI.

XI.

11. *The Duty of repreſenting the Inconveniences that might attend the Execution of an Order which might have bad Conſequences.*

We may reckon among the Duties of giving Counſel or Advice to the Prince, the Conduct which thoſe Perſons ought to obſerve, who being charged with the Execution of ſome Order which had been ſurreptitiouſly obtained from the Prince, foreſee that it might turn to ſome Injuſtice, or prejudice the Intereſt of the Prince. For both Prudence and their Duty would oblige them to take the neceſſary Meaſures for repreſenting in an humble ſubmiſſive manner to the Prince the Conſequences that might be apprehended to enſue thereupon *n*.

n It was becauſe of this Duty that Joab *made his Remonſtrances to* David *upon the Order which he had given for numbering his People.* And again the Anger of the Lord was kindled againſt *Iſrael*, and he moved *David* againſt them, to ſay, Go number *Iſrael* and *Judah*. For the King ſaid to *Joab* the Captain of the Hoſt, which was with him, Go now thro all the Tribes of *Iſrael*, from *Dan* even to *Beerſheba*, and number ye the People, that I may know the Number of the People. And *Joab* ſaid unto the King, Now the Lord thy God add unto the People, how many ſoever they be, an hundredfold, and that the Eyes of my Lord the King may ſee it: But why doth my Lord the King delight in this thing? 2 *Sam.* 24. 1, 2, 3.

And Satan ſtood up againſt *Iſrael*, and provoked *David* to number *Iſrael*. 1 *Chron.* 21. 1.

XII.

12. *The Protection of the Weak.*

The Importance and Conſequence of all theſe Duties which have been now explained is not confined to Affairs of great moment, but they extend even to the ſmalleſt Matters where it may be neceſſary to have recourſe to the Prince. Thus the Intereſts of the meaneſt Perſons who ſuffer any Oppreſſion, and whoſe Deliverance depends upon the Prince, make it a Duty in thoſe whoſe proper buſineſs it is to lay the ſame before the Prince, to hear the Complaints that are brought before them, that they may inform the Prince thereof, and to protect the Weak againſt the Violence of thoſe who are in power. For it is in order to ſupport the Weak againſt Oppreſſion and Injuſtice, that God hath eſtabliſhed the uſe of Authority *o*.

o Deliver him that is ſpoiled out of the hand of the Oppreſſor. Jer. 21. 12.

Execute ye Judgment and Righteouſneſs, and deliver the Spoiled out of the hand of the Oppreſſor; and do no wrong, do no violence to the Stranger, the Fatherleſs, nor the Widow, neither ſhed innocent Blood in this caſe. Jer. 22. 3.

The Lord raiſed up Judges, which delivered them out of the hand of thoſe that ſpoiled them. Judges 2. 16.

Deliver him who ſuffereth Wrong from the hand of the Oppreſſor. Eccluſ. 4. 9. Pſal. 52. 5.

XIII.

13. *Fidelity in performing all the Duties in Matters of the ſmalleſt Concern.*

It is not enough that the Perſons who are obliged to all theſe ſeveral Duties perform ſome of them on ſome particular occaſions, of which they reſerve to themſelves the diſtinction, neglecting the others which they believe they may omit without any prejudice to their Honour or Fortune; but they ought to perform all the Duties in general as much as in them lies. For the Principle which ought to be the Rule of their Conduct does not reject any one of them; ſeeing the ſaid Principle ought to be a fixed Habit of a generous Love of Truth and Juſtice, which never fail to have an Intereſt in all Affairs which may deſerve the Prince's Cognizance. Thus every one of the ſaid Conjunctures makes it a Duty incumbent on them to exerciſe their Miniſtry and their Power for the ſupport of Juſtice and Truth *p*.

p He who is faithful in that which is leaſt, is faithful alſo in much. Luke 16. 10.

XIV.

14. *To avoid falſe Wiſdom and falſe Policy.*

As the Principle of the Duties of the Prince, and the true Grandure of his Glory conſiſts in filling in a manner worthy of God the Place which he holds of him; ſo it is alſo the Principle of the Duties, and of the true Honour of thoſe whoſe buſineſs it is to give the Prince Counſel and Advice, to inſpire into him only ſuch Sentiments as are ſuitable to this Grandure. Thus nothing is more oppoſite to their Duties than that Littleneſs of Soul and Spirit which bounds their Views to thoſe of their own Preferment and Fortune, and to other Meanneſſes of human Motives which engage them in baſe and unworthy Flatteries, and to give Counſel that is founded only upon a falſe Wiſdom, and upon a Policy that is criminal. But this Conduct, what Succeſs ſoever it may have, cannot eſcape the knowledge of God, nor ſkreen it ſelf from his Juſtice *q*.

q There is no Wiſdom, nor Underſtanding, nor Counſel againſt the Lord. Prov. 21. 30.

I will deſtroy the Wiſdom of the Wiſe, and will bring to nothing the Underſtanding of the Prudent. 1 Cor. 1. 19.

The Wiſdom of their wiſe Men ſhall periſh, and the Underſtanding of their prudent Men ſhall be hid. Iſaiah 29. 14.

See the Text quoted on the eleventh Article of this Section.

XV.

XV.

15. *Not to turn their Greatneſs into Pride.*

We may add as a laſt Duty of thoſe who have the Honour to be about the Prince, and to have a ſhare in his Confidence, that the Uſe which they ought to make of it, according to the Rules that have been now explained, obliges them not only not to uſe that Advantage againſt Juſtice and Truth, but on the contrary, to defend and ſupport them with all their Force; and further, not to make uſe of the Honour which they have of approaching the Prince's Perſon, as an occaſion of ſhewing to the World their Pride and their Vanity. For this would be to debaſe the Dignity of their Miniſtry, and to raiſe among the Subjects a Spirit of Indignation and Averſion againſt this Uſe of an Authority, which ought naturally to procure unto them the Reſpect and Love of the People, and which they would certainly gain by a moderate Uſe of the Prince's Favour, which raiſes them above the reſt of the Subjects *r*.

r Many the more often they are honoured with the great Bounty of their gracious Princes, the more proud they are waxen. Eſther 16. 2.

If thou be made the Maſter of a Feaſt, lift not thy ſelf up, but be among them as one of the reſt; take diligent care for them, and ſo ſit down. And when thou haſt done all thy Office, take thy Place, that thou mayeſt be merry with them, and receive a Crown for thy well ordering of the Feaſt. Eccluſ. 32. 1, 2.

Then the Men of Iſrael *ſaid unto* Gideon, *Rule thou over us, both thou and thy Son, and thy Son's Son alſo; for thou haſt delivered us from the hand of* Midian. *And* Gideon *ſaid unto them, I will not rule over you, neither ſhall my Son rule over you; the Lord ſhall rule over you.* Judges 8. 22, 23.

Altho this Text relates to the Prince, yet it may be applied to his Miniſters. a

TIT. IV.

Of the Uſe of the Forces neceſſary for the Defence of a State; and of the Duties of thoſe who ſerve in the Army.

What Rules are to be explained under this Title.

THE Reader may eaſily judge from the Deſign of this Book, which has been explained in the Preface, that he is not to expect to ſee under this Title the Detail of the ſeveral Matters which might be comprehended in a particular Treatiſe of the Forces neceſſary in a Kingdom; for this Deſign might extend to the Rules of Fortification, and of attacking and defending ſtrong Towns, to the Rules for the Exerciſe of Soldiers, to thoſe of the Marches of the Troops, of their Encampments, of their making Retreats, of an Order of Battle, of the Artillery, of Ships of War, and to other the like Matters. But this Detail, altho it be of a very important Conſequence, yet ſeeing it hath its particular Rules which Experience and Uſe diverſify according to Times and Places, ought not to be mixed with the Rules which are to compoſe the Science of the Law, and that of the Publick Law, which is a part of the Law in general, and which hath its Principles in the Divine Law, and in the immutable Rules of natural Equity. So that we ſhall comprehend under this Title only the Rules which have this Character, and ſome of which have been taken from the Body of the *Roman* Law. And theſe are reduced to the Rules of Juſtice, which may direct the right Uſe of the Forces of a State, whether it be for maintaining within the Kingdom Order, Peace, and Tranquillity, by ſupporting Juſtice, or for defending it againſt the Attempts of Enemies from without. And theſe ſorts of Rules ſhall be the Subject-matter of two Sections. The firſt ſhall be of the Uſe of Forces within the Kingdom; and the ſecond of the Uſe of Forces without the Kingdom, and of the Military Government, which regulates the Duties of the Officers of War and of the Soldiers.

SECT. I.

Of the Uſe of Forces within a Kingdom.

The CONTENTS.

1. *The Uſe of Forces for the Support of Juſtice.*
2. *The Force of Juſtice ought to reign in all Caſes.*
3. *The Power reſides in the Perſon of the Sovereign.*
4. *It is communicated from him to the Officers.*
5. *The Uſe of the Power of the Sovereign for the Benefit of every particular Perſon.*

6. *Uſe*

6. *Uſe of the Power for puniſhing Crimes.*
7. *The Forces ought to be proportioned to the Uſe of the Government.*
8. *The Duty of thoſe who ſhare in the Authority.*

I.

1. *The Uſe of Forces for the Support of Juſtice.*

SEEING Forces are neceſſary for the Support of Juſtice againſt thoſe who do not voluntarily ſubmit themſelves to it, they are of uſe in all Caſes where the Adminiſtration of Juſtice is neceſſary, and where it may meet with any Obſtacle *a*.

a For Power is given you of the Lord, and Sovereignty from the Higheſt. Wiſd. of Sol. 6. 3.

II.

2. *The Force of Juſtice ought to to reign in all Caſes.*

This Uſe of Forces within a Kingdom for ſupporting Juſtice therein, extends in general to every thing which hath relation to the publick Order and the common Good, as alſo to the Adminiſtration of Juſtice between the Subjects. Thus, the ſaid Forces are communicated from the Sovereign to the whole Body of which he is the Head, and he diſpenſes them to all the Uſes of the Body and of the Members. So that as it is the Force of Juſtice which ought to animate this Body and theſe Members, and which is as it were the Life of the Body; ſo it ought to be felt in all the Members thereof, in the ſame manner as the Life of the Soul makes it ſelf to be felt in what it animates *b*.

b This is a Conſequence of the preceding Article.

III.

3. *The Power reſides in the Perſon of the Sovereign.*

The firſt place in which the Force of the Authority of the Sovereign within his Dominions reſides, and from whence it ought to diffuſe it ſelf throughout the whole Body, is his own Perſon, which ought to be environed with all the Marks and all the Pomp of Authority, in ſuch a manner, that as it is in him that the Miniſtry of the whole Diſpenſation of Juſtice hath its Origin, ſo the Force of Juſtice may derive its Origin from him likewiſe, that ſo the good Uſe which the Wiſdom of the Prince ought to make of this Power, may be the Foundation of the publick Quiet *c*.

c See the Paſſage cited on the firſt Article.
A wiſe King is the upholding of the People. Wiſd. of Sol. 6. 25.

IV.

4. *It is communi-*

It is in order to attain this Uſe of the Power of the Sovereign that he exerciſes the principal Functions thereof himſelf, and commits the others which he cannot or ought not to exerciſe in Perſon to thoſe whom he raiſes to this Miniſtry, whether it be in the quality of Officers of the Crown, Governors of Provinces, or Magiſtrates, and all others to whom he communicates a Share of the Authority, whether it be for the Adminiſtration of Juſtice, for the Civil Government, or for the whole Detail of the Functions which the publick Good doth demand. Thus, this Power ought to be conſidered in the hands of the ſaid Officers and other Miniſters, as being the Power of the Prince, which he holds of God *d*.

cated from him to the Officers.

d Submit your ſelves to every Ordinance of Man for the Lord's ſake, whether it be the King as Supreme, or unto Governors, as unto them that are ſent by him. 1 Pet. 2. 13.

V.

5. *The Uſe of the Power of the Sovereign for the Benefit of every particular Perſon.*

This Power of the Sovereign, and the Functions thereof, which he commits to his Miniſters, ought to have this effect, to make Peace to reign among his Subjects by means of the Reign of Juſtice, which may contain them all in that Order which produces the ſaid Peace, by making every one of them to dread the Power of Juſtice if they rebel againſt it, and aſſuring them of its Protection if they are faithful and obedient. For which reaſon it is that every particular Perſon who contains himſelf within the bounds of his Duty, ought to have the ſame uſe of this Power as if he himſelf had the Diſpenſation of it, provided that he has Juſtice on his ſide. And it is in this uſe of the Power, ſo as to make every particular Perſon ſenſible of their having the Protection thereof, that the publick Tranquillity doth conſiſt *e*.

e For every Man ſat under his Vine, and his Fig-Tree, and there was none to fray them. 1 Maccab. 14. 12.
He ſtrengthned all thoſe of his People that were brought low. 1 Maccab. 14. 12.

XI.

2. *Uſe of the Power for puniſhing Crimes.*

Seeing the Uſe of the Forces neceſſary in a Kingdom for the Support of Juſtice, cannot have always, and in all Caſes, its effect ſo as to ſtop the Torrent of Iniquity which carries along with it ſo many Injuſtices, which no Vigilancy of the Sovereign, nor of his Miniſters, is able to prevent, and that often thoſe very Perſons to whom he intruſts the ſaid Power, make uſe of it againſt

againſt Juſtice itſelf; it is therefore a Conſequence of the Miniſtry of the ſaid Power, that when the Peace and Order which Juſtice ought to ſupport is diſturbed, Juſtice may make the Weight of its Forces to be felt by thoſe who were not reſtrained by Fear. Thus the Diſorder which hath troubled the Peace is redreſſed by Puniſhment and Correction, whether it be by inflicting them on the particular Perſons who have been diſobedient to the Authority of Juſtice in order to reduce them to a Subjection to it, or by taking Vengeance of thoſe Miniſters, by means of the natural Uſe of Authority, for the criminal Abuſe which they have made thereof *f*.

f But if thou do that which is evil, be afraid; for he beareth not the Sword in vain: for he is the Miniſter of God, a Revenger to execute Wrath upon him that doth Evil. Rom. 13. 4.
For the Puniſhment of evil Doers. 1 Pet. 2. 14.

VII.

7. The Forces ought to be proportioned to the Uſe of the Government.

It follows from all theſe Truths, that the Uſe of Forces, as to what concerns the internal State of a Kingdom, demands that they ſhould be ſuch as to ſuffice for giving Authority to the Government, imprinting on the Minds of all the Subjects Reſpect and Obedience to the Sovereign, and to thoſe who exerciſe his Authority, for giving to the Good an Aſſurance of the Protection of Juſtice, and for terrifying the Wicked with the Fear of Puniſhment *g*.

g For Rulers are not a Terror to good Works, but to the Evil; wilt thou then not be afraid of the Power? Do that which is good, and thou ſhalt have Praiſe of the ſame: For he is the Miniſter of God to thee for Good. Rom. 13. 3, 4.

VIII.

8. The Duty of thoſe who ſhare in the Authority.

All theſe ſeveral Uſes of Authority in a Kingdom demand the Application of the Sovereign, and Fidelity in his Miniſters in all the Functions committed to them, for diſpenſing the ſame according as there is occaſion. And this Fidelity is one of the Duties of thoſe Miniſters, which ſhall be explained in its proper place *h*.

h See the fourth Title of the ſecond Book.

SECT. II.

Of the Uſe of Forces without the Kingdom, of Military Diſcipline, and of the Duties of thoſe who ſerve in the Army.

The CONTENTS.

1. *The Uſe of Forces without the Kingdom.*
2. *In what theſe Forces do conſiſt.*
3. *Different Uſes of the Forces according to the different Occaſions.*
4. *Neceſſity of Military Diſcipline.*
5. *The firſt Rule of Military Diſcipline, Obedience to the Head.*
6. *Diſobedience is puniſhed, altho it have a good Succeſs.*
7. *Three parts of the Conduct of the General.*
8. *The firſt Part of this Conduct, Vigilance in carrying on his own Undertakings, and in preventing thoſe of the Enemy.*
9. *The ſecond Part of the General's Conduct, is to be careful to have his Troops in good Order.*
10. *Third Part of the General's Conduct, Vigilance in providing all the Neceſſaries for the War.*
11. *The Duties of ſubaltern Officers.*
12. *The Duty of Soldiers.*
13. *Crimes and Offences of the Soldiers.*
14. *Time of Service.*
15. *Three ſorts of Diſcharges.*
16. *Other arbitrary Regulations for the Military Diſcipline.*
17. *Officers and Soldiers ought to abſtain from all manner of Violence and Extortion.*

I.

1. The Uſe of Forces without the Kingdom.

THE Uſe of Forces as to what concerns the external State of a Kingdom, conſiſts in defending it againſt the Attempts of Strangers, by preventing them before they are fully ripe, and by reſiſting thoſe which could not be foreſeen before they were put in execution *a*.

a See the ſecond Article of the ſecond Section of the ſecond Title.

II.

2. In what theſe Forces do conſiſt.

This Occaſion for Forces to prevent the Enterprizes of Strangers, or to put a ſtop to them, obliges thoſe who have the ſupreme Government in their hands to

provide for the Safety of the Kingdom, not only by having ſtrong Places on the Frontiers well gariſoned, but alſo by a Facility of aſſembling Troops readily on any emergent Occaſion, or even by having them always in a readineſs, if there be reaſon for uſing ſuch Precaution: Which ought to depend on the Prudence of the ſupreme Governours, who ſhould take ſuch wiſe and prudent Meaſures as not to alarm their Neighbours, and oblige them to take up Arms, which might draw on Wars; and who likewiſe ought not to neglect to prevent the Enterprizes which ſeem to threaten the Kingdom, and might ſurprize it, if not timely prevented *b*.

b And he (Jehoſaphat) *placed Forces in all the fenced Cities of* Judah, *and ſet Gariſons in the Land of* Judah, *and in the Cities of* Ephraim. 2 Chron. 17. 2.

And Jehoſaphat *waxed great exceedingly, and he built in* Judah *Caſtles and Cities in ſtore. And he had much Buſineſs in the Cities of* Judah; *and the Men of War, mighty Men of Valour, were in* Jeruſalem. *And theſe are the numbers of them according to the Houſe of their Fathers; of* Judah, *the Captains of thouſands,* Adnah *the chief, and with him mighty Men of Valour, three hundred thouſand,* &c. 2 Chron. 17. 12, 13, 14.

And there was ſore War againſt the Philiſtines *all the Days of* Saul; *and when* Saul *ſaw any ſtrong Man, or any valiant Man, he took him unto him.* 1 Sam. 14. 52.

III.

3. *Different Uſes of the Forces according to the different Occaſions.*

It is alſo on the ſame Prudence of the ſupreme Governours that the uſe of the Forces in open War ought to depend. For according to the Cauſes of the Wars, the Acts of Hoſtility committed by the Enemies, the Violences, the Inhumanities which they are guilty of, and the other Manners in which they on their part uſe their Forces, a Nation may uſe different ways of defending themſelves, or attacking their Enemies with more or leſs Moderation. Thus when a Town is beſieged, the Beſiegers do not begin with violent Attacks and an Aſſault upon the Place; but they firſt ſummon the Governour of the Town to ſurrender it, and if he refuſes, then they go on with their Attacks; and if they come to capitulate, the Conditions are made eaſier or harder, according as the Condition in which the beſieged are, and their Conduct may oblige the Beſiegers to treat them *c*.

c When thou comeſt nigh unto a City to fight againſt it, then proclaim Peace unto it. And it ſhall be, if it make thee Anſwer of Peace, and open unto thee, then it ſhall be that all the People that is found therein, ſhall be Tributaries unto thee, and they ſhall ſerve thee. And if it will make no Peace with thee, but will make War againſt thee, then thou ſhalt beſiege it. And when the Lord thy God hath delivered it into thy hands, thou ſhalt ſmite every Male thereof with the Edge of the Sword. Deut. 20. 10, 11, 12, 13.

IV.

4. *Neceſſity of Military Diſcipline.*

Since the Uſe of Forces is not only neceſſary in time of War, but may be ſo alſo in time of Peace, whether it be for Gariſons, or for other Troops that may be neceſſary for other Services, Military Diſcipline is alſo neceſſary in both thoſe times. And this Diſcipline conſiſts firſt of all in ſome general Rules that are common at all Times and Seaſons, and relate to the Duties of Soldiers and Officers; and ſecondly in particular Regulations which are diverſified according to the Times, the Places, and the Occaſions. We ſhall explain theſe general and common Rules in the Articles which follow; and as to the particular Regulations, it would neither be poſſible nor of any ſervice to make a Collection of them in this Place, ſeeing thoſe which have been made hitherto relating to this Matter, are to be found in the Ordinances, in the Edicts, and in the ſeveral Regulations which have been touching this Matter *d*.

d See the following Articles.

[By the Law of *England* the Exerciſe of Martial Law, or Military Diſcipline, is not permitted within his Majeſty's Dominions in time of Peace, when the King's Courts are open for all Perſons to receive Juſtice, according to the Laws of the Land. But it having been judged neceſſary of late Years, that a certain number of Troops ſhould be kept on foot even in time of Peace, for the Guard of his Majeſty's Royal Perſon, and for the Safety of the Kingdom, the Exerciſe of Military Diſcipline, for the better Government of the ſaid Troops, has been from time to time permitted by expreſs Acts of Parliament, under certain Reſtrictions and Limitations, particularly ſpecified in the ſaid Acts. See *Stat.* 3. *Car.* I. *cap.* 1. and 12 *Annæ, An Act for the better regulating the Forces to be continued in her Majeſty's Serivce*; as alſo the ſubſequent Acts of Parliament for the Puniſhment of Mutiny and Deſertion. See the Lord Chief Juſtice *Hale*'s Hiſtory of the Common Law of *England*, *chap.* 2. *pag.* 38, 39.

There is this Difference to be obſerved with reſpect to the Exerciſe of Martial Law in *England*, that altho it is not permitted in the Land Forces in time of Peace, except by the expreſs Conſent of Parliament, which is renewed from time to time; yet the ſame is allowed to be exerciſed over the Naval Forces on board the Fleet in time of Peace as well as War. And there are for that purpoſe ſtanding Articles and Orders, ratified by the Parliament, for the regulating and better Government of his Majeſty's Navy, Ships of War, and Forces by Sea. See 13 *Car.* 2. *cap.* 9. In the twelfth Year of the Reign of the late Queen *Anne*, ſome Doubts having ariſen at the Board of Admiralty touching the Conſtruction of the ſaid Act of Parliament of 13 *Car.* II. *cap.* 9. whether the ſame was to be put in execution in time of Peace as well as War,

the late Queen did, upon Application to her by the Lords Commiſſioners of the Admiralty, direct the Judges to conſult and give their Opinion upon the ſaid Act. And accordingly the Judges of the Common Law, and ſome Doctors of the Civil Law, having met together on *December* 22. 1713, in Obedience to her Majeſty's Command, and having taken the ſaid Matter into conſideration, they agreed in the following Opinion; 'That the Act of Parliament 'made in the thirteenth Year of King *Charles* II. 'entitled, *An Act for eſtabliſhing Articles and Or-* 'ders for the regulating and better Government of 'his Navy, Ships of War, and Forces by Sea, 'was made for the Regulation and better Govern- 'ment of the Fleet at all times, *as well in Peace as* 'War; and that Mutiny, or any other of the Of- 'fences therein ſpecified, committed by any Per- 'ſon or Perſons in actual Service and Pay in her 'Majeſty's Fleet, or Ships of War, at the time of 'ſuch Offence, may be puniſhed in a Court-Martial 'according to the Direction of that Act, *in time* 'either of Peace or War, provided ſuch Offence be 'done upon the main Sea, or in any Ships or Veſ- 'ſels being and hovering in the main Stream of 'great Rivers, only beneath the Bridges of thoſe 'Rivers neareſt to the Sea, where the Admiralty had 'before that Act Juriſdiction, in caſe of Murder and 'Mayhem.' Which Opinion they reported to her Majeſty.]

V.

5. The firſt Rule of Military Diſcipline, Obedience to the Head.

The firſt of all the Rules of Military Diſcipline, and which is common to Officers and Soldiers, is the Duty of Obedience to the Orders which they are to execute. Thus the General of an Army owes this Obedience to the Orders of the Sovereign, and the other Officers owe it to the General, and to other their ſuperior Officers, and the Soldiers owe it to all thoſe who have a Right to command them. For without this Obedience the Uſe of Forces would be ineffectual; ſince inſtead of being united in carrying on that only End propoſed by the Sovereign, they would be divided into the different Views of thoſe who by their Diſobedience would turn them to other Uſes *e*. Thus the Diſobedience both of Soldiers and Officers is juſtly repreſſed by the Puniſhments which the particular Regulations may have eſtabliſhed, and even by Death itſelf, if the Conſequence demands that Severity *f*.

e See the ſecond Section of the firſt Title.
f See the following Article.

VI.

6. Diſobedience is puniſhed, altho it have a good Succeſs.

The Conſequence of Obedience in Military Government is ſuch, that even Succeſs itſelf, let it be ever ſo great, cannot juſtify Diſobedience, nor be an Excuſe for it. But altho he who diſobeys may have taken in effect a better Courſe, or may have avoided or prevented Inconveniences which would have enſued upon his obeying his Orders, or that he may have obtained Advantages which could not have been hoped for except from the Courſe which he has followed, his Diſobedience does nevertheleſs deſerve the Puniſhment that may be due to it, and even the Loſs of Life, according to the Quality of the Fact, and the Circumſtances. For all the Good which the Succeſs of an Act of Diſobedience would cauſe, would not be able to counterballance the infinite Evils which would follow upon the Impunity of this overthrowing of all Order and Diſcipline. And the Liberty which all thoſe who ſhould flatter themſelves with obtaining much greater Advantages from their own private Views and Deſigns might imagine they had to diſobey, would put all into Confuſion, and into ſuch a Diſorder as would ruin all Military Government, and would deſtroy that Union in which conſiſts the Uſe of Forces.

g In bello qui rem a duce prohibitam fecit, aut mandata non ſervavit, capite punitur, etiamſi res bene geſſerit. *l.* 3. §. 15. *ff. de re milit.*

Ye ſhall not do after all the things that we do here this Day, every Man whatſoever is right in his own Eyes. Deuter. 12. 8.

VII.

7. Three Parts of the Conduct of the General.

We may ſet down as a ſecond Rule of Military Diſcipline, the Watchfulneſs of the General about every thing that may be neceſſary for the Execution of the Orders of the Sovereign, in relation to the War he has entruſted him with the Management of. And this contains three different Parts of his Conduct, which comprehend the whole detail thereof, and on which depends the good Uſe of the Forces that are in his hands *h*, as will appear by the Articles which follow.

h See the Articles which follow.

VIII.

8. The firſt Part of this Conduct, Vigilance in carrying on his own Undertakings, and preventing thoſe of the Enemy

The firſt Part of the Conduct of the General, is Vigilance in diſcovering the Deſigns of the Enemy, in forming his own Deſigns as Occaſion may offer, and in concealing them until the Execution thereof require that he make known either his Deſigns, or that which may be neceſſary to be done in order to attain them, without letting them be diſcovered by the Motions which are made for the more effectual Accompliſhment of them. And this Vigilance implies the Care of obſerving and watching the Countenance, the Motions, and the Proceedings of the Enemy,

my, and of ſending out Detachments to view their Situation, their Number, their Force; the uſe of good Spies for the Diſcoveries that may be made by their means, and the other Ways of prying into the Deſigns and Undertakings of the Enemy, if there be ground to fear any, that proper Means may provided for preventing them, or reſiſting them; Application in concertting his Deſigns in a manner proportionable to the Number and Condition of his Forces, and to the Advantages which he may hope to obtain over thoſe of the Enemy, whether it be in giving of Battle, or forming a Siege or other Undertaking, the General determining himſelf in theſe Matters, after mature Deliberation thereupon with his Council, and purſuant to the Orders of the Prince; Moderation in good Succeſs, and an Intention to improve the Advantages of Victory, and to prevent any Slackneſs or Remiſſneſs of Diſcipline that may be apt to creep in after ſome Advantage has been gained over the Enemy; a Firmneſs and Steddineſs which in bad Events may preſerve a Preſence of Mind for diminiſhing the Loſſes, or repairing them, for re-eſtabliſhing that which may be preſerved, for rallying the Troops, and inſpiring them with freſh Courage; for conducting a Retreat without Trouble, without Emotion, and with all the Order that is poſſible; and in a word, for acting on all Occaſions whatſoever with that Prudence and Courage which may anſwer the preſent Wants, and may inſpire both into Officers and Soldiers a Zeal to acquit themſelves on their parts of all their Duties *i*.

i He that ruleth, with Diligence. Rom. 12. 8. Altho this Text does not particularly reſpect the Duties of thoſe who have the Command of Armies; yet theſe Duties are comprehended under this Precept, ſince in general whoever is entruſted with a Government, with a Command, or other Publick Miniſtry, is obliged to be diligent and careful in the diſcharge of his Functions.

IX.

9. The ſecond Part of the General's Conduct, is to be careful to have his Troops in good Order.

The ſecond Part of the General's Conduct relates to the good Order and the good Condition of all the Troops which may happen to be under his Command. This comprehends an Exactneſs in obſerving punctually himſelf, and cauſing others to obſerve the Regulations already made, and in making new ones according as there is occaſion *l*; an Application to know perſonally as much as he can the ſeveral Regiments he commands, the Condition of every Regiment, if the Number of the Officers and Soldiers be entire, in order to have it as compleat as may be; the Care to examine if all the Soldiers have their Arms in good Condition, and to puniſh thoſe who are faulty therein *m*; an Enquiry into the Characters of the Officers, and of thoſe who are diſtinguiſhable by their Birth, their Services, their Conduct, their Valour, Experience; a Diſtinction of the Regiments, of the Companies, and of the other Bodies, according as they are ſtronger or weaker, more or leſs inur'd to War, that they may regulate by all theſe Views the Choice either of the Regiments or of the Perſons who ſhall be moſt proper for the different Expeditions; an Exactneſs to keep the Soldiers within their Camp, or in their Poſts, to review the Troops, to keep the Soldiers and Officers to their Duty, and to make them do their Exerciſes; the viſiting of the Guards and Centinels; the keeping of the Keys which ought to be in his Cuſtody *n*; a Dexterity to make himſelf be beloved and feared both by the Officers and Soldiers, and in giving his Orders to join a Mildneſs with the Authority of the Command, and to apply the ſeveral Temperaments that may be neceſſary according to the Quality of the Orders, and that of the Perſons to whom he commits the Execution of them; Prudence in not expoſing the Army, or a Part of it, or even ſingle Soldiers, to Danger without great Neceſſity; a Care to ſee that Juſtice be adminiſter'd, and Diſcipline obſerved throughout the Army; a prudent Severity in puniſhing the

l Officium regentis exercitum, non tantum in danda, ſed etiam in obſervanda diſciplina conſiſtit. Paternus quoque ſcripſit, debere eum qui ſe meminerit armato præeſſe, parciſſime commeatum dare; equum militarem extra provinciam duci non permittere; ad opus privatum, piſcatum, venatum, militem non mittere. Nam in diſciplina Auguſti ita cavetur. Et ſi ſcio, fabrilibus operibus exerceri milites, non eſſe alienum: vereor tamen, ſi quicquam permiſero quod in uſum meum aut tuum fiat, ne modus in ea re non adhibeatur, qui mihi ſit tolerandus, *l.* 12. *ff. de re milit.*

m Arma non ſine flagitio amittuntur. *l.* 2 §. *ult. ff. de capt. & poſt. lim. rev.*

Miles qui in bello arma amiſit, vel alienavit, capite punitur. *l.* 3. §. 13. *ff. de re milit.*

n Officium tribunorum eſt, vel eorum qui exercitui præſunt, milites in caſtris continere, ad exercitationem producere, claves portarum ſuſcipere, vigilias interdum circumire. *l.* 12. §. 2. *ff. de re milit.*

Crimes of the Soldiers, ſuch as thoſe who abandon their Poſts, Deſerters who may be differently puniſhed according to the quality of the Deſertion and the Circumſtances *o*; thoſe who reſiſt him, and violate the Reſpect due to his Perſon *p*; thoſe who tranſgreſs the general Rules, or the particular Orders which concerned them *q*: An Application to repreſs the Extortions and Violences which Officers or Soldiers may be guilty of towards other Perſons *r*; and to prevent and pacify all Quarrels and Tumults among them, and eſpecially thoſe which may be likely to cauſe a Sedition in the Army *s*: An Eaſineſs of Acceſs for receiving Complaints, and doing Juſtice upon them *t*: A Care of the Sick and Wounded *u*: Prudence in diſcerning, and likewiſe in recompenſing as much as is poſſible ſignal Services that deſerve it: And laſtly, a Vigilance about every thing that may be neceſſary for putting and keeping the Troops in a good Condition, and holding them in a Readineſs for all the Services which his ſeveral Orders may require.

X.

10. *Third part of the General's Conduct, Vigilance in providing all the Neceſſaries for the War.*

The third part of this Conduct of the General takes in all the reſt of his Functions, which conſiſt in joining to the good Condition and to the good Diſpoſition of the Troops, the Art of poſting them advantageouſly, of providing Subſiſtence for them, of adding to the Force of the Men all the other neceſſary Helps, ſuch as Artillery, and all the Inſtruments and Materials that the Quality of the War by Land or by Sea, and the different Expeditions may demand, whether it be for defending themſelves, or attacking the Enemy, or for forming a Siege, or executing all manner of Enterprizes or Orders. And this implies a Care to chuſe an advantageous Ground for a Camp, to fortify it, to defend the Avenues thereof, to place Guards and Centries, to order Detachments, to ſee that the Army be ſupplied with Proviſions, and that there be ſufficient Convoys to guard the ſame, to be well informed of the Quantity and Quality of the Grain, and of the Ammunition Bread, and of their Weight, and of every thing that ought to be furniſhed for the Subſiſtence of the Troops, and of Forage for the Horſes: To provide every thing that may be neceſſary for the Undertakings, ſuch as to facilitate the Paſſages over Rivers, and thro difficult Ways: To cauſe the Officers who are placed Overſeers over all theſe different Functions to bring him in an Account of the Condition of that which belongs to their Miniſtry; and to inform himſelf of all the Particulars as minutely as he can, or to recommend the Care of what he cannot viſit himſelf to Perſons in whom he may confide: And in a word, to ſtudy and procure every thing that may ſtrengthen and augment the Forces, and contribute to the good Uſe that ought to be made of them.

o Non omnes deſertores ſimiliter puniendi ſunt: ſed habetur & ordinis & ſtipendiorum ratio, gradus militiæ, vel loci muneris deſerti, & ante actæ vitæ, ſed & numerus, ſi ſolus, vel cum altero, vel cum pluribus deſeruit, aliudve quod crimen deſertioni adjunxerit. Item temporis quo in deſertione fuerit, & eorum quæ poſtea geſta fuerint. Sed & ſi fuerit ultro reverſus non cum neceſſitudine, non erit ejuſdem ſortis. Qui in pace deſeruit eques gradu pellendus eſt, pedes militiam mutat: in bello idem admiſſum capite puniendum eſt. *l.* 5. *D. l.* §. 1. *ff. de re milit.*

Si præſidis, vel cujuſvis præpoſiti ab excubatione quis deſiſtat, peccatum deſertionis ſubibit. *l.* 3. §. 6. *eod.*

Qui excubias palatii deſeruerit, capite punitur. *l.* 10. *eod.*

p Qui manus intulit præpoſito, capite puniendus eſt. Augetur autem petulantiæ crimen dignitate præpoſiti. Contumacia omnis adverſus ducem, vel præſidem, militis capite punienda eſt. *l.* 6. §. 1, & 2. *ff. de re milit.*

Irreverens miles non tantum a tribuno, vel centurione, ſed etiam a principali coercendus eſt. Nam eum, qui centurioni caſtigare ſe volenti reſtiterit, veteres notaverunt. Si vitem tenuit, militiam mutat; ſi ex induſtria fregit, vel manum centurioni intulit, capite punitur. *l.* 13. §. 4. *eod.*

q Delicta ſecundum ſuæ auctoritatis modum caſtigare. *l.* 12. §. 2. *eod.*

r Decem librarum auri mulcta ferietur quiſquis adminiſtrator, rogator, apparitorve ullus militans ſcilicet, vel iter agens, ullo in loco aliquid ab hoſpite poſtulaverit. *l.* 5. *C. de metat. & epidem.*

Nequis comitum vel tribunorum, aut præpoſitorum, aut militum nomine, ſalgami gratia culcitras, lignum, oleum a ſuis extorqueat hoſpitibus, ſed nec volentibus hoſpitibus, in prædictis ſpeciebus aliquid auferat: ſed ſint provinciales noſtri ab hac præbitione ſecuri: comitibus, tribunis, vel certe præpoſitis militibuſque gravi vexationi ſubjacentibus. *l. un. C. de ſalgamo hoſp. n. p.*

s Si quis commilitonem vulneravit, ſi quidem lapide militia rejicitur: ſi gladio, capitale admittit. *l.* 6. §. 6. *ff. de re milit.*

Qui ſeditionem atrocem militum concitavit, capite punitur. *l.* 3. §. 19. *eod.*

t Querelas commilitonum audire. *l.* 12. §. 2. *eod.*

u Valetudinarios inſpicere. *D. l.* 12. *in fine. See the Law quoted on the following Article.*

x Frumentationibus commilitonum intereſſe, frumentum probare, menſorum fraudem coercere. *l.* 12. §. 1, & 2. *ff. de re milit.*

It is by the good Uſe of theſe Regulations that the Troops can ſubſiſt in the natural Condition in which they ought to be.

See the Texts cited in the preceding Article; and the Ordinances of Henry *the Third at* Blois, *Art.* 315. *and at* Fountainbleau *in* 1553, *Art.* 8, *and* 28. *Of* Lewis *the Thirteenth at* Paris *in* 1633.

1633. *Of* Lewis *the Fourteenth at* Compeigne *in* 1655.

Joſhua *aroſe, and all the People of War, to go up againſt* Ai: *And* Joſhua *choſe out thirty thouſand mighty Men of Valour, and ſent them away by Night. And he commanded them, ſaying, Behold, ye ſhall lie in wait againſt the City, even behind the City; go not very far from the City, but be ye all ready: And I, and all the People that are with me, will approach unto the City; and it ſhall come to paſs, when they come out againſt us, as at the firſt, that we will flee before them,* &c. Joſh. 8. 3, 4, 5.

XI.

11. *The Duties of Subaltern Officers.*

The Rules of Military Diſcipline which relate to other Officers beſides the General, and who ſerve under him, are reduced to thoſe of the Conduct of the General himſelf, according as they are applicable to the Subaltern Officers, in proportion to their Functions, and to a ſtrict and faithful Obſervance of the Regulations of their Charges, and of the particular Orders which concern every one in his proper poſt *y*.

y See the preceding Articles.

XII.

12. *The Duty of Soldiers.*

As for the Soldiers in particular, the Military Diſcipline obliges them to apply themſelves to the Service which they are bound to by their Engagement. This comprehends the Reſpect and Obedience which they owe their Officers *z*; as alſo an Affection for their Perſons on all Occaſions where it may be in their power to do them any Service, and eſpecially to aſſiſt them when they ſee them in danger *a*; Fidelity in every thing that may require an exact and ready Execution of their Orders, whether it be for a March, for a Retreat, for an Encampment, for a Siege, for an Attack, for a Battle, for being placed in a Guard, or as a Sentinel, or for any other Function of the Service; which they ought to perform with the greateſt Chearfulneſs, with all poſſible Care, and without Delay *b*; that they ſhould be careful of their Arms, their Clothes, their Horſes, for thoſe who are obliged to have Horſes *c*; that they ſhould be aſſiduous in the Service, which they ought never to quit or interrupt without Leave, and then they ought to return when the time of their Leave is expired, unleſs they have ſome juſt Excuſe *d*; that they ſhould prefer their Functions in the Service to their own private Concerns, unleſs they are diſpenſed with by their Officers *e*. And finally, an exact Obſervance of the Regulations and Orders which concern them in particular, even to the expoſing of their Lives, if the Occaſion ſhould require their doing ſo.

z See the third Article.

a Qui præpoſitum ſuum protegere noluerunt, vel deſeruerunt, occiſo eo, capite puniuntur. *l.* 3. §. *ult. ff. de re milit.*

Qui præpoſitum ſuum non protexit, cum poſſet, in pari cauſa factori habendus eſt. Si reſiſtere non potuit, parcendum ei. *l.* 6. §. 8. *eod.*

b Omne delictum eſt militis quod aliter quam diſciplina communis exigit, committitur; veluti ſegnitiæ crimen, vel contumaciæ, vel deſidiæ. *l.* 6. *ff. de re milit.*

c Arma non ſine flagitio amittuntur. *l.* 2. §. *ult. de cap. & poſt. rev.*

Miles qui in bello arma amiſit, vel alienavit, capite punitur; humane militiam mutat. *l.* 3. §. 13. *ff. de re milit.*

d Si ad diem commeatus quis non veniat, perinde in eum ſtatuendum eſt, ac ſi emanſiſſet, vel deſeruiſſet, pro numero temporis; facta prius copia dicendi, num forte caſibus quibuſdam detentus ſit, propter quos venia dignus videatur. *d. l.* 3. §. 7.

e Milites qui a republica armantur & aluntur, ſolis debent utilitatibus publicis occupari, nec agrorum cultui, & cuſtodiæ animantium vel mercimoniorum quæſtui: ſed propriæ muniis inſudare militiæ. *l.* 15. *C. de re milit.*

Militares viros, civiles curas arripere prohibemus: aut ſi aliquam hujuſmodi ſollicitudinem forte ſuſceperint, & militia ſtatim & privilegiis omnibus denudari decernimus, formidantibus his motum noſtræ ſerenitatis, qui temeritate ſaluberrimis ſtatutis obviam ire tentaverint. *l.* 16. *eod.*

XIII.

13. *Crimes and Offences of the Soldiers.*

All theſe different Rules of the Military Diſcipline for Soldiers are ſo very eſſential, that every thing that is a Violation of any one, even the leaſt of them, ought to be puniſhed with Puniſhments proportionable to the Crimes and Offences, according to the quality of the Facts and Circumſtances. Thus, a Soldier who goes over to the Service of the Enemy, if he is taken, is puniſhed with Death: Thus, a Deſerter in the time of War, is alſo puniſhed with Death, both becauſe of the Quality of the Crime, and becauſe of the Conſequence *g*; and Deſertion in time of Peace, is puniſhed according to the Conſequence thereof: Thus, Deſertion from a particular Function, ſuch as the Guard of a Poſt, or the Station of a Sentinel, or others of the like nature, deſerves a Puniſhment ſuitable to the Circumſtances of the Fact, and the particular Regulations which may have been provided againſt ſuch Offences *h*. Thus, every

f Is qui ad hoſtem confugit, & rediit, torquebitur, ad beſtiaſque vel in furcam damnabitur: quamvis milites nihil eorum patiantur. Et is qui volens transfugere adprehenſus eſt, capite punitur. *l.* 3. §. 10, & 11. *ff. de re milit.*

g Qui in pace deſeruit eques gradu pellendus eſt: pedes militiam mutat. In bello idem admiſſum capite puniendum eſt. *l.* 5. §. 1. *ff. de re milit.*

h Qui ſtationis munus reliquit, pluſquam eman-

ſor

every thing that violates the reſpect due to the Officers, whether it be by ſome Geſture, or ſome inſolent Language, or otherwiſe, and all Acts of Diſobedience are ſo many Crimes againſt the Military Diſcipline, which deſerve to be puniſhed in a manner proportionable to the Diſobedience, the Inſolence, and the Attempt *i*. Thus, Abſence without Leave, the delaying to return after the Time of Leave is expired, without juſt Cauſe, deſerve their particular Puniſhments *l*. And Quarrels, Mutiny, Negligence, Careleſneſs, the Loſs of their Arms, and the other Faults, Crimes, or Offences againſt the Laws of Military Diſcipline, are puniſhed with Puniſhments that are in uſe *m*; and a Soldier *is* puniſhed even for running away, on an Occaſion where his ſo doing may have given a bad Example to others, and where it was contrary to his Duty *n*.

ſor eſt, itaque pro modo delicti, aut caſtigatur, aut gradu militiæ dejicitur. *l.* 3. §. 5. *eod.*

Si præſidis vel cujuſvis præpoſiti ab excubatione quis deſiſtat, peccatum deſertionis ſubibit. *d. l.* §. 6.

i Irreverens miles non tantum a tribuno vel centurione, ſed etiam a principali coercendus eſt. Nam eum qui centurioni caſtigare ſe volenti reſtiterit, veteres notaverunt. Si vitem tenuit, militiam mutat. Si ex induſtria fregit, vel manum centurioni intulit, capite punitur. *l.* 13. §. 4. *eod.*

l Qui commeatus ſpacium exceſſit, emanſoris vel deſertoris loco habendus eſt. Habetur tamen ratio dierum quibus tardius reverſus eſt: item temporis navigationis, vel itineris: & ſi ſe probet valetudine impeditum, vel a latronibus detentum, ſimilive caſu moram paſſus, dum non tardius a loco profectum ſe probet, quam ut occurrere poſſet intra commeatum, reſtituendus eſt. *l.* 14. *eod.*

Si ad diem commeatus quis non veniat, perinde in eum ſtatuendum eſt, ac ſi emanſiſſet, vel deſeruiſſet, pro numero temporis facta prius copia docendi num forte quibuſdam caſibus detentus ſit propter quos venia dignus videatur. *l.* 3. §. 7. *eod.*

m See the preceding Articles.

n Qui in acie prior fugam fecit, ſpectantibus militibus, propter exemplum capite puniendus eſt. *l.* 6. §. 3. *eod.*

Arma alienaſſe grave crimen eſt; & ea culpa deſertioni exæquatur, utique ſi tota alienavit. Sed & ſi partem eorum, niſi quod intereſt. Nam ſi tibiale, vel umerale alienavit, caſtigari verberibus debet. Si vero loricam, ſcutum, galeam, gladium, deſertori ſimilis eſt: Tironi in hoc crimine facilius parcetur. Armorumque cuſtodi plerumque ea culpa imputatur, ſi arma militi commiſit non ſuo tempore. *l.* 14. §. 1. *eod.*

According to the Roman *Law the Crimes of Soldiers were differently puniſhed.* Pœnæ militum hujuſcemodi ſunt; caſtigatio, pecuniaria mulcta, munerum indictio, militiæ mutatio, gradus dejectio, ignominioſa miſſio. Nam in metallum, aut in opus metalli non dabuntur, nec torquentur. *l.* 3. §. 1. *eod.*

XIV.

14. *Time of Service.*

The Engagements of Officers and Soldiers laſt during the Time that they ought to ſerve, and do not ceaſe but by a Diſcharge, either general, if the Troops are broken or disbanded, or particular, and for ſome Cauſe *o*.

o See the following Article.

XV.

15. *Three ſorts of Diſcharges.*

The particular Diſcharges of Soldiers are of three ſorts, according to three ſeveral ſorts of Cauſes. For a Soldier may be diſcharged after the Time of Service for which he was engaged is elapſed, or becauſe ſome Infirmity, or other Cauſe, may excuſe him from ſerving; or by reaſon of ſome Crime, or ſome Offence, for which he may have deſerved to be broke, and to be expelled the Army *p*.

p Miſſionum generales cauſæ ſunt tres: honeſta, cauſaria, ignominioſa. *Honeſta*, eſt quæ tempore militiæ impleto datur. *Cauſaria*, cum quis vitio animi, vel corporis minus idoneus militiæ renunciatur. *Ignominioſa* cauſa, eſt cum quis propter delictum ſacramento ſolvitur. *l.* 13. §. 3. *ff. de re milit.*

There was a very great difference between theſe three ſorts of Diſcharges; for thoſe who had quitted the Service, miſſione honeſta, *were capable of enjoying the Privileges of Veterans.*

Si ſolemnibus ſtipendiis & honeſte ſacramento ſolutus es, licet ſuper hujuſmodi re inſtrumenta (ut dicis) facta perdita ſint: tamen ſi aliis evidentibus probationibus veritas oſtendi poteſt, veteranorum privilegia etiam uſurpare poſſe dubium non eſt. *l.* 7. *C. de fide inſtrum.*

XVI.

16. *Other arbitrary Regulations for the Military Diſcipline.*

Beſides theſe Rules of Military Diſcipline which have been juſt now explained, there are other particular and arbitrary Regulations which are different in divers Places, and which in the ſame States are often varied, according as Experience or other Cauſes may give occaſion for ſo doing. Thus we ſee the Orders for the Service often changed, as alſo thoſe for the Artillery, for Proviſions and Forage. And theſe ſorts of Regulations oblige thoſe whom they concern to obſerve them, and the Officers to look to the Execution thereof, according as the Orders of the Prince may have directed them *q*.

q There is in the Ordinances a great Number of Regulations for the Military Diſcipline, and even ſome of thoſe which have been explained in this Section.

See the Ordinance of Henry *the Third at* Fountainbleau, *in the Year* 1553, *Art.* 8, *and* 28. *at* Blois, *Art.* 108. *at* Villiers-Coſterets *in* 1570. *Art.* 1. *That of* Charles *the Ninth at* Paris *in* 1533, *Art.* 2. *Of* Charles *the Sixth in* 1413. *Of* Francis *the Firſt in* 1523. *Of* Henry *the Fourth in* 1591, *Art.* 1. *Of* Lewis *the Thirteenth at* Paris, *in* 1616.

XVII.

XVII.

17. Officers and Soldiers ought to abſtain from all manner of Violence and Extortion.

We muſt add to all the Duties both of Officers of War and Soldiers, that of a good Uſe of the Forces which they have in their hands, and of imploying them only for the Execution of their Orders, abſtaining from all manner of Violence and Oppreſſion, and contenting themſelves with the Allowance appointed them by the Prince *r*.

r Do Violence to no Man, neither accuſe any falſly, and be content with your Wages. Luk. 3. 14. Omne delictum eſt militis, quod aliter, quam diſciplina communis exigit, committitur: veluti ſegnitiæ crimen, vel contumaciæ, vel deſidiæ. *l. 6. ff. de re milit.*

TIT. V.

Of the Publick Revenue; and of the Functions and Duties of thoſe who have any Office or Imployment about it.

The Duty of contributing to the Expences of the State.

SEEING the State forms a Body, of which every one is a Member; and that all the Members of a Body ought to perform their Functions in it, that the Body may ſubſiſt in the good Order in which it ought to be for the common Good; it is both neceſſary and juſt that all thoſe who compoſe a State, ſince they may look upon the Good of the State to be their own proper Good, ſhould alſo look upon it as their peculiar Duty to do what they ought on their part to contribute to this common Good. And they ought to be moved to a Performance of their Engagements and Duties towards the Publick, not out of fear of the Puniſhments which thoſe who fail in the Performance of their Duty may deſerve; but by an inward Perſuaſion of Reaſon and Conſcience, as has been obſerved in another Place *a*.

This Truth, which reſpects in general all ſorts of Duties towards the Publick, comprehends particularly the Duty of thoſe who compoſe a State, to contribute towards the Expences which the publick Good makes neceſſary, whether it be for preſerving Order in it, or for defending it againſt its Enemies; ſince without this Help the State would inevitably periſh by Injuſtices, Violences, Diviſions, Seditions; and it would be left as a Prey to its Neighbours, who would take the advantage of its Diſorders and Want of Money to invade it.

a See the third Article of the ſecond Section of the firſt Title.

Several ſorts of Expences in a Kingdom.

The Expences of a Kingdom are of ſeveral ſorts. There are extraordinary Expences in the Time of War: And there are Expences that are always neceſſary; ſuch as thoſe of the King's Houſhold; thoſe for the keeping in repair fortified Places, for maintaining Gariſons in them, and other Troops which may be neceſſary in Time of Peace; thoſe of the Pay of the Officers, and of all thoſe who have publick Salaries, the Charges of Embaſſies; thoſe for the Repair of Bridges, for the Conveniency and Safety of Navigation, for making Rivers navigable, mending the Highways, and many others.

Two ſorts of Funds for theſe Expences, the Prince's Demeſnes, and Taxes levied on the Subject.

For ſupplying all theſe Expences of the State, which may be greater or leſſer, according to the Times, there are two ſorts of Funds: That of the Revenues which are gathered from the ſeveral ſorts of Taxes and Impoſts, which are greater or leſſer, according as the Expences may increaſe or diminiſh, and which are properly called the Publick Revenue, which ſhall be treated of under this Title; and that of the Revenues ariſing from the Prince's Demeſne, which ſhall be the Subject-matter of the following Title.

The Contributions or Taxes for defraying the Expences of the State can be levied only on the Perſons who compoſe it: And as we cannot demand of Perſons any more than what may ariſe from their Goods, comprehending under this word *Goods* all the Eſtate and Effects which every one hath of whatever ſort they be, and in what manner ſoever he may have acquired them; it is from theſe Goods and Effects that the whole Supply of the Revenue of a State does proceed. Thus, in order to explain the divers manners in which the Funds of the Publick Revenue are provided for, it behoveth us in the firſt place to diſtinguiſh the ſeveral ſorts of Goods which may contribute to them; and in the ſecond place to conſider the different ways that are taken for levying the ſaid Contributions.

All Goods whatſoever may be divided into two kinds: One of Immoveables, taking in under this kind Ground-Rents, Annuities, and the other ſorts of Goods which are of the nature of Immoveables, ſuch as Offices, and many

ny Rights. And the other of Moveables, or mobiliary Effects, comprehending under this ſort of Goods, Gold, Silver, Jewels, Merchandize of all ſorts, Credits, the Profits of Induſtry, and all other Goods which are not Immoveable.

According to this Diſtinction of theſe two general kinds, which comprehend all ſorts of Goods without exception, there might be three ways of raiſing out of them the Funds for the Expences of the State, whether they be ordinary or extraordinary. The firſt, by raiſing them all out of the Immoveables; the ſecond, by taking them only out of the other ſort of Goods; and the third, by laying them partly on the Immoveables, and partly on the Moveables.

Of theſe three ways, the two firſt would be unjuſt. For the Charges of the State reſpect the Perſons; and ſeeing every one ought to contribute towards them in proportion to his Eſtate, there would be no manner of reaſon for laying the ſaid Charges rather on one kind of Goods than the other, and to make the whole Burden to fall on thoſe who ſhould chance to have Goods of that kind which are made ſubject to the Charge, and to free intirely from the ſaid Charge thoſe whoſe Goods ſhould happen to be all of another nature.

The third Manner therefore of levying the Funds for the Expences of the State out of both the kinds of Goods, is undoubtedly the moſt juſt and the moſt natural, ſince it affects all ſorts of Goods indifferently, and even thoſe acquired by Induſtry; ſo that no body is exempted from it, except thoſe who having neither Goods nor Induſtry are themſelves a Burden to the State, which is forced to provide for their Subſiſtence. And it is to this third Manner that all ſorts of Taxes and Impoſts are reduced in general, whether it be under the Name of Land-Tax, Exciſe, Cuſtoms, or others; not ſo as that every one of theſe kinds of Taxes is laid on all the kinds of Goods, but they are raiſed differently, the one upon one kind of Goods, and the others upon the other kind; ſo that all Perſons and all ſorts of Goods contribute to the Publick Charges, excepting the Exemptions and Privileges, which ſhall be explained in the ſeventh Section.

Three ſorts of Impoſts. The Impoſts or Aſſeſſments which are called in *France*, *Le Tailles*, or Land-Tax, are Contributions of certain Sums of Money which are levied yearly in two different manners; the firſt whereof is in uſe in moſt of the Provinces of *France*, and the ſecond in ſome others. The firſt is that of Impoſts or Aſſeſſments which are called Perſonal, being laid on every Head of a Family, who is aſſeſſed according to his Eſtate, whether it conſiſt in Moveables or Immoveables, or in the Perquiſites of his Labour and Induſtry; which is called a Perſonal Tax, becauſe it is levied on each Perſon who is Head of a Family, with regard to all his Goods and Effects without diſtinction. And the ſecond, which is called a Real Tax, is an Impoſition of a certain Tribute or Tax which is levied on every Land and Tenement in proportion to its Revenue, without having any regard to the Poſſeſſor of it. And in the Places where this Tribute or Tax is in uſe, there is another Impoſt or Aſſeſſment which is Perſonal, being laid on every Head of a Family, for his other Goods beſides his Immoveables, and for his Gains by his Labour and Induſtry. So that whereas in the Provinces of *France* where the Taxes are Perſonal, each Perſon is only liable to one ſingle Aſſeſſment for all his Goods, and the Gains which he makes by his Labour and Induſtry. In the other Provinces where the Real Taxes are in uſe, there are two different Aſſeſſments for thoſe who have Immoveables, and other ſorts of Goods.

Theſe Real Taxes on Lands and Tenements were in uſe among the *Romans b*; and it is from them that we have derived the uſe of Real Taxes in ſome of the Provinces of *France* which are governed by the *Roman* Law.

Beſides theſe two ſorts of Taxes, whether they be Real on Immoveables, or Perſonal upon Perſons, there are other different ſorts which are neither laid upon Immoveables, nor upon Perſons on account of their Goods, but on certain kinds of mobiliary Effects, ſuch as Salt, Wine, and other Wares and Merchandizes, without any regard to the Perſons to whom they belong. Theſe ſorts of Duties come under the Denomination of Exciſe, Cuſtoms, and other Names, and are diſtinguiſhed from the Perſonal Tax, becauſe that Tax is laid on Perſons on account of their Goods and the Gains which they

b Is, qui agrum in alia civitate habet, in ea civitate profiteri debet in qua ager eſt. Agri enim tributum in eam civitatem debet levare, in cujus territorio poſſidetur. *l.* 4. §. 2. *ff. de cenſ. V. Tot. h. Tit.*

make

make by their Induſtry; whereas theſe other Impoſitions are laid on theſe kinds of Goods without reſpect to the Perſons to whom they may belong. Thus the Duty upon Salt is laid upon that Commodity in ſuch a manner as to reſtrain private Perſons from having it, except for the Price which the King has fixed; and the Commerce and Diſtribution thereof is committed only to ſuch Perſons as the King names for that purpoſe. Thus the Exciſe, the Cuſtoms, and other Duties are levied on Wines and other Liquors, and on other Wares and Merchandizes which are made liable to the ſaid Duties, and are collected either at the Entry of theſe ſorts of Goods into the Ports, or into the Towns, or in their Paſſage from one Province to another, or at the time of their Sale, or otherwiſe, according to the different Regulations made therein.

Beſides theſe ſeveral ſorts of Impoſts, and others of the like kind, there is likewiſe in *France* another Tax which is called the Tenths, which are a Tax or Impoſition laid upon the Revenues of Church Benefices; for the Revenues of the Temporal Goods belonging to Church Benefices ought to contribute towards the Publick Good of the State.

Other kinds of Revenues belonging to the Sovereign.

All theſe ſorts of Taxes or Impoſitions make up the greateſt Part of the Publick Revenue, which is deſtined for ſupplying the ſeveral Wants of the State. But beſides theſe ſeveral Funds, the Sovereign has other Revenues, and other ſorts of Rights, ſuch as Forfeitures, Fines, the Succeſſions of Foreigners or Aliens, thoſe of Baſtards, and of Perſons who die without leaving any Heir behind them, the Right to vacant Goods, and the other caſual Revenues; ſuch as in *France* thoſe which the King draws from venal Offices, whether it be by the annual Acknowledgment due from thoſe who are poſſeſſed of the Offices charged with ſuch annual Acknowledgment, in order to perpetuate the ſaid Offices in their Family, or by the Forfeiture of the Offices by thoſe who die without having paid that Acknowledgment.

Of all theſe Kinds of Revenues, we ſhall treat under this Title, as we have already obſerved, only of thoſe which are properly called the Publick Revenue, and which are theſe ſeveral ſorts of Taxes or Contributions. And we ſhall explain in the following Title that which relates to the King's Demeſne, Goods that are vacant, or which have no Owner, Forfeitures, and thoſe Succeſſions which fall to him for want of Heirs or otherwiſe. And in treating of all theſe Matters, we ſhall confine ourſelves to the Rules which have the Characters that have been remarked at the End of the Preface to this Book. So that the Reader muſt not expect to find here all the ſeveral Rules relating to theſe Matters which are contained in the Ordinances: And there are even ſome Matters which we ſhall take no manner of notice of hereafter; as for example, thoſe caſual Duties due upon Offices, the Tenths, and other Duties explained in the Ordinances. For theſe Duties and others are of the ſame nature with thoſe which ſhall be explained; and the ſame Rules which are within the Deſign of this Book, may be applied to them. And as for the other Rules which regard the Detail of all theſe Matters, they are to be found in the Ordinances.

It remains only that we ſet down the Order of the particular Matters treated of under this fifth Title, which we have divided into eight Sections. The firſt is of the Neceſſity of Taxes, and of their Kinds. The ſecond, of the laying on in general of the ſeveral ſorts of Taxes. The third, of the rating or aſſeſſing particular Perſons. The fourth, of the particular Taxes on Immoveables. The fifth, of Impoſts on Wares and Merchandize. The ſixth, of the levying and collecting all theſe ſorts of Taxes. The ſeventh, of the Exemptions from ſeveral ſorts of Taxes. The eighth, of the Functions and Duties of thoſe who have any Office or Imployment about the Publick Revenue.

We ſhall not take up time to explain here, nor in any other Part of this Title, the relation which the Taxes that are in uſe with us may have to thoſe mentioned in the Texts of the *Roman* Law which ſhall be quoted. This uſeleſs Curioſity would exceed the Bounds of the Deſign of this Book; and it ſufficeth to acquaint the Reader, that he ought not ſo much to ſtudy in thoſe Texts to find out the Conformity between our Taxes and thoſe mentioned in the ſaid Texts, as to apply the Rules we gather from them for our Uſe.

[*The Publick Taxes in* England *are levied by Authority of Parliament, according to the preſent Occaſions and Exigencies of the State. And they are laid upon Lands, and Tenements, and Perſonal Eſtates, upon Liquors, and upon moſt ſorts of Wares and Merchandizes, in ſuch manner and in ſuch Proportion as the Wiſdom of the Parliament judgeth neceſſary to ſupply the Demands which are made by the King for the Publick Service.* See the ſeveral Acts of Parliament made in every Seſſion for theſe purpoſes.]

SECT. I.

Of the Neceſſity of Taxes, and of their Kinds.

The CONTENTS.

1. *The Juſtice of Taxes.*
2. *The Duty of paying the Taxes.*
3. *Divers ſorts of Taxes.*
4. *It is only the Sovereign that can lay on and regulate the Taxes.*
5. *The Publick Expences regard either the whole Kingdom in general, or particular Towns and other Places.*
6. *Contributions for the Expences of Towns ought not to be raiſed without the Permiſſion of the Sovereign.*

I.

1. *The Juſtice of Taxes.*

THE Neceſſity of Publick Money for the Subſiſtence of the State in time of Peace and of War, demands Contributions for the raiſing of the ſaid Money: So that the common Good juſtifies the laying on and levying of the Taxes which the Occaſions of the State render neceſſary *a*.

a See the twenty third and twenty fourth Articles of the ſecond Section of the ſecond Title.
See the ſecond Book of the Chronicles, *ch.* 10.

II.

2. *The Duty of paying the Taxes.*

It follows from this Neceſſity, and from this Juſtice of Taxes, that all thoſe whom they concern are obliged to pay them as a moſt lawful Debt, and that they may be conſtrained to do it by the Ways which the Laws and Uſage have eſtabliſhed for that End *b*.

b Render unto Cæſar *the things which are* Cæſar's, *and unto God the things which are God's.* Mat. 22. 21. Mark 12. 17. Luke 20. 25.

Wherefore ye muſt needs be ſubject, not only for Wrath, but alſo for Conſcience ſake. For, for this Cauſe pay you Tribute alſo. For they are God's Miniſters attending continually upon this very thing. Render therefore to all their Dues; Tribute to whom Tribute is due, Cuſtom to whom Cuſtom. Rom. 13. 5, 6, 7.

Seeing the Payment of Taxes is a Duty, and that this Duty is an Effect of the Neceſſity of theſe publick Aids for the common Good, and of the Juſtice which impoſes the ſaid Charge; we may from thence conclude, that it is a Duty of Conſcience. And it is enjoined as ſuch in theſe Paſſages of the Goſpel and of St. *Paul*. From whence it follows, that it is not lawful to defraud the Publick of the ſaid Duties, and to imbezzle them. For beſides that an Injuſtice is done thereby, either to the Publick, or to thoſe who have farmed the Taxes, it is becauſe of the ſaid Frauds which are ſo frequent, that the Government in order to prevent them is obliged to uſe ſeveral Precautions which are very chargeable. And theſe Frauds are likewiſe unjuſt by reaſon of this Effect which they have of encreaſing the Publick Expences, which would be much leſs if every one were faithful to his Duty in paying the Taxes.

The defrauding of the Publick of the Taxes was called a Crime in the *Roman* Law. *Fraudati vectigalis crimen.* l. 8. ff. de publ. & vectig.

III.

3. *Divers ſorts of Taxes.*

It is a Conſequence of the Neceſſity of Taxes, that they ſhould be greater or leſſer according to the Occaſions and Exigences of the State, and that according to the divers ſorts of Goods and Commerces in each Kingdom they ſhould be diverſified, and raiſed differently in proportion to what the Perſons and Goods may be able to bear, to the end that each ſort of Tax being leſs, thoſe who are to bear it may be thereby eaſed. Thus Impoſitions are laid upon Perſons becauſe of their Goods and the Profit which every one may make by his Labour and Induſtry; and this is called a Tax on Perſonal Eſtates. Thus a Tax is laid upon Lands and Tenements, which is called a Tax on Real Eſtates. Thus divers ſorts of Duties are laid upon ſome ſorts of Proviſions, ſuch as Salt and Wine; and upon other ſorts of Goods and Merchandize: all which come under the Names of Exciſe, Cuſtoms, and other Impoſts of divers ſorts *c*.

c Munerum civilium quædam ſunt patrimonii, alia perſonarum. *l.* 1. *ff. de muner. & honor.*

Sciendum eſt quædam eſſe munera aut perſonæ aut patrimoniorum. *l.* 6. §. 3. *eod.*

Altho this Text relates to other Charges than Taxes upon Perſons, yet they may be comprehended under this Diviſion, and alſo under the Name of the Taxes which were levied at Rome *by the Head or Poll.* Tributum capitis. *l.* 3. *ff. de cenſib.*

Divus Veſpaſianus Cæſarienſes colonos fecit, non adjecto ut & juris Italici eſſent, ſed tributum his remiſit capitis. *l. ult.* §. 7. *eod.*

As to Taxes upon Land, vid. tot. tit. ff. & C. de cenſib.

As to Exciſe, Cuſtoms, and other Impoſts, vid. tit. ff. de public. & vectig.

Ex præſtatione vectigalium nullius omnino nomine quicquam minuatur, quin octavas more ſolito conſtitutas omne hominum genus, quod commerciis voluerit intereſſe dependat; nulla ſuper hoc militarium perſonarum exceptione facienda. *l.* 7. *C. de vectig. & com. Vid. tit. C. de annon. & Trib. & ſeq.*

As to the Relation which theſe Texts have to our Taxes, the Reader may conſult the laſt Remark in the Preamble of this Title.

IV.

4. *It is only the Sovereign that can*

All the Taxes and Contributions that can be levied in a Kingdom, whether

lay on and regulate the Taxes.

ther it be upon Perſons, or upon Lands and Houſes, or upon Proviſions and Merchandize, or otherwiſe, being deſtined for the Publick Good, and all thoſe upon whom the ſaid Taxes are to be raiſed being obliged to bear the Burden of them whether they will or not, it is only the Sovereign who having alone the univerſal Authority of the Government, and the Right of providing for the Publick Order, and for every thing wherein the Good of the Kingdom is concerned, may lay on Taxes and Impoſitions of all kinds, and regulate the Uſe of them. And it is he alone who can either eſtabliſh new Taxes, or augment the old ones, or diminiſh them, or make any other Alterations in them *d*.

d Vectigalia ſine imperatorum præcepto, neque præſidi, neque curatori, neque curiæ conſtituere, nec præcedentia reformare, & his vel addere vel minuere licet. *l.* 10. *ff. de public. & vectig.*

Omnes penſitare debebunt, quæ manus noſtræ delegationibus adſcribuntur, nihil amplius exigendi vel remittendi poteſtatem eſſe; nam ſi quis vicarius, aut rector provinciæ aliquid jam cuiquam crediderit remittendum, quod alii remiſerit de propriis dare facultatibus compelletur. *l.* 4. *C. de annon. & trib.*

[*It has been already obſerved, that in* Great Britain *no Taxes are impoſed or levied on the Subjects but by and with the Conſent of Parliament.* See the Remark on the twenty fourth Article of the ſecond Section of the ſecond Title of this Book.]

V.

5. The publick Expences regard either the whole Kingdom in general, or particular Towns and other Places.

The Publick Order and the common Good of a Kingdom demand two ſorts of Expences; the firſt is of thoſe which concern the whole Kingdom in general, ſuch as the Expences of a War, thoſe for ſubſiſting Gariſons and other Troops in time of Peace, the Expences for the Prince's Houſhold, thoſe for the Salaries of the Officers, and many others: And the ſecond is of the Expences which are neceſſary for the Government of every particular Town and other Places, ſuch as paving the Streets, the keeping in repair the Fountains, the Town-Halls and other publick Edifices, and for their other Charges. It is becauſe of theſe two ſorts of Expences that it is uſual to have two ſorts of Publick Money. One is of the Money that is deſtined for the Expences which concern the whole Kingdom in general, and of which the Sovereign orders the Diſpoſal and Application; and this Money is collected and received by Officers whom the Prince names for that purpoſe. And the other is of the Money allotted for the Expences of Towns, which does not enter into the Coffers of the Prince, but is received by Perſons to whom the Communities of Towns and other Places commit that Truſt *e*.

e See the following Article.

VI.

6. Contributions for the Expences of Towns ought not to be raiſed without the Permiſſion of the Sovereign.

Altho theſe Impoſitions of Money neceſſary for the Expences of Towns, and other Places, ſeem not to concern the State, and that one may think that thoſe Corporations might regulate the ſaid Impoſitions, and levy the ſaid Money without leave from the Prince, yet nevertheleſs it is neceſſary to have his leave; and they cannot raiſe any greater Sum for the ſaid Expences than what he allows. For beſides the Abuſes that are to be feared on the part of thoſe who ſhould lay on theſe Impoſitions; it is certain that otherwiſe they are of great Importance to the State, upon two Conſiderations: One is, that the good Order of the State depends on that of the Towns and other Places; and the other, that it concerns the State that thoſe Expences be regulated in ſuch a manner, as that they do not hinder the raiſing of the Taxes which the Inhabitants of the Towns and other Places are bound to pay to the Publick. And it is by reaſon of this Neceſſity of having leave from the Sovereign to levy theſe ſorts of Impoſitions, that they are called in *France* Impoſts by Letters of Licence from the Prince; whither they be laidon by way of Capitation or Poll-Tax, that is, ſo much on every Head, or by other Ways, according as the Prince gives leave *f*.

f Non quidem temere permittenda eſt novorum vectigalium exactio; ſed ſi adeo tenuis eſt patria tua, ut extraordinario auxilio juvari debeat, allega præſidi provinciæ, quæ in libellum contuliſti, qui re diligenter inſpecta, utilitatem communem intuitus, ſcribet nobis quæ compererit: & an habenda ſit ratio veſtri, & quatenus exiſtimabimus. *l.* 1. *C. vectig. nov. inſt. non poſſe.*

See the fourth Article.

SECT. II.

Of the laying on in general of the ſeveral ſorts of Taxes.

The CONTENTS.

1. *The Manner of laying on the Taxes is different according to the Nature of the Tax.*
2. *Three kinds of Taxes.*
3. *The firſt kind of Taxes is that on the Perſonal Eſtate.*
4. *Second kind, Taxes on the Real Eſtate.*
5. *Third kind, Impoſts upon Proviſions and Merchandize.*

6. *The Manner of laying on the Tax on Perſonal Eſtates.*
7. *The Manner of laying on the Tax on Real Eſtates.*
8. *The Duties on Goods and Merchandizes are laid on by Regulations, which fix how much each ſort is to pay.*
9. *The Tax on Perſonal Eſtates is liable to Changes.*
10. *As is alſo the Tax on Real Eſtates.*
11. *The Impoſts on Wares and Merchandizes are fixed.*
12. *The Revenue of the Prince ariſing from the Cuſtoms laid on Goods and Merchandize may riſe or fall, but the Produce of the Tax on Real and Perſonal Eſtates is always certain.*
13. *The yearly Produce of the Exciſe and Cuſtoms cannot be fixed at any certain preciſe Sum.*
14. *All theſe Taxes do reſpect both Perſons and Things directly or indirectly.*

I.

1. The Manner of laying on the Taxes is different according to the Nature of the Tax.

THE Manner of laying on the Publick Taxes is different, according to the different Nature of the Taxes *a*, which ſhall be diſtinguiſhed in the Article that follows.

a See the following Article.

II.

2. Three kinds of Taxes.

The Taxes are of three ſorts, as hath been already obſerved *b*. Thoſe which are levied upon Perſons on account of their Goods, moveable and immoveable, and of the Profits which they make by their Labour and Induſtry. Thoſe which are raiſed upon Immoveables, without reſpect to the Perſons. And thoſe which are gathered from mobiliary things on which Duties have been laid, and which Duties are collected either in the Paſſage of thoſe things from Place to Place, or in the Commerce of them, or otherwiſe, without regard to the Perſons to whom they may belong. And for theſe three ſorts of Taxes there are three Manners of laying them on, which ſhall be explained in the Articles that follow.

b See the third Article of the preceding Section, and the Preamble of this Title.

III.

3. The firſt kind of Taxes is that on the Perſonal Eſtate.

The firſt ſort of Taxes is that which is called Perſonal, by which Perſons are aſſeſſed in a certain Sum in proportion to their Goods, and to what they acquire by their Labour and Induſtry *c*; which ſhall be the ſubject Matter of the third Section.

c Tributum capitis. *l.* 3. *ff. de cenſ.*
Divus Veſpaſianus Cæſarienſes colonos fecit, non adjecto, ut & juris Italici eſſent, ſed tributum his remiſit capitis. *l. ult.* §. 7. *eod.*

IV.

4. Second kind, Taxes on the Real Eſtate.

The ſecond ſort of Taxes is that which is raiſed on Immoveables, and is called a Real Tax, being laid on each Land and Tenement *d*; and which ſhall be explained in the fourth Section.

d V. tot. tit. ff. de cenſib.
Omne territorium cenſeatur. *l.* 4. *C. eod.*
See the firſt Article of the fourth Section of this Title.

V.

5. Third kind, Impoſts upon Proviſions and Merchandize.

The third ſort is that of the Duties or Impoſts which are levied on certain Proviſions and Merchandize which the Laws have made ſubject thereto *e*, which ſhall be the ſubject Matter of the fifth Section.

c Omnium rerum ac perſonarum, quæ privatam degunt vitam, in publicis functionibus æqua debet eſſe inſpectio. Hoc ideo dicimus quia nonnulli privatorum elicitas ſuffragio proferunt ſanctiones, quibus vectigalia vel cætera hujuſmodi, quæ inferri fiſco moris eſt ſibi adſerant eſſe conceſſa. Si quis ergo privatorum hujuſmodi reſcriptione nitatur, caſſa eadem ſit. Vectigalium enim non parva functio eſt, quæ debet ab omnibus, qui negotiationis ſeu tranſferendarum mercium habent curam, æqua ratione dependi. *l.* 6. *C. de vectig. & comm. V. T. h. T.*
V. T. ff. de public. & vectig.

VI.

6. The Manner of laying on the Tax on Perſonal Eſtates.

The Tax on Perſonal Eſtates in *France* is laid on after this manner: Firſt the King by an Order in writing regulates for every Year the Sum which he intends ſhould be raiſed throughout the whole Kingdom. And that Sum being divided among the Provinces, the Towns, and the other Places, the ſeveral Inhabitants of each Place are rated and aſſeſſed for the Share which they are to bear of the ſame *f*.

See the fourth Article of the firſt Section, and the third Section.

This Tax is laid on in France, *firſt by an Order of the King whereby he regulates the Sum Total of the Tax; and then it is divided among the Generalities, the Officers whereof, who are the Treaſurers of* France, *make a ſecond Diſtribution thereof among the Elections, who make a third Diviſion thereof, by which it is fixed and adjuſted what Proportion of the ſaid Tax is to be paid by each reſpective Town and other Place, where the Perſons appointed to make the particular Aſſeſſments make up Rolls or Liſts, wherein each particular Perſon is rated for what he ought to pay in proportion to his Goods, and the Gains he makes by his Induſtry.*

[The Manner of laying on and levying the Publick Taxes in *Great Britain* is thus: The King lays before the Houſe of Commons Eſtimates of the ſeveral ſorts of Expences which are judged to be neceſſary for the Service of the current Year. And the Commons

Commons having voted the neceſſary Subſidy or Aid to his Majeſty for defraying the ſaid Expences, they then conſider of proper Ways and Means to raiſe the Sums granted with the greateſt Eaſe and Equality to all his Majeſty's Subjects, partly by a Tax upon Lands and Tenements and Perſonal Eſtates, and partly by an Exciſe upon Liquors, and by Cuſtoms and Duties laid on Goods and Merchandize, and by other Ways, as they in their great Wiſdom judge to be meet and proper. Which Aids and Subſidies being ſettled and adjuſted by the Commons, and approved of by the Lords, have afterwards the Royal Aſſent, and thereby become Acts of Parliament, and are binding on all the Subjects.

In the Act of Parliament which grants an Aid to his Majeſty by a Land-Tax, there is a certain Sum fixed by Parliament, which is to be raiſed on Lands and Tenements, and Perſonal Eſtates throughout the whole Kingdom of *Great Britain*, according to the Proportions and in the manner preſcribed by the ſaid Act. Which Act ſpecifies the particular Sums that are to be raiſed in each County, City, Town, or other Place within the Kingdom, and the Proportion that is to be laid on the reſpective Lands, and Tenements, and Perſonal Eſtates of the Inhabitants of the ſaid Counties, Cities, Towns, and other Places. And in the ſaid Act Commiſſioners are named and appointed for the reſpective Counties, Cities, Towns, Boroughs and other Places throughout the Kingdom, for the better aſſeſſing, ordering, levying, and collecting of the ſeveral Sums of Money ſo limited and appointed to be raiſed. Which Commiſſioners are directed to aſcertain and ſet down in writing the ſeveral Proportions which ought to be charged upon every Hundred, Lathe, Wapentake, Rape, Ward, or other Diviſion, for and towards the raiſing and making up the whole Sum charged upon the whole County, City, or other Place, for which they are appointed Commiſſioners. And the ſaid Commiſſioners have power to name Aſſeſſors for each Pariſh, Townſhip, or Place within the reſpective Diviſions, who are to rate and aſſeſs the ſeveral Inhabitants of the Pariſh, Townſhip, or Place for which they are appointed Aſſeſſors. And the ſaid Commiſſioners do likewiſe appoint Collectors for each Pariſh, Townſhip or Place within their reſpective Diviſions, who are to collect and levy the Monies which are aſſeſſed, and to pay the ſame into the hands of the Receiver General, who is to pay the ſaid Monies into the Exchequer. *Coke* 4. *Inſt. ch.* 1. *See the ſeveral Acts of Parliament for the Land Tax.*]

VII.

7. The Manner of laying on the Tax on Real Eſtates.

The Tax on Real Eſtates in *France* is laid on in the ſame manner in each Province, and in each Town, and in every one of the other Places where it is in uſe, in proportion to what all the Lands and Tenements ſituate within any Diviſion ought to pay of the Tax that is laid upon the whole Kingdom. And the Officers who are named for that purpoſe do rate and aſſeſs each particular Land or Tenement in proportion to the Rent which they yield *g*.

g See the fourth Section.

VIII.

8. The Duties on Goods and Merchandizes are laid on by Regulations, which fix how much each ſort is to pay.

The Duties on Goods and Merchandizes are impoſed in *France* by Regulations which fix the Sum that each kind of Goods is to pay, and which is to be levied in proportion to the Value of the things, which are eſtimated according to their Nature, either by Number, Weight, or Meaſure. Theſe Duties are ſettled and adjuſted by the means of Tariffs, or Books of Rates, which contain the Tax or Impoſt that is laid on each ſort of the things that are taxed *h*.

h See the fifth Section.

IX.

9. The Tax on Perſonal Eſtates is liable to Changes.

It is to be obſerved concerning the Tax on Perſonal Eſtates, that it is ſubject to two ſorts of Changes. One on the part of the Prince who may make the Tax greater or leſſer; and the other on the part of thoſe who are to pay it, becauſe of the Events which may encreaſe or diminiſh the Fruits of the Ground in the reſpective Pariſhes, and the Goods of particular Perſons, and even the Number of the Inhabitants of a Place; which occaſions the augmenting or diminiſhing the Sums that are allotted to be levied on the reſpective Places, and the Aſſeſſments of particular Perſons *i*.

i See the fifth Article of the third Section.

X.

10. As is alſo the Tax on Real Eſtates.

The Tax upon Lands and Tenements may likewiſe receive Changes, either by reaſon of the Augmentation or Diminution of the general Tax, or becauſe of the Loſs which the Lands may have ſuſtained by an Inundation, or by other Accidents, or becauſe of Augmentations or Diminutions that may happen to every Eſtate; as if one plants in it, or builds on it, or if ſome Inundation or other Accident renders it barren, or deſtroys ſome Portion of it *l*.

l Illam æquitatem debet admittere cenſitor, ut officio ejus congruat, relevari eum, qui in publicis tabulis delato modo frui certis ex cauſis non poſſit; quare, & ſi agri portio chaſmate perierit, debebit per cenſitorem relevari. Si vites mortuæ ſint, vel arbores aruerint; iniquum, eum numerum inferi cenſui.

Quod ſi exciderit arbores, vel vites; nihilominus eum numerum profiteri jubetur, qui fuit cenſus tempore, niſi cauſam excidendi cenſitori probabit. *l.* 4. §. 1. *ff. de cenſib.*

See the fifth and ſeventh Articles of the fourth Section.

XI.

11. The Impoſts on Wares and Merchandizes are fixed.

The Impoſitions on Wares and Merchandizes in *France* receive no other Augmentations or Diminutions, beſides thoſe which the Prince makes, by Regulations which either raiſe or lower the Duties

Duties on the reſpective kinds of Goods, or on ſome of them. For whereas the Tax upon the perſonal Eſtates, and Lands belonging to particular Perſons may be greater or leſſer, altho the general Tax continue the ſame, becauſe of the Changes which have been mentioned in the two preceding Articles; yet the Taxes on Wares and Merchandizes being laid not on any one Thing in particular, but in general on the Kind in proportion to the Number, Weight, and Meaſure, the ſaid Tax cannot be changed except by a general and univerſal Change, which augments the Duty, or diminiſhes it *m*.

m This is an effect of the Nature of theſe ſorts of Impoſitions, each Thing being eſtimated on a certain foot in order to fix the Duty, which it would neither be juſt nor poſſible to raiſe or lower, in proportion to the different Eſtimations that might be made of the ſeveral Things of one and the ſame kind.

XII.

12. The Revenue of the Prince ariſing from the Cuſtoms laid on Goods and Merchandize, may riſe or fall; but the Produce of the Tax on real and perſonal Eſtates is always certain.

It follows from theſe Differences between theſe ſeveral ſorts of Impoſitions, that, with reſpect to the Prince, the Changes which may happen in the Taxes on real and perſonal Eſtates, do neither augment nor diminiſh the Sum that is to be paid into the Prince's Coffers. For the Sum Total which he has directed to be raiſed by the ſaid Tax throughout the whole Kingdom is to be levied; and the Changes reſpect only the particular Perſons, and the Lands and Tenements which are to contribute towards the general Tax, and which may be divided among them unequally, according as the ſaid Changes may give occaſion thereto. But as for the Duties and Impoſitions on Wares and Merchandizes, there may happen, and there does likewiſe often happen, many Changes which augment or diminiſh the Income of that Branch of the Revenue, altho the Duty on each kind of Goods continues to be the ſame. For the Commerce of a Merchandize may increaſe or diminiſh: There may likewiſe be a greater or leſs Conſumption of the Things ſubject to the ſaid Duties: Some of them may grow rarer, or it may happen that ſome ſort of Merchandize is not any more imported into a Kingdom where it was formerly in uſe *n*.

n This a Conſequence of the preceding Articles.

XIII.

13. The yearly produce of the Exciſe and Cuſtoms cannot be fixed at any certain preciſe Sum.

It follows from the ſame Differences between theſe ſeveral Impoſitions, that whereas in the Taxes on perſonal Eſtates, and upon Lands and Tenements in *France*, the Prince may fix a certain Sum to be raiſed thereby throughout the Kingdom; he cannot fix in the ſame manner the Sum to be raiſed by Duties or Impoſitions on Wares and Merchandizes; ſeeing every Year there may happen Changes which make it impoſſible to fix the Produce of that Branch of the Revenue at any certain preciſe Sum. And it is for this Reaſon that theſe ſorts of Taxes are farmed out either by Cant or Auction, or by Contract with particular Perſons, to whom the King aſſigns over his Right in conſideration of a certain Sum of Money *o*. And he might likewiſe let out to Farmers the Tax on real and perſonal Eſtates, according as the Circumſtances of the Times, and the Conditions of the Contract may make that Method more advantageous than levying the Tax by the hands of the Officers who are appointed for that Service.

o Publicani dicuntur qui publica vectigalia habent conducta. *l.* 12. §. *ult. ff. de publ. & vectigal.*

Publicani autem ſunt, qui publico fruuntur. Nam inde nomen habent, ſive fiſco vectigal pendant, vel tributum conſequantur: & omnes qui quid a fiſco conducunt, recte appellantur publicani. *l.* 1. §. 1. *eod.*

XIV.

14. All theſe Taxes do reſpect both Perſons and Things directly or indirectly.

Altho all theſe ſorts of Impoſitions of the ſaid ſeveral Taxes have a direct relation either barely to Perſons, or barely to Things; yet there is not any one of them which does not affect the Things, and alſo oblige the Perſons. Thus, the Tax on the real Eſtate regards thoſe who are the Proprietors or Poſſeſſors of the Lands and Tenements, or who reap the Profits of them, altho the Tax does not particularly mention them. Thus, the Duties and Impoſts on Goods and Merchandizes reſpect thoſe who are the Owners of them, altho they be not named, nor known. Thus, the Tax on perſonal Eſtates affects the Goods of the Perſons who are aſſeſſed, altho the Aſſeſſments do not make any mention of their Goods *p*.

p This is a Conſequence of the preceding Articles.

SECT.

The Rule of this Text may be applied to the Tax on perſonal Eſtates, and it is uſually applied to it.

SECT. III.

Of the Aſſeſſments of particular Perſons for their Perſonal Eſtates.

The CONTENTS.

1. *The Tax for Perſonal Eſtate is impoſed on the Head of the Family.*
2. *Widows and unmarried Women may be aſſeſſed.*
3. *Children who are emancipated, altho they be not married, are aſſeſſed.*
4. *The Aſſeſſments ought to be in proportion to the Goods.*
5. *In aſſeſſing the Goods, the Charges ought to be deducted.*
6. *Every one is aſſeſſed in the place of his Abode.*
7. *Aſſeſſments made in the place of one's Abode, take in the perſonal Eſtate which they have elſewhere.*
8. *Equity to be obſerved in Aſſeſſments.*
9. *The Aſſeſſments of particular Perſons are made by the Aſſeſſors.*
10. *The Aſſeſſors cannot exempt themſelves.*
11. *Aſſeſſments of Offices.*
12. *One may apply for a Mitigation of their Aſſeſſment.*
13. *The Effect of the Mitigation.*
14. *Another way of obtaining a Mitigation of one's Aſſeſſment.*

I.

1. The Tax for perſonal Eſtate is impoſed on the Head of the Family.

THE Taxes which reſpect perſonal Eſtates are impoſed in each Town, and in each Place, not upon every individual Perſon in particular, as upon every one of thoſe who compoſe a Family; but upon every Head of a Family, in proportion to his Goods and his Acquiſitions by his Induſtry. For it is becauſe of their Goods and Induſtry that particular Perſons are aſſeſſed *a*.

a See the third Article of the firſt Section.

II.

2. Widows and unmarried Women may be aſſeſſed.

Widows and unmarried Women, who are Heads of a Family, may be aſſeſſed as well as Men, but not Women who are married; for their Husbands are aſſeſſed for their own Goods, and alſo for the Goods of their Wives. But Wives who have a Separation of Goods may be aſſeſſed: for ſince they enjoy their Goods independently of their Husbands, they ought alſo to bear this Burden. *b*.

b Patrimoniorum munera mulieres etiam ſuſtinere debent. *l.* 9. *C. de muner. patr.*

III.

3. Children who are emancipated, altho they be not married, are aſſeſſed.

When Children are emancipated, whether they have Children of their own, or whether they have none, and whether they be married or not, they are aſſeſſed, if they have any Goods, or any Acquiſitions by their Induſtry. For the Emancipation makes them Heads of a Family *c*.

c This is a Conſequence of the firſt Article.

IV.

4. The Aſſeſſments ought to be in proportion to the Goods.

The Aſſeſſments of every Family are laid upon him who is Head of it, according to the Share which he ought to bear of the Sum that is to be levied on the Place of his Abode, in proportion to his Goods, and to the Goods of the other Families inhabiting the ſame place, ſo as that the Strong may help out the Weak. So that according to the greater or leſſer Value of the Goods of each Family, their Aſſeſſments ought to be greater or leſſer *d*.

d Ita ut relevato onere rei quod imminet fatigatis, tranſlatio in eos qui integris viribus florent, & adſcriptio tributorum æqua lance dividatur. *l.* 10. *C. de fund. patrim.*

The Reader muſt not forget, as to the Quotations of Texts out of the Roman *Law, in relation to this Matter, the laſt Remark made in the Preamble to this Title.*

V.

5. In aſſeſſing the Goods, the Charges ought to be deducted.

Seeing the Aſſeſſments ought to be made on the foot of the Goods, and of the Acquiſitions by Induſtry, and that every one has more or leſs Income from his Eſtate, and Profit by his Induſtry, in proportion to the Charges of his Condition, the Number of his Children, the Debts which he owes, the Loſſes which he may have ſuſtained, and other Cauſes which may leſſen and diminiſh the clear Profit which he might otherwiſe make by the Income of his Eſtate, and by his Induſtry: The Aſſeſſments for perſonal Eſtates ought to be made in proportion to the Goods, in ſuch a manner, as to join to this Proportion that of the Conditions of the Perſons, of the Debts which they owe, and of their other Charges, that every one may be aſſeſſed in that Sum which theſe Proportions joined together may demand. And as there happen every Year divers Changes in the Eſtates of Families, and in their Charges, and that likewiſe the Tax

may

may be raiſed or diminiſhed, for this reaſon the Aſſeſſments are renewed every Year *e*.

e This is a Conſequence of the preceding Article.

VI.

6. Every one is aſſeſſed in the place of his Abode.

Since Aſſeſſments for perſonal Eſtates reſpect directly the Perſons without mention of their Goods, altho they are to be made in conſideration of their Goods; every one is aſſeſſed in the Place of his Abode, and not in the Places where their Goods may chance to be ſituated *f*.

f Intributiones quæ agris fiunt, vel ædificiis, poſſeſſoribus indicuntur: munera vero quæ patrimoniorum habentur, non aliis quam municipibus vel incolis. *l. 6. §. ult. ff. de muner. & hon.*

Originis ratione, ac domicilii voluntate ad munera civilia quemque vocari, certiſſimum eſt. *l. 6. C. de inc. & ubi quiſque.*

Altho theſe Texts have relation to other ſorts of Charges, yet they may be applied to Taxes.

VII.

7. Aſſeſſments made in the place of one's Abode take in the perſonal Eſtate which they have elſewhere.

Altho Aſſeſſments on account of perſonal Eſtates expreſs only the Perſons who are aſſeſſed, without making any mention of their Goods, yet it is for their whole perſonal Eſtate that the Aſſeſſment is made: and the ſame is regulated in proportion not only to the Goods which they have in the place of their Abode, but alſo thoſe which they have elſewhere, excepting the Immoveables which they may chance to have in another place, which is ſubject to the Tax on real Eſtates; for theſe Goods bear their Charge in the Places where they are ſituated *g*.

g This is a Conſequence of the preceding Articles.

VIII.

8. Equity to be obſerved in Aſſeſſments.

In order to ſettle the foot on which the Aſſeſſments for perſonal Eſtates are to be made, it behoveth to begin by taking out of the Number of thoſe who are to contribute, ſuch as have any one of the Exemptions which ſhall be explained in the ſeventh Section, and then to diſtribute the Sum which is to be raiſed in the Place among all the reſt of the Inhabitants of the ſame, in proportion to the Share which every one ought to bear thereof, according as it is greater or leſſer, and as every one has more or leſs Goods, and Profits by his Induſtry *h*.

h See the fourth Article.

IX.

9. The Aſſeſſments of particular Perſons are made by the Aſſeſſors.

Seeing the Aſſeſſment of Perſons for perſonal Eſtates ought to be made with that Equity which is due to the ſeveral Regards that ought to be had to the Conditions, the Goods and Acquiſitions of the Perſons, and to their Charges, it cannot be rightly made but by Perſons who have a thorough knowledge of the Condition of the Families which are to be aſſeſſed. Thus, in order to make this Aſſeſſment, choice is made of the Inhabitants of the ſame Place, and of different Conditions, who are named every Year; and the Name of Aſſeſſors is given to the Perſons to whom this Function is committed *i*.

i Nec inſpectio, nec peræquatio fiat aliter quam ex ſcripta juſſione principis. *l. ult. C. de ann. & trib.*

This Text may be applied to the Impoſition of Taxes, which are laid on purſuant to the Regulations for that purpoſe by Perſons who are called Aſſeſſors, and who are choſen by the Inhabitants of the reſpective Pariſhes, as having knowledge of the Eſtates and Charges of thoſe who are to be aſſeſſed.

X.

10. The Aſſeſſors cannot exempt themſelves

The Aſſeſſors cannot be Judges in their own Cauſe; and therefore their Aſſeſſment remains on the ſame foot as it was before their Nomination: And they cannot eaſe themſelves of their former Aſſeſſment, except in ſo far as the Tax is leſſened with reſpect to all the Inhabitants in general. But if they have cauſe to ſhew why they ought be eaſed in their Aſſeſſment, they may alledge the ſame before the proper Judges, in order to have a Redreſs therein, in the ſame manner as in the exorbitant Aſſeſſments of other particular Perſons, as ſhall be ſhewn in the twelfth Article. Neither can they diſcharge or eaſe their Wives, their Children, or other Relations *l*.

l Generali lege decernimus neminem ſibi eſſe judicem, vel jus ſibi dicere debere: in re enim propria iniquum admodum eſt alicui licentiam tribuere ſententiæ. *l. un. C. ne quis in ſua cauſa jud.*

Qui juriſdictioni præeſt, neque ſibi jus dicere debet, neque uxori, vel liberis ſuis, neque libertinis, vel cæteris quos ſecum habet. *l. 10. ff. de juriſdic.*

It is the ſame thing as to Aſſeſſors; for it is a kind of Judgment which they render in ſettling the Aſſeſſments.

See the ninth Article of the eighth Section.

XI.

11. Aſſeſſments of Offices.

Since it frequently happens in little Places, that there are ſome Inhabitants thereof

thereof, who by virtue of their Offices and their great Eſtates take ſo much Authority upon them, as that the Aſſeſſors dare not aſſeſs them in the juſt proportion which they ought to bear; this Abuſe is remedied by making Application to the proper Judges of ſuch Caſes, who regulate their Aſſeſſments; for which reaſon they are called Aſſeſſments of Office, becauſe they are made independently of the Function of the Aſſeſſors, and by the Office of the Judges who are to take cognizance of the ſaid Matters, and to aſſeſs thoſe Perſons upon a juſt and equitable foot with their Neighbours *m*.

m See the Text cited on the following Article.

It is both juſt and neceſſary to ſupply by this means the Injuſtice and the Weakneſs of the Aſſeſſors, who favour theſe ſorts of Perſons to the prejudice of others.

Peræquatores ac diſcuſſores ſi incurrerint culpam negligentiæ vel gratiæ, non ſolum bonorum jacturam, verum etiam annonarum in quadruplum mulctam ſubire debebunt: ea vero, quæ in damnum provincialium fuerint accepiſſe convicti, in quadruplum cogentur exolvere. *l. 6. C. de cenſib. & cenſ.*

See the fourth Article of the Regulation of the Tax on real and perſonal Eſtates for the Year 1600.

XII.

12. One may apply for a Mitigation of their Aſſeſſment.

If the particular Perſons who are aſſeſſed complain that their Aſſeſſment is exceſſive, and deſire that it may be moderated, whether it be that the Aſſeſſors refuſe to do them Juſtice, or that the Value of their Eſtates, and the greatneſs of their Charges was not ſufficiently known, or that they have ſuſtained Loſſes; they may ſue for Redreſs before the proper Judges againſt thoſe who repreſent the Community, whether they be Sheriffs, Conſuls, or others. And in order to judge of their Demand for a mitigation of their Aſſeſſments, the Officers whoſe buſineſs it is to hear and determine all ſuch Complaints, name Perſons who are called skilful Perſons, or Arbitrators, whom the Parties on both ſides agree to, or whom the Judges name of their own accord, purſuant to the Rules which ſhall be explained in their proper place. And the ſaid Arbitrators, after having examined the Roll of the Aſſeſſments, the Circumſtances of the Plaintiff, as to the Income of his Eſtate, and the Charges with which the ſame is burdened, and the other Writings produced by the reſpective Parties, regulate the Aſſeſſment complained of, and may either confirm it, or mitigate it, as they ſhall judge reaſonable *n*.

n Quoniam tabularii civitatum per colluſionem potentiorum ſarcinam ad inferiores transferunt, jubemus, ut quiſquis ſe gravatum probaverit, ſuam tantum priſtinam profeſſionem agnoſcat. *l. 1. C. de cenſib. & cenſitor.*

XIII.

13. The Effect of the Mitigation.

The Defalcation which he who complained of his Aſſeſſment may obtain, will not excuſe him from paying the Sum he is aſſeſſed at proviſionally; for it is neceſſary that the whole Sum which is laid upon the Place, be levied without any diminution *o*. But care is taken to do him Juſtice afterwards in the following Years.

o This is an Effect of the Privilege of Monies granted for the Uſe of the Publick.

[The Act for the Land-Tax in *England* impowers the Commiſſioners, upon Complaint made to them, to abate and leſſen the Aſſeſſments for that Year, and does not poſtpone the granting Relief to the ſubſequent Year.]

XIV.

14. Another way of obtaining a Mitigation of one's Aſſeſſments.

Beſides this way of making a Complaint in general terms of their being over-rated in the Aſſeſſment, there is another way, which is called Compariſon; by which the Party who complains is obliged to name ſome Perſon among thoſe who are aſſeſſed with him, whom he alledges to be under-rated, and upon whom he deſires that the Overplus of his Aſſeſſment may be laid. So that it is between them two that the Queſtion is to be decided, what ſhare each of them ought to pay of the Sum which their two Aſſeſſments amount to *p*.

p Qui gravatos ſe eſſe a peræquatoribus conqueruntur, & injuſto oneri impares eſſe proclamant, competitionis habeant facultatem: ut quid remiſſum gratia, quidve interceptum fuerit fraude convincant, & ex eo levamen accipiant, quod per deformia & criminoſa commercia ſibi impoſitum eſſe deplorant, ut aliis demeretur. *l. 5. C. de cenſib. & cenſitor.*

Ut quod ei fuerat ſuperfuſum ille cognoſcat quem debitæ functioni fraus clandeſtina ſubtraxerat. *d. l.*

This way of Compariſon would not be attended with any Inconveniencies, if it were circumſcribed to that of leaving him who complains of his Aſſeſſment, at liberty to produce Inſtances of other Perſons who are aſſeſſed at a much leſs Sum than he is, in proportion to their Eſtates; which is the Method when a Complaint is received in general terms. But when one ſingles out another Perſon, in order to have a part of his Aſſeſſment thrown upon him, this way may indeed be uſeful to the Publick, but is attended with this bad Conſequence, that it is often an occaſion of Quarrels and Enmities among Neighbours.

SECT. IV.

Of Taxes on Immoveables.

The CONTENTS.

1. *In what manner the Tax on Real Eſtates is laid on.*
2. *This Tax is impoſed in the Places where the Lands and Tenements are ſituated.*
3. *The Form of the Impoſition.*
4. *In what manner the Taxes on Lands and Tenements oblige the Perſons.*
5. *The Tax on each Land or Tenement may be raiſed or leſſened according to the Changes that happen to the ſaid Land or Tenement.*
6. *The Rate at which a Land or Tenement is aſſeſſed, is independent of the other Goods of the Proprietor or Poſſeſſor thereof.*
7. *The Tax which is loſt upon one Eſtate is caſt upon the others.*
8. *The Duty of thoſe who make the Aſſeſſments for the Land Tax to inform themſelves of the Changes.*
9. *The whole Eſtate is liable for the whole Tax.*
10. *One may apply for a Diminution of their Aſſeſſment in the Land Tax.*

I.

1. In what manner the Tax on Real Eſtates is laid on.

THE Taxes on Immoveables, which are called Taxes on the Real Eſtate, are impoſed in the Places where the ſaid Tax is received on each Eſtate, in proportion to what the Revenue which they yield is able to bear of the Sum Total that is to be levied on all the Lands and Houſes of that Place, eſtimating them all according as their Revenue is more or leſs conſiderable *a*.

a Omne territorium cenſeatur. *l.* 4. *C. de cenſib. & cenſit.*

Ut ſterilia atque erema his quæ culta vel opima ſunt compenſentur. *D. l.*

II.

2. This Tax is impoſed in the Places where the Lands and Tenements are ſituated.

The Taxes on Lands and Tenements are laid on in the Places where the Lands and Tenements are ſituated, and not in the Places where the Perſons to whom they belong inhabit. For they are impoſed on the Lands and Tenements themſelves which are ſubject to the ſaid Tax, without any regard to the Perſons, whether they be Proprietors or Poſſeſſors thereof *b*.

b Is qui agrum in alia civitate habet, in ea civitate profiteri debet, in qua ager eſt. Agri enim tributum in eam civitatem debet levari in cujus territorio poſſidetur. *l.* 4. §. 2. *ff. de cenſib.*

III.

3. The Form of the Impoſition.

The Impoſition on each Land or Tenement is diſtinguiſhed by the Nature of the Land or Tenement, by its Situation, by its Extent, and by its Confines *c*.

c Forma cenſuali cavetur, ut agri ſic in cenſum referantur nomen fundi cujuſque, & in qua civitate & quo pago ſit, & quos duos vicinos proximos habeat. *l.* 4. *ff. de cenſibus.*

Quot jugerum ſit. *D. l.*

IV.

4. In what manner the Taxes on Lands and Tenements oblige the Perſons.

Altho the Taxes on Lands and Tenements do directly affect only each Land and Tenement that is ſubject thereto; yet ſeeing the ſaid Tax ought to be taken out of the Revenues thereof, the Charge of it follows thoſe who have enjoyed the Fruits, and received the Rents. Thus the Proprietors, the Poſſeſſors, the Mortgagees, the Uſufructuaries and their Tenants, and others who may have enjoyed by other Titles, ought to pay theſe Taxes. And altho the Fruits themſelves be no more in being, yet the other Goods of the ſaid Perſons ought to anſwer for them *d*.

d In tributiones quæ agris fiunt, vel ædificiis, poſſeſſoribus indicuntur. *l.* 6. §. *ult. ff. de mun. & honor.*

V.

5. The Tax on each Land or Tenement may be raiſed or leſſen'd according to the Changes that happen to the ſaid Land or Tenement.

Seeing the Tax on each Land or Tenement ought to be impoſed on the foot of the Revenue that it may yield, it may be either raiſed or leſſened in proportion to the Augmentation or Diminution which may happen in the Revenue. Thus the Revenue of an empty Space of Ground in a Town may be augmented by building a Houſe or Shop upon it. Thus a Country Farm may be improved by making a Plantation or other Improvement in it. Thus, on the contrary, Lands and Tenements may periſh or be diminiſhed, as a Houſe by Fire or by Decay; a Ground may be carried away either in whole or in part by a Flood. And in all theſe Caſes, and others of the like nature, the Tax may be either augmented or diminiſhed in proportion, and may even ceaſe entirely if the Land or Houſe periſhes *e*.

e Quiſquis vitem ſuccideris aut feracium ramorum fœtus vetaverit, quo declinet fidem cenſuum, & mentiatur callidæ paupertatis ingenium, mox defectus competenti indignationi ſubjiciatur. *l.* 2. *C. de cenſib.*

Illam

Illam æquitatem debet admittere cenſitor, ut officio ejus congruat relevari eum qui in publicis tabulis delato modo frui certis ex cauſis non poſſit. Quare & ſi agri portio chaſmate perierit, debebit per cenſitorem relevari. Si vites mortuæ ſint, vel arbores aruerint, iniquum, eum numerum inſeri cenſui. Quod ſi exciderit arbores vel vites, nihilominus eum numerum profiteri jubetur qui fuit cenſus tempore, niſi cauſam excidendi cenſitori probabit. *l.* 4. §. 1. *ff. eod.*

See the tenth Article of the ſecond Section.

VI.

6. The Rate at which a Land or Tenement is aſſeſſed, is independent of the other Goods of the Proprietor or Poſſeſſor thereof.

The particular Impoſitions on each Land or Tenement are independent of all manner of regard for thoſe who are the Proprietors or Poſſeſſors of them. And whether they be rich or poor, the Lands and Houſes are aſſeſſed on the ſame foot. For it is on the Lands and Houſes, and in proportion to the Rent which they may yield, that this Burden ought to be laid, without regard to any thing elſe *f*.

f Onus fructuum hæc impendia ſunt. *l.* 13. *ff. de imp. in res dot. fact.*

Indictiones non perſonis ſed rebus indici ſolent: ideo ne ultra modum earumdem poſſeſſionum quas poſſidet conveniaris præſes provinciæ proſpiciat. *l.* 3. *C. de annon. & trib.*

VII.

7. The Tax which is loſt upon one Eſtate is caſt upon the others.

In order to ſettle the Proportion that each Land or Tenement is to pay, it is neceſſary to leave out of the Number of the Lands and Tenements of the Places where the Tax is to be levied, thoſe which may happen not to be ſubject to it, as alſo thoſe which have periſhed, or are become unfruitful by an Inundation, or other Accident, and to diſtribute the Tax among the others *g*.

g Cum divus Aurelianus parens noſter civitatum ordines pro deſertis poſſeſſionibus juſſerit conveniri, & pro his fundis qui Dominos invenire non potuerunt, quos præceperamus earumdem poſſeſſionum triennii immunitate percepta de ſolemnibus ſatisfacere, ſervato hoc tenore præcipimus, ut ſi conſtiterit ad ſuſcipiendas eaſdem poſſeſſiones ordines minus idoneos eſſe; eorumdem agrorum onera poſſeſſionibus & territoriis dividantur. *l.* 1. *C. de omn. agr. deſert.*

VIII.

8. The Duty of thoſe who make the Aſſeſſments for the Land Tax to inform themſelves of the Changes.

Altho there be no Change in the general Impoſition of the Land-Tax that is to be raiſed in any Place or Diviſion, yet ſince the particular Aſſeſſments of the ſeveral Lands and Houſes may be encreaſed or leſſened on account of the Changes explained in the fifth and ſeventh Articles, and that the Augmentation or Diminution of the Aſſeſſment of one particular Land or Houſe diminiſhes or angments the Aſſeſſments of ſome others; it is the Duty of thoſe who are entruſted with the Regulation of the ſaid Aſſeſſments, to inform themſelves of theſe Changes *h*.

h See the fifth and ſeventh Articles of this Section.

IX.

9. The whole Eſtate is liable for the whole Tax.

If an Eſtate which is ſubject to the Land Tax, and comprehended under one ſingle Aſſeſſment in the Diſtribution of the Sum that is to be raiſed in the Place where it lies, happens to be divided either among Coheirs, or by an Alienation of one part of it, or by ſome other means; each Portion of the ſaid Eſtate would be liable for the whole Sum that the ſaid Eſtate was aſſeſſed at; and he who ſhould be ſued for the whole Tax would be compelled to pay it, and he would recover the Portions of the others *i*.

i Cum poſſeſſor unus expediendi negotii cauſa tributorum jure conveniretur, adverſus cæteros quorum æque prædia tenentur, ei, qui conventus eſt, actiones a fiſco præſtantur, ſcilicet omnes pro modo prædiorum pecuniam tributi conferant. *l.* 5. *ff. de cenſib.*

X.

10. One may apply for a Diminution of their Aſſeſſment in the Land Tax.

If the Proprietors or Poſſeſſors of Lands and Tenements that are ſubject to the Land Tax, pretend that they are exorbitantly taxed in compariſon of others, they may complain of it, and ſue for Redreſs in the Way and Method that is practiſed in the Places where the ſaid Lands and Tenements are ſituated *l*.

l See the Text cited on the fifth Article, and that of the fourteenth Article of the preceding Section.

SECT. V.

Of the Impoſitions laid on Goods and Merchandize.

The CONTENTS.

1. *Theſe Duties are of ſeveral ſorts.*
2. *How they are collected.*
3. *The ſame.*
4. *How Doubts, whether ſome particular Merchandizes be liable to the Duty, ought to be determined.*
5. *Duty upon Salt.*
6. *Difference between theſe Impoſts, and the Tax on Lands and Perſonal Eſtates.*
7. *The Duties of the Exciſe and Cuſtoms in ſome Countries are let to Farm.*
8. *After the Farms have been adjudged to the higheſt Bidder for a certain time, others are admitted to outbid him.*

9. *The Farmers, and others who contract for the ſaid Duties, are obliged to give Security.*
10. *A Condition of the Leaſes of theſe Duties, when they are farmed out.*

I.

1. *Theſe Duties are of ſeveral ſorts.*

THE Impoſitions on Goods and Merchandize are thoſe which are called by the Names of Exciſe, Cuſtoms, and other Appellations *a*; and they have all of them this in common, that they are levied on the things which are ſubject to them, and in the Places where the things are at the time when this Duty ought to be paid, as ſhall be explained by the Articles which follow.

a Vectigalia. *l.* 1. *C. de vectig. & comm.* Octavæ. *l.* 7. *C. eod.* Portorium. *l.* 203. *ff. de verb. ſignif.*

II.

2. *How they are collected.*

The Duties which are payable at the Paſſage or Entry of Goods and Merchandize into Towns and other Places where they are to be ſold, are due at the Paſſage or at the Entry. And thoſe who carry or tranſport them, whether it be upon their own account or on the account of others, ought to pay there the ſaid Duties at the time of their Paſſage or Entry *b*.

b Ex his tantum ſpeciebus quas de locis propriis unde conveniunt, huc deportant, octavarii vectigal accipiant. *l.* 8. *C. de vectig. & comm. V. l.* 203. *ff. de verb. ſignif.*

Theſe Duties, and the Ways of collecting them, depend on the Regulations which have made Proviſion therein.

III.

3. *The ſame.*

If this Duty is due on Goods which are not to paſs from one Place to another, ſuch as Wine which the Perſon who made it of his own Vineyard ſells by retail in the Place where it grew, it ought to be paid in the Place where the ſaid Goods are *c*.

c The Duty on ſuch things is collected in the manner preſcribed by the Regulations.

IV.

4. *How Doubts, whether ſome particular Merchandizes be liable to the Duty, ought to be determined.*

Seeing there is an infinite Number of different ſorts of Goods and Merchandizes, that there are ſome which are not liable to any Duty whatſoever, and that of thoſe which are not expreſly exempted, there may be ſome concerning which it may be doubted whether they are or are not comprehended under the Kinds expreſſed in the Regulations and Book of Rates, as being liable to the ſaid Duties; this Doubt is to be decided either by the Uſage, if there is any in relation to the ſaid Matter, or by the Conſiderations which may determine either for their being ſubject to the Duty, or for their being exempt from it; which depends on the Prudence of the Judges who are to take cognizance of the Matter, or on the Regulation thereof by the Sovereign, if the Difficulty be of ſuch importance as to require it *d*.

d In omnibus vectigalibus fere conſuetudo ſpectari ſolet. Idque etiam principalibus conſtitutionibus cavetur. *l.* 4. §. *ult. ff. de public. & vectig.*

Earum rerum vectigal quarum numquam præſtitum eſt, præſtari non poteſt. *l.* 9. §. 6. *eod.*

Res exercitui paratas, præſtationi vectigalium ſubjici non placuit. *D. l.* §. 7.

V.

5. *Duty upon Salt.*

We muſt reckon in the number of the Duties of this ſort that which is laid on Salt, which in *France* is different from the other Duties in this reſpect, that whereas the Commerce of all other Commodities is permitted to particular Perſons, that of Salt is not allowed to any within the Provinces where that Duty takes place, except to ſuch as are authorized by the Prince, who makes them Maſters of all the Salt within the ſaid Provinces, and they diſtribute it for the Price that is fixed; which comprehends, beſides the Value of the Salt, the Duty which the Prince gathers from it *e*.

e Publica vectigalia intelligere debemus ex quibus vectigal fiſcus capit: quale eſt vectigal portus, vel venalium rerum, item ſalinarum. *l.* 17. §. 1. *ff. de verb. ſignif.*

Qui ſalinas, & cretifodinas, & metalla habent, publicanorum loco ſunt. *l.* 13. *ff. de publican.*

Si quis ita hæredem inſtituerit, *Titius qua ex parte mihi ſocius eſt in vectigalia ſalinarum pro ea parte mihi hæres eſto.* l. 59. §. 1. ff. de hæred. inſtit.

VI.

6. *Difference between theſe Impoſts and the Tax on Lands and Perſonal Eſtates.*

There is this Difference between the Duties laid on Goods and Merchandizes, and the Taxes upon Perſonal Eſtates, and upon Lands and Houſes, that, as has been obſerved in another Place, the Total of the general Impoſition that is laid on Lands, and Houſes, and on Perſonal Eſtates, are fixed by the Sovereign at certain Sums which he ordains to be raiſed; whereas the general Impoſition which is laid on Goods and Merchandize cannot be fixed at any certain Sum: and there is nothing regulated but the Duty on each kind, without any certainty what the Sum Total will amount to *f*: For that varies conſtantly, for the Cauſes explained

f See the ſixth, ſeventh, and twelfth Articles of the ſecond Section.

in the twelfth Article of the ſecond Section.

VII.

7. *The Duties of the Exciſe and Cuſtoms in ſome Countries are let to farm.*

The Changes which render the total Sum ariſing from the Duties on Goods and Merchandize uncertain, induce them in *France* to let them out to Farm by Cant or Auction to the higheſt Bidder, or by Contract with thoſe who offer the beſt Condition, whether there be a publick Auction, or not *g*.

g Penes illum vectigalia manere oportet qui ſuperior in licitatione extiterit. *l.* 4. *C. de vectig. & comm.*

VIII.

8. *After the Farms have been adjudged to the higheſt Bidder for a certain time, others are admitted to outbid him.*

The Farms of the Duties ariſing by the Exciſe and Cuſtoms which are let by Cant or Auction to the higheſt Bidder, imply the Condition, that if within a certain time after they are adjudged to the higheſt Bidder, others outbid them in a certain Sum regulated by Uſe, they ſhall be put into the Place of the firſt Farmer. Which Uſage is noways unjuſt; becauſe, beſides that the Perſons to whom the Farms were firſt adjudged knew of this Uſage, and had their Leaſe only on this condition, it hath its Equity, which is founded on the Advantage that redounds thereby to the Publick *h*.

h Si tempora quæ in fiſcalibus auctionibus vel haſtis ſtatuta ſunt, patiuntur: cum etiam augmentum te facturam eſſe profitearis: ad rationalem noſtrum, ut juſtam uberioris pretii oblationem admittat. *l.* 4. *C. de fide & jur. haſt.*

Tempora adjectionibus præſtituta ad cauſam fiſci pertinent. Niſi ſi qua civitas propriam legem habeat. *l.* 1. *C. de vend. reb. civ.*

Idem reſpondit, ſi civitas nullam propriam legem habet de adjectionibus admittendis, non poſſe recedi a locatione vel venditione prædiorum publicorum, jam perfecta tempora enim adjectionibus præſtita ad cauſas fiſci pertinent. *l.* 21. §. *ult. ff. ad municip.*

This laſt Text confirms the Privilege which the Exchequer has in this particular, becauſe it oppoſes to it the Uſage of Adjudications in relation to Duties belonging to Towns, which have not this Privilege, unleſs the ſame be expreſly granted to them.

The Rule explained in this Article is eſtabliſhed by the Ordinances, which allow of the doubling and trebling the Farms of the Aids or Subſidies.

IX.

9. *The Farmers, and others who contract for the ſaid Duties, are obliged to give Security.*

The Conſequence of the Duties that are laid on Goods and Merchandize, and of thoſe which are laid on Salt, make it neceſſary to take Security from the Farmers, or thoſe who contract for the ſaid Duties; and the Conditions of the Engagement of the Sureties are regulated by the Leaſe or Contract which contains their Obligation *i*.

i Qui fidejuſſerint pro conductore vectigalis *in univerſam conductionem*, in uſuras quoque in jure conveniuntur: niſi proprie quid in perſona eorum verbis obligationis expreſſum. *l.* 2. §. 12. *ff. de adm. rer. ad civit. pert.*

[*In* England *every Receiver, Collector, or other Officer Accomptant to the King for any part of his Majeſty's Revenue, is, before his Entry upon the Office, bound with Surety or Sureties for his true Accompt and Payment.* Stat. 7. Edw. VI. cap. 1.]

X.

10. *A Condition of the Leaſes of theſe Duties, when they are farmed out.*

Whether it be that theſe Duties on Goods and Merchandize have been farmed out by Cant or Auction, or by Contract at a certain Price agreed for, the Conditions of the Farmers and Contracters, the Eaſes and Abatements which they may claim, and the other Conſequences of the Events, are regulated either by their Contract, or by the Conditions of their Leaſe, if Proviſion has been made therein for ſuch Caſes. And if there ſhould ariſe Difficulties unforeſeen which may concern the Intereſt of the Prince, they would be adjuſted by his Counſel. For the Intereſt which he may have in the ſaid Matter does not diveſt him of the general Adminiſtration of Juſtice within his Dominions, and of the Right of rendring Juſtice, or cauſing it to be render'd by his Miniſters even in the Cauſes where he himſelf is a Party; ſeeing he cannot acknowledge any other Authority beſides that which God hath put into his hands, and which he diſpenſes either by himſelf, or by his Miniſters *l*.

l This is a Conſequence of the Right of Sovereignty.

SECT. VI.

Of the levying of all ſorts of Publick Money.

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3. *The Privilege of Taxes.*
4. *They affect the Goods which the Perſon aſſeſſed has in other Places beſides that of his Abode.*
5. *The Land Tax affects the Lands which are charged therewith, as alſo the other Goods of thoſe who are in Arrear for the ſame.*
6. *The private Agreements between the Proprietors and Poſſeſſors of Lands cannot change the Order of levying the ſaid Tax.*

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7. *The Place where the Duties on Goods and Merchandizes are levied.*
8. *This Duty is levied on the thing it ſelf, which is ſeized for the Payment of it.*
9. *The Owner may relinquiſh the Goods for the Duty, or get it moderated.*
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12. *No body is compelled to aſſiſt in collecting the Impoſts on Goods and Merchandizes, as they are in the Tax on Real and Perſonal Eſtates.*
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15. *One ought not to be caſt into Priſon for not paying the Taxes.*
16. *The Taxes do not admit of any Compenſation.*
17. *Taxes do not preſcribe.*
18. *In doubtful Caſes thoſe who are indebted for Taxes, are favoured againſt the Exchequer.*

I.

1. Divers ſorts of Rules for levying the Publick Money.

AS there are three kinds of Impoſitions explained in the three preceding Sections, ſo there are three different ſorts of Rules which regard the levying of each of theſe three kinds; and there are alſo ſome Rules common to all the three, as will appear in the Articles which follow *a*.

a See the three preceding Sections.

II.

2. The Taxes for Perſonal Eſtates affect all the Goods of the Perſon who is aſſeſſed.

As the Taxes on perſonal Eſtates are levied on the Perſons on account of their Goods and the Profits which they make by their Induſtry, ſo they affect the ſaid Goods and the ſaid Profits. And the Collectors of the ſaid Taxes may by the bare Effect of the Aſſeſſments ſigned by the proper Officers, diſtrain the Fruits and the moveable Effects of the Party who is aſſeſſed, without any other Obligation or Condemnation. For theſe ſorts of Goods belonging to the Perſons aſſeſſed are bound and engaged by the bare Effect of the Aſſeſſment *b*.

b Fiſcus ſemper habet jus pignoris. *l.* 46. §. 3. *ff. de jur. fiſc.*

One may for the Tax on Real and Perſonal Eſtates diſtrain the Moveables and all ſorts of Mobiliary Effects, and alſo the Fruits of the Lands and Tenements, but not the Lands and Tenements themſelves. For with reſpect to the Immoveables, it ſufficeth that the Fruits thereof be hypothecated for the annual Charge of the Taxes.

[In the ſeveral Acts of Parliament in *England*, for granting an Aid to his Majeſty to be raiſed by a Land Tax, Power is given to the Collectors thereof, in caſe of Non-payment, to levy the Sum aſſeſſed, by Diſtreſs and Sale of the Goods and Chattels of ſuch Perſons as refuſe or neglect to pay, or diſtrain upon the Meſſuages, Lands and Tenements charged with any Sum or Sums of Money. *See the ſeveral Acts of Parliament for the Land Tax.*]

III.

3. The Privilege of Taxes.

This Mortgage of the Goods of thoſe who are aſſeſſed is privileged, and the Tax is preferred before all other Debts, except ſuch as have ſome privileged Mortgage on the thing that is diſtrained, for ſome of the Cauſes explained in the fifth Section of the Title of Pawns and Mortgages *c*.

c Reſpublica creditrix omnibus chirographariis creditoribus præfertur. *l.* 38. §. 1. *ff. de reb. auct. jud. poſſid.*

See the twenty third Article of the fifth Section of the Title of Pawns and Mortgages, and the fourth, fifth, and following Articles of the ſame Section in the Book of the Civil Law in its Natural Order.

IV.

4. They affect the Goods that the Perſon aſſeſſed has in other Places beſides that of his Abode.

Seeing the Aſſeſſments for Perſonal Eſtates are made on the foot of all the Goods which the Perſons aſſeſſed are poſſeſſed of, they affect not only the Goods they have in the Places of their Habitation; but even all their other Goods, in what Place ſoever they are ſituated, are bound for the ſame *d*.

d Illorum qui publica, ſive fiſcalia debent, omnia bona ſunt obligata. *l. ult. C. vectig. nov. inſt. n. p.*

V.

5. The Land Tax affects the Lands that are charged therewith, as alſo the other Goods of thoſe who are in Arrear for the ſame.

The Land Tax affects directly only the Lands which are charged therewith. But becauſe it is a Charge on the Fruits, it follows thoſe who have enjoyed them, whether they be Proprietors, Uſufructuaries or others. And ſince their Enjoyment of the Fruits makes them Debtors for the Tax due from the Lands, their other Goods are engaged for the ſame for the time that they enjoyed them *e*.

d Imperatores Antoninus & Verus reſcripſerunt, in vectigalibus ipſa prædia, non perſonas conveniri, & ideo poſſeſſores etiam præteriti temporis vectigal ſolvere debere. Eoque exemplo actionem ſi ignoraverint, habituros. *l.* 7. *ff. de publ. & vectig.*

Univerſa bona eorum qui cenſentur vice pignorum pro tributis obligata ſunt. *l.* 1. *C. in quib. cauſ. pign. vel hyp. tac. cont.*

VI.

6. The private Agreements between the Proprietors

Seeing the Land Tax affects the Land which is charged, and regards him who reaps the Fruits thereof, nothing can be done in derogation of the ſaid Mort-

gage

and Poſſeſſors of Lands cannot change the Order of levying the ſaid Tax.

gage by any Covenant between the Proprietor of the Land and other Perſon who has the Enjoyment of it. Thus when a Proprietor mortgages to his Creditor the Land that is ſubject to the ſaid Tax, and gives him the preſent Enjoyment and Poſſeſſion thereof, the Proprietor undertaking to pay the Tax, this Agreement would not diſcharge the Creditor from paying it, but he would be liable to pay the Tax becauſe of his Enjoyment of the Fruits *f*. Thus the Purchaſer of Lands or Tenements who ſhould ſtipulate that the Seller ſhould bear the Charge of the Tax, would nevertheleſs be anſwerable for it. For theſe private Agreements can make no change as to the Rights of the Exchequer, and they give only an Action of Relief againſt him who has undertaken to pay the Tax *g*.

f Inter debitorem & creditorem convenerat, ut creditor onus tributi prædii pignerati non agnoſceret: ſed ejus ſolvendi neceſſitas debitorem ſpectaret: talem conventionem quantum ad fiſci rationem, non eſſe ſervandam, reſpondi. Pactis enim privatorum formam juris fiſcalis convelli non placuit. *l.* 42. *ff. de pact.*

g Rei annonariæ emolumenta tractantes cognovimus hanc eſſe cauſam maxime reliquorum, quod nonnulli captantes aliquorum momentarias neceſſitates, ſub hac conditione fundos comparant, ut nec reliqua eorum fiſco inferant, & immunes eos poſſideant. Ideoque placuit, ut ſi quem conſtiterit hujuſmodi habuiſſe contractum, atque hac lege poſſeſſionem eſſe mercatum: tam pro ſolitis cenſibus fundi comparati, quam pro reliquis univerſis ejuſdem poſſeſſionis obnoxius teneatur. Cum neceſſe ſit eum qui comparavit, cenſum rei comparatæ agnoſcere: nec liceat cuiquam rem ſine cenſu comparare, vel vendere. *l.* 2. *C. ſine cenſ. vel rel. fund. comp. n. p.*

VII.

7. The Place where the Duties on Goods and Merchandizes are levied.

The Impoſitions on Goods and Merchandizes are levied on the things themſelves which are ſubject thereto, and in the Places where the Duty ought to be paid, whether it be at their Entry into a Port, or at a Paſſage, or in the Places where the Goods are to be ſold, or elſewhere, according to the Nature of the Impoſition, and the Regulations which have been made therein *h*.

h See the ſecond and third Articles of the fifth Section.

VIII.

8. This Duty is levied on the thing itſelf, which is ſeized for the Payment of it.

Altho the Owners of the Goods and Merchandizes which are ſubject to Duties do not appear, yet ſince the Impoſt is not laid on any Perſon in particular, but only in general on each kind of the ſeveral Goods and Merchandizes, the ſame is levied on every one of them according as its Nature ſubjects it thereto. And this Duty is levied on the thing itſelf, which is ſeized and ſtopped in the Place where the Duty ought to be paid *i*.

i Ad res ejus omnemque ſubſtantiam exactor accedat. *l.* 2. *C. de exact. trib.*

If it is lawful to ſeize the Goods for all manner of Contributions, much more is it lawful to ſeize the things themſelves which are ſubject to the Duty.

IX.

9. The Owner may relinquiſh the Goods for the Duty, or get it moderated.

If the Owner was preſent at the Entry of the Goods or Merchandizes which he owned to be his, and that they were delivered to him upon his undertaking to pay the Duty afterwards, he would be perſonally bound for it, and his other Goods would be engaged for the ſaid Duty. But if it ſhould happen that the thing were not worth the Duty, and that the Owner ſhould chuſe rather to abandon it, than to take it, and to pay the Duty, he would be quit by abandoning the thing, if the Impoſt were not moderated. For it is only on account of the thing itſelf that this Duty is due *l*.

l Indictiones non perſonis, ſed rebus indici ſolent. Ideo ne ultra modum earumdem poſſeſſionum quas poſſides conveniaris, præſes provinciæ proſpiciat. *l.* 3. *C. de annon. & trib.*

This Text may be applied to this Rule.

X.

10. If one defrauds the King of the Cuſtoms, the Goods are confiſcated.

If the Owners of theſe ſorts of things committed any manner of Fraud to avoid paying the Duty thereof, as if for avoiding Payment of the Cuſtoms of Goods at their Entry, they ſhould run them, the Fraud being diſcovered, the Goods and Merchandizes would be confiſcated. And this Confiſcation would take place againſt the Heir or Executor; for he who had committed the Fraud, had already incurred this Penalty. And if there were other Puniſhments ordained by the Statutes and Ordinances, thoſe who were guilty of the Fraud, and their Accomplices, would be liable to them *m*.

m Commiſſa vectigalium nomine etiam ad hæredem tranſmittuntur. Nam quod commiſſum eſt ſtatim deſinit ejus eſſe qui crimen contraxit, dominiumque rei vectigali acquiritur. Ea propter commiſſi perſecutio, ſicut adverſus quemlibet poſſeſſorem, ſic & adverſus hæredem competit. *l.* 14. *ff. de public. & vectig. & com.*

Fraudati vectigalis crimen ad hæredem ejus qui fraudem contraxit, commiſſi ratione tranſmittitur. *l.* 8. *eod.*

XI.

11. Ignorance does not excuſe him who

We reckon as a Fraud in this matter, all the Ways which are made uſe of to con-

has defrauded the King of the Customs.

conceal from the knowledge of the Persons imployed to collect these Duties the things which are liable to them, whether it be that he who uses this Way does it with design to cheat, knowing well enough that they ought to pay the Duty, or whether he be ignorant of it. And his Goods and Merchandizes will be confiscated *n*. For this Duty being imposed by a publick Law, it is presumed to be known by every body; and if Ignorance were a sufficient Excuse, every one would plead it *o*.

n Licet quis se ignorasse dicat, nihilominus eum in pœnam vectigalis incidere, divus Adrianus constituit. Divi quoque Marcus & Commodus rescripserunt, non imputari publicano, quod non instruxit transgredientem: sed illud custodiendum ne decipiat profiteri volentis. *l.* 16. §. 5 *&* 6. *ff. de public. & vectig. & comm.*

o See the ninth Article of the first Section of the Rules of Law, in the first Tome of the Civil Law in its Natural Order.

XII.

12. Nobody is compelled to assist in collecting the Imposts on Goods and Merchandizes, as they are in the Tax on Real and Personal Estates.

There is this Difference between the levying of the Imposts on Goods and Merchandizes, and that of the Tax on Real and Personal Estates, that no body is compelled to assist in levying the said Imposts, no more than to take them to farm, unless they engage therein voluntarily; and it belongs to the Farmers and others who have contracted for the Duties of this kind, to take care of levying them *p*. But in levying the Tax on Lands and Personal Estates, one may be compelled to assist therein; for it is one of the Functions of those Offices which are called Municipal, of which notice shall be taken in its due place *q*. Thus the Sheriffs or Consuls of the respective Towns and other Places, or the other sorts of Officers, or Overseers, according to the Usage of the several Places, are obliged to levy the said Tax. For which reason this Imployment of collecting the publick Taxes has nothing in it that is mean or dishonest, and it does not any ways derogate from the Dignity which they may have by other Offices *r*.

p Ad conducendum vectigal invitus nemo compellitur. Et ideo impleto tempore conductionis elocanda sunt. *l.* 9. §. 1. *ff. de public. & vectig.*

Cum quinquennium, in quo quis pro publico conductore se obligavit, excessit; sequentis temporis nomine non tenetur, idque principalibus rescriptis exprimitur: divus etiam Adrianus in hæc verba rescripsit, valde inhumanus mos est isti quo retinentur conductores vectigalium publicorum & agrorum si tantidem locari non possint, nam & facilius invenientur conductores si scierint fore, ut, si peracto lustro discedere voluerint, non teneantur. *l.* 3. §. 6. *ff. de jure fisci.*

Si cum Hermes vectigal octavarum in quinquennium conduceret, fidem tuam obligasti, posteaque spacio ejus temporis expleto, cum idem Hermes in conductione, ut idoneus detineretur non consensisti, sed cautionem tibi reddi postulasti: non oportere te de posterioris temporis periculo adstringi, competens judex non ignorabit. *l.* 7. *C. de locat. V. l.* 11. *eod.*

q See the first Article of the fourth Section of the sixteenth Title.

r Exigendi tributi munus inter sordida munera non habetur. Et ideo decurionibus quoque mandatur. *l.* 17. §. 7. *ff. ad municip. & de in.*

[*In the Acts of Parliament in* England *by which the Land Tax is imposed, Commissioners are therein named for putting the said Acts more effectually in Execution, and they have Power to compel Persons to serve in making the several Assessments, and collecting the Sums that are assessed.*]

XIII.

13. Punishments of the Misdemeanours of those who collect these Duties.

Since the levying of the Duties which are imposed on Goods and Merchandizes at their Entry into Ports, or at their Passage from one Place to another, or otherwise, is liable to Concussions and Violences which those Persons who are employed to collect the said Duties may commit, because of the Facility they have of turning into Violence the Force which they have in their hands, and of cheating either in the Duty itself, or in the Quality or Quantity of the things which are subject to it, or otherwise; Punishments are therefore ordained for these sorts of Concussion and Violence, and they are repressed according to the Quality of the Fact and the Circumstances, pursuant to the Regulations which have been made therein *s*.

s Quantæ audaciæ, quantæ temeritatis sint publicanorum factiones, nemo est qui nescial; idcirco prætor ad compescendam eorum audaciam hoc edictum proposuit. *l.* 12. *ff. de publ. & vectig. & comm.*

Prætor ait, quod publicanus ejus publici nomine vi ademerit quodve familia publicanorum, si id restitutum non erit, in duplum, aut si post annum agetur, in simplum judicium dabo. Item si damnum injuriæ furtumve factum esse dicetur, judicium dabo. Si ad quos ea res pertinebit non exhibebitur, in dominos sine noxæ seditione judicium dabo. *l.* 1. *ff. eod.*

XIV.

14. All the Goods of Persons owing any sort of Taxes are engaged for the same.

It is common to the recovering of all the different sorts of Taxes, that all the Goods of the Persons who are indebted on that score, are engaged for the Payment of them, whether the Tax be laid on Persons, as the Tax on Personal Estates, or whether it affect certain Things, as the Tax on Lands and Houses, and the Imposts on Goods and Merchandize *t*.

t Illorum qui publica sive fiscalia debent, omnia bona sunt obligata. *l. ult. de vectig. nov. inst. n. p.*

Res

Res eorum qui fiſcalibus debitis per contumaciam ſatisfacere differunt, diſtrahantur, comparatoribus data perpetua firmitate poſſidendi. *l.* 1. *C. de cap. & diſtr. pign. trib. cauſ.*

See concerning the Mortgage of the Goods of Perſons owing Taxes, the Remark on the ſecond Article as to Immoveables.

XV.

15. *One ought not to be caſt into Priſon for not paying the Taxes.*

It is likewiſe a Rule common to all ſorts of Taxes, that no body can be impriſoned for not paying them, unleſs they be guilty of ſome Offence. For the Taxes regard the Perſons of Men only becauſe of their Goods: And they are of themſelves a Burden ſufficient without adding to it this Hardſhip, which, thro the Indiſcretion of the Perſons who ſhould have this Power in their hands, might be a means to fill all the Priſons of the Kingdom *u*.

u Nemo carcerem plumbatarumque verbera, aut pondera, aliaque ab inſolentia judicum reperta ſupplicia in debitorum ſolutionibus, vel a perverſis, vel ab iratis judicibus expaveſcat. *l.* 2. *C. de exactor. tribut.*

Satis ſit debitorem annonarum ad ſolvendi neceſſitatem captione pignorum conveniri. *l.* 2. *C. de cap. & diſtr. pign. tribr. cauſ.*

[*According to our Uſage in* England, *Perſons refuſing to pay the publick Taxes may be impriſoned. For by the Act of Parliament, which impoſes the Tax on Lands and perſonal Eſtates, if any Perſon or Perſons ſhall neglect or refuſe to pay their Aſſeſſment by the ſpace of ten Days after Demand, any two of the Commiſſioners are thereby authorized to commit ſuch Perſon or Perſons (except a Peer or Peereſs of* Great Britain) *to the common Goal, there to remain without Bail or Mainprize, until Payment be made of the Money aſſeſſed, and of the Charges for bringing in of the ſame.* See the Act for the Land-Tax.]

XVI.

16. *The Taxes do not admit of any Compenſation.*

It is alſo common to all ſorts of Taxes, that they do not admit of any manner of Compenſation, neither for what may be due to the Perſons paying the Taxes from thoſe who collect them, nor for what may be owing to them either by the Exchequer it ſelf, or the Prince. For as to thoſe who collect the Taxes, it is not to them that they are due: And as for the Prince, ſeeing the Taxes are deſtined and ſet apart for the publick Service, it is no ways allowable that they ſhould be diminiſhed on account of what the Prince may owe on another ſcore to the Perſons of whom the Tax is demanded; ſince they have no reaſon to fear the Inſolvency of the Exchequer, which is always ſolvent *x*.

x Ut debitoribus fiſci quod fiſcus debet compenſetur ſæpe conſtitutum eſt, excepta cauſa tributoria & ſtipendiorum. *l.* 46. §. 5. *ff. de jure fiſci.*

Ob negotium copiarum, expeditionis tempore mandatum, curatorem condemnatum, pecuniam jure compenſationis retinere non placuit: quoniam ea non compenſatur. *l.* 20. *ff. de compenſ.*

In ea, quæ reipublicæ te debere fateris, compenſari ea quæ invicem ab eadem tibi debentur, is cujus de ea re notio eſt, jubebit: Si neque ex Kalendario, neque ex vectigalibus, neque ex frumenti vel olei publici pecunia, neque tributorum, neque alimentorum, neque ejus qui ſtatutis ſumptibus ſervit, neque fideicommiſſi civitatis debitor ſis. *l.* 3. *C. eod.*

Fiſcus ſemper idoneus. *l.* 2. *in f. ff. de fund. dot.*

Nec ſolet fiſcus ſatisdare. *l.* 1. §. 18. *ff. ut legat. ſeu fid.*

See the fourth Article of the ſeventh Section of the fifth Title.

XVII.

17. *Taxes do not preſcribe.*

Altho the Taxes ought to be levied within their proper Times, and that the Taxes on Lands and perſonal Eſtates ought to be levied every Year, and the Duties on Goods and Merchandizes ought to be collected in the Places, and at the Times preſcribed by the Statutes and Ordinances for that purpoſe; yet all the Taxes to which a Right has been once acquired, may be levied in the ſubſequent Years; and there are no other Preſcriptions for the Arrears of Taxes beſides thoſe which the Ordinances and the Uſage of Places may have eſtabliſhed *y*. Thus, for example, he who ſhould produce Acquittances for three ſubſequent Years of any Tax or Impoſition, would be preſumed to have acquitted the preceding Years, and would be diſcharged from them, unleſs there were evident Proof that he had not paid them *z*. But the Right of the Tax it ſelf is impreſcriptible. Thus, Lands ſubject to the Land-Tax are not freed from it by Preſcription, unleſs there be ſome Title to ſhew their Exemption *a*.

y Juſtas etiam quæ locum habent fiſci actiones præcipimus concremari ob hoc ſolum quod ſuis temporibus prolatæ non ſunt. *l.* 6. *C. de jure fiſci.*

z Quicumque de provincialibus & collatoribus, decurſo poſthac quantolibet annorum numero, cum probatio aliqua ab eo tributariæ ſolutionis expoſcitur, ſi trium cohærentium ſibi annorum apochas ſecuritateſque protulerit, ſuperiorum temporum apochas non cogatur oſtendere: neque de præterito ad illationem functionis tributariæ coarctetur: niſi forte aut curialis, vel quilibet publici debiti coactor, ſive compulſor poſſeſſorum vel collatorum habuerit cautionem, aut id quod repoſci deberi ſibi manifeſta geſtorum adſertione patefecerit. *l.* 3. *C. de apoch. publ.*

We muſt underſtand this Text, according to the Uſage in France, *of the Caſes where the Tax is levied by one and the ſame Perſon. For if the Caſe were, for example, of the Taxes for ſeveral Years, which had been laid either on real or perſonal Eſtates, and had been levied by different Conſuls or Collectors, every one of them having their diſtinct reſpective Years wherein they were charged with the levying of the Tax for that Year, the Payment which had been made to three of them, would be of no prejudice to the preceding Conſuls or*

Collectors, whose Rolls are not indorsed, and who had given no Acquittance.

a Jubemus eos qui rem aliquam per continuum annorum quadraginta curriculum sine quadam legitima interpellatione possederint, de possessione quidem rei, seu dominio nequaquam removeri. Functiones autem, seu civilem canonem, vel aliam quampiam publicam collationem eis impositam dependere compelli. Nec huic parti cujuscunque temporis præscriptionem oppositam admitti. *l. 6. de præsc.* xxx. *vel* xl. *ann.*

XVIII.

18. *In doubtful Cases those who are indebted or Taxes are favoured against the Exchequer.*

In all sorts of Taxes and Impositions, if there arise any Difficulties which render the Cause of the Exchequer doubtful, so as that its Right appears to be uncertain, whether it be that it is not sufficiently enough established, as if some particular Merchandize were not clearly enough expressed in the Enumeration of the several sorts of Merchandizes upon which the Duty is laid, or that the Duty being sufficiently established, there be some doubt concerning the Quality of the Duty, or other such like Difficulties; these kinds of Doubts ought to be resolved in favour of particular Persons against the Exchequer. For besides that the Exchequer is in the place of the Plaintiff, and that in general every Demand ought to be clear, and well proved, the Rights of the Exchequer are entitled to Favour and Privilege only in so far as concerns the Justice of the Taxes, which makes them necessary for the publick Good, and the Facility of levying them; which is restrained to Taxes that appear to be clearly and evidently established, and does not extend to the Demands and Pretensions which the Officers imployed in levying the Taxes, or the Farmers thereof, may make beyond the Bounds of the Duties and Impositions which are clearly fixed and established by the Sovereign.

b Non puto delinquere eum qui in dubiis quæstionibus contra fiscum facile responderit. *l.* 10. *ff. de jure fisci.*

Actore non probante, qui convenitur, etsi nihil ipse præstat, obtinebit. *l.* 4. *in f. C. de edendo.*

See the last Article of the first Section of the ensuing Title.

SECT. VII.

Of Exemptions from the several sorts of Taxes

The CONTENTS.

1. *All Persons are subject to the personal Taxes, unless they are exempted.*
2. *It is the same thing as to the Taxes on real Estates.*
3. *The Imposts on Goods and Merchandizes are limited to certain Things.*
4. *Three sorts of Exemptions from Taxes.*
5. *Exemptions from Taxes for several Causes.*
6. *Exemptions granted by Towns, and other Places, to certain Persons.*
7. *Exemptions which pass, or do not pass to the Heirs.*
8. *The Exemptions which go to Descendants, do not go to those of Daughters.*
9. *Age, Sex, Children, do not exempt: And it is necessary to have a Privilege for Exemption.*
10. *The Exemptions depend on the Favour granted by the Sovereign.*
11. *The Exchequer is exempt from all manner of Taxes.*
12. *The Exemptions of Things pass to all Possessors and Successors, but not the Exemptions of Persons.*
13. *The Privilege of the Place ceases by the Removal of one's Habitation to another Place.*

I.

1. *All Persons are subject to the personal Taxes, unless they are exempted.*

THE Taxes on personal Estates regard in general all Persons who are settled in the Places which are subject thereto: For there are some Places in *France* which are not subject to this Tax. And even in the Places which are subject to it, there may be Persons who are exempt from it *a*.

a Munera quæ patrimoniis, publicæ utilitatis gratia, indicuntur, ab omnibus subeunda sunt. *l.* 2. *C. de muner. patr.*

Altho this Text relates to other sorts of Charges, yet the Rule is with much more reason true as to the Charges of Taxes.

II.

2. *It is the same thing as to the Taxes on real Estates.*

The Taxes on real Estates or Immoveables are limited in *France* to such as are situated within the Provinces which are subject to the said Tax: And as for the other Provinces, it is by virtue of a Franchise or Immunity, and not

not of a Privilege, that they are exempted from the ſaid Tax *b*. But in the Provinces which are ſubject to the ſaid Tax, there are Exemptions which except certain Lands from being charged therewith; and there are alſo ſome Perſons who are exempted *c*.

b In the Roman *Empire, the Conditions of the Provinces were different; ſome of them were totally exempt.* Barcenonenſes immunes ſunt. *l.* 8. *ff. de cenſib.*

Others were of an eaſier Condition than the generality. But in France *there are but few of thoſe Provinces where the* Roman *Law is moſt in uſe, which are ſubject to the Tax on real Eſtates.*

c See the tenth Article.

III.

3. The Impoſts on Goods and Merchandizes are limited to certain things.

The Impoſts on Goods and Merchandizes are alſo reſtrained not only to the Things which are ſubject to the ſaid Duties, but likewiſe for every one of the ſaid Things to the Caſes of their Entry, of their Paſſage, and others where the Duty ought to be collected. And there are two ſorts of Exemptions from theſe Duties: One of certain Things that are not ſubject to the Duty, as Books. And the other of ſome Perſons who have ſome Privilege which diſcharges them of the ſaid Duty *d*.

d See the eighth Article of the ſecond Section; as alſo the tenth Article of this Section.

IV.

4. Three ſorts of Exemptions from Taxes.

It follows from the three preceding Articles, that the Exemptions or Immunities from Taxes are of three ſorts: Some are general and common to Provinces, to Towns, and to certain Places; and others are particular and peculiar to ſome Perſons; and there are ſome which except certain Things. Thus, for the general Exemptions, ſome Provinces have a Franchiſe or Immunity from the Tax on perſonal Eſtates, and moſt of them are exempted from the Tax on real Eſtates. And in the Provinces ſubject to the Tax on perſonal Eſtates, there are Towns and other Places which are exempted from it. And there are alſo ſome Provinces which have an Exemption or Immunity from Impoſitions on Goods and Merchandize, or on ſome kinds of them. And there are ſome Things which are exempted throughout the whole Kingdom *e*.

e Quamquam in quibuſdam beneficia perſonis data immunitatis cum perſona extinguantur, tamen cum generaliter locis, aut cum civitatibus immunitas ſic data videtur, ut ad poſteros tranſmittatur. *l.* 4. §. 3. *ff. de cenſib.*

One ſees in this Text the Diſtinction between perſonal Exemptions which are limited to certain Perſons, and thoſe which are granted to Towns and other Places, which are common to all thoſe who are Inhabitants of thoſe Places, and paſs to thoſe who ſhall be ſuch for the future.

V.

5. Exemptions from Taxes for ſeveral Cauſes.

The particular Exemptions from perſonal Taxes are of two ſorts: One is of thoſe which belong to ſome Perſons by the bare Effect of their Quality, without having any Title thereto in their own private Right. Thus, Eccleſiaſtical Perſons are exempted from this Tax, in conſideration of that Quality. Thus, the Gentry in *France* are exempted becauſe of their Nobility; and many Officers are entitled to this Exemption on account of their Offices. And the other is of the Exemptions granted for other particular Cauſes, as for certain Functions, or upon other Conſiderations in favour of which the Prince may grant this Privilege. And we ſee in the Regulations concerning this Matter many of theſe Exemptions of ſeveral ſorts *f*.

f Quibuſdam aliquam vacationem munerum graviorum conditio tribuit. *l.* 6. *ff. de jure immun.*

Altho this Text relates to other Exemptions, yet the Rule agrees to the Exemption from Taxes.

Mechanicos, geometras & architectos, qui diviſiones partium omnium, inciſioneſque ſervant, menſuriſque & inſtitutis opera fabricationibus ſtringunt, & eos qui aquarum ductus & inventos modos docili liberatione oſtendunt in par ſtudium docendi atque diſcendi noſtro ſermone compellimus. Itaque immunitatibus gaudeant & ſuſcipiant docendos, qui docere ſufficiunt. *l.* 2. *C. de excuſ. artif.*

VI.

6. Exemptions granted by Towns, and other Places, to certain Perſons.

Beſides the Exemptions explained in the preceding Article, there are ſome which the Corporations of Towns and other Places may grant to certain Perſons, to engage them to ſettle among them, and there exerciſe ſome Functions that are uſeful to the Publick. Thus, it is the Cuſtom in ſome Places to encourage Phyſicians, and Profeſſors of Arts and Sciences, to come and ſettle among them by ſuch like Exemptions, none of which is of any prejudice to the Rights of the Crown; for the publick Taxes are not by this means diminiſhed, and the Inhabitants of thoſe Places bear willingly the Share of the publick Taxes which would fall upon thoſe Perſons; and they do not even thereby increaſe their own Aſſeſſments, which continue the ſame *g*.

g Exceptis qui liberalium ſtudiorum antiſtites ſunt, & qui medendi cura funguntur, decurionum decreto immunitas nemini tribui poteſt. *l.* 1. *C. de decr. decur. ſup. imm. quib. conced.*

Nec intra numerum præſtitutum ordine invitos medicos immunitatem habere ſæpe conſtitutum eſt, cum oporteat eis decreto decurionum immunitatem tribui. *l.* 5. *C. de profeſſ. & med.*

Negotiatores qui annonam urbis adjuvant, item navicularii, qui annonæ urbis ſerviunt, immunitatem a muneribus publicis conſequuntur, quamdiu in ejuſmodi actu ſunt. Nam remuneranda pericula eorum, quin etiam & hortanda præmiis, merito placuit, ut qui peregre muneribus, & quidem publicis, cum periculo & labore fungentur, a domeſticis vexationibus & ſumptibus liberentur: cum non ſit alienum dicere, etiam hos reipublicæ cauſa, dum annonæ urbis ſerviunt, abeſſe. *l.* 5. §. 3. *ff. de jure immun.*

See the tenth Article of the fourth Section of the ſixteenth Title of this Book.

Sometimes they give likewiſe Salaries to Phyſicians and others, beſides an Exemption from Taxes. And in this Caſe it is the Duty of thoſe Phyſicians to attend the Poor gratis. Archiatri ſcientes annonaria ſibi commoda a populi commodis miniſtrari, honeſte obſequi tenuioribus malint, quam turpiter ſervire divitibus. Quos etiam ea patimur accipere quæ ſani offerunt pro obſequiis, non ea quæ periclitantes pro ſalute promittunt. *l.* 9. *eod.*

We have no ſuch Examples among us of Phyſicians, who bargain for a certain Sum of Money in caſe the Patient recovers: It is only Quacks and Mountebanks that practiſe after this manner.

VII.

7. *Exemptions which paſs or do not paſs to the Heirs.*

Among the particular Exemptions of Perſons, there are ſome which are limited to one Perſon, and do not go to his Deſcendants; ſuch as thoſe which are granted in conſideration of ſome Functions, or of ſome Offices, which have not the Effect to ennoble the Perſon *h*. And there are ſome which go to the Deſcendants, ſuch as the Exemption on the ſcore of Nobility; and that of Offices which ennoble the Perſon, whether it be that the Office ennobles the firſt who is veſted with it, or that it hath this effect only after it has paſſed from Father to Son, whoſe Children are intitled to the Exemption: and there may likewiſe be ſome Exemptions which upon particular Conſiderations paſs to all the Deſcendants of thoſe to whom they have been granted *i*.

h Perſonis datæ immunitates hæredibus non relinquuntur. *l.* 1. §. 1. *ff. de jure imm.*

Quod datur perſonis, cum perſonis admittitur. *l.* 1. §. 43. *ff. de aq. quot.*

Sordidorum munerum excuſatio delata perſonis, ad hæredem ſucceſſoremve tranſire non poteſt. *Neque enim poteſt eſſe perpetuum, quod non rebus, ſed perſonis contemplatione dignitatis atque militiæ indulſiſſe nos conſtat.* l. 13. C. de excuſ. mun.

See, in relation to the Exemptions which do not go to the Heirs, the third Section of the fifth Law, ff. de jure immun. *which has been quoted on the foregoing Article.*

i Immunitates generaliter tributæ eo jure ut ad poſteros tranſmitterentur, in perpetuum ſuccedentibus durant. *l.* 4. *eod.*

VIII.

8. *The Exemptions which go to Deſcendants, do not go to thoſe of Daughters.*

The Exemptions which paſs to Deſcendants are limited to thoſe of the Male Iſſue, and do not go to the Children of Daughters. For theſe do not follow the Condition of their Mothers, but that of their Fathers *l*.

l Generi poſteriſque datæ cuſtoditæque (*immunitates*) ad eos qui ex fœminis nati ſunt non pertinent. *l.* 1. §. 2. *ff. de jure imm.*

Cum legitimæ nuptiæ factæ ſint, patrem liberi ſequuntur. *l.* 19. *ff. de ſtat. hom.*

There are ſome Places in France, *where the Children of Fathers who are ignoble, and Mothers who are noble, are likewiſe noble. It is with reſpect to this Uſage that it is ſaid, the Mother ennobles the Iſſue.*

IX.

9. *Age, Sex, Children, do not exempt; and it is neceſſary to have a Privilege for Exemption.*

There is no Exemption barely on account of Age, whether it be Infancy, or old Age, or becauſe of Sex, or for the number of Children, or for other Cauſes beſides thoſe of Privileges *m*, or Exemptions ſpecified in the Regulations made concerning this Matter.

m Munera quæ patrimoniis injunguntur vel intributiones, talia ſunt ut neque ætas ea excuſet, neque numerus liberorum. *l.* 6. §. 4. *ff. de mun. & hon.*

Neque tempore ætatis, neque numero liberorum a muneribus quæ patrimoniorum ſunt, excuſationem quis habere poteſt. *l.* 5. *C. de mun. patrimon.*

Etiam minores ætate patrimoniorum muneribus ſubjugari ſolent. Unde intelligis te fruſtra plenam immunitatem deſiderare cum munera, quæ impenſas exigunt, ſubire te neceſſe ſit. *l.* 7. *C. de mun. patrim.*

Patrimoniorum munera mulieres etiam ſuſtinere debent. *l.* 9. *eod.*

Altho the Contributions mentioned in theſe Texts were different from our Taxes, yet the Rule agrees to them, and it is in uſe with us, except in ſome Places, where they grant to Minors an Exemption from perſonal Taxes. Which may be perhaps grounded on a Law which we find in the Body of the Roman *Law, where it is ſaid, that in ſome Provinces the Children were exempt from the Poll-Tax, until the Males arrived at the Age of fourteen, and the Females at that of twelve, and after they were paſt ſixty five Years.* Ætatem in cenſendo ſignificare neceſſe eſt, quia quibuſdam ætas tribuit ne tributo onerentur. Veluti in Syriis, a quatuordecim annis maſculi, a duodecim fœminæ uſque ad ſexageſimum quintum annum tributo capitis obligantur. *l.* 3. *ff. de cenſib. There are likewiſe ſome Regulations and Uſages which grant an Exemption to thoſe who have ten Children.*

X.

10. *The Exemptions depend on the Favour granted by the Sovereign.*

The particular Exemptions from the Tax on Lands, and thoſe from the Duties that are laid on Goods and Merchandizes, depend on the ſeveral Regulations which have made different Proviſions therein, and are not the ſame with

with the Exemptions from the Tax on perſonal Eſtates. For Eccleſiaſticks, for example, and Gentlemen who are exempt from the Tax on perſonal Eſtates, are not exempt from the other Taxes. Thus, the ſaid Exemptions depend on particular and different Grants, which may be eaſily learned from the ſeveral Regulations in theſe Matters *n*.

n The Privileges and Exemptions depend on the Favours granted by the Prince, which thoſe who lay claim to them muſt verify and inſtruct.

XI.

11. *The Exchequer is exempt from all manner of Taxes.*

Whatever belongs to the Sovereign on the ſcore of his Demeſnes, and all Goods and Merchandizes deſtined for his Uſe, and for his Houſhold, or for the Army, is ſubject to no manner of Contribution *o*.

o Fiſcus ab omnium vectigalium præſtationibus immunis eſt. *l.* 9. §. *ult. ff. de public. & vectig.*

Res exercitui paratas præſtationi vectigalium ſubjici non placuit. *D. l.* §. 7.

XII.

12. *The Exemptions of Things paſs to all Poſſeſſors and Succeſſors; but not the Exemptions of Perſons.*

There is this Difference between perſonal Exemptions and the Exemptions of Things, that theſe paſs all of them to all thoſe whom the Contributions may affect, Heirs, Purchaſers, or others: And the Exemptions of Perſons are limited to thoſe to whom they are granted, and do not go to the Heirs except in the Caſes explained in the ſeventh Article *p*.

p Et datur interdum prædiis, interdum perſonis. Quod *Prædiis* datur, extincta perſona non extinguitur: quod datur *Perſonis*, cum perſonis amittitur. Ideoque neque ad alium dominum prædiorum, neque ad hæredem, vel qualemcunque ſucceſſorem tranſit. *l.* 1. §. 43. *ff. de aqu. quot.*

Rebus conceſſam immunitatem non habere intercidere reſcripto Imperatoris noſtri ad Pelignianum recte expreſſum eſt. Quippe perſonis quidem data immunitas cum perſona extinguitur: rebus, nunquam extinguitur. *l.* 3. §. 1. *ff. de cenſibus.*

Privilegia quædam cauſæ ſunt, quædam perſonæ. Et ideo quædam ad hæredem tranſmittuntur, quæ cauſæ ſunt: quæ perſonæ ſunt, ad hæredem non tranſeunt. *l.* 196. *ff. de reg. jur.*

See the Texts quoted on the ſeventh Article.

XIII.

13. *The Privilege of the Place ceaſes by the Removal of one's Habitation to another Place.*

Seeing there are Places exempt from certain Contributions, the Inhabitants of thoſe Places enjoy the Exemption only during the Time that they live there; and if they go and ſettle in another Place that is not exempt, they cannot enjoy that Privilege there *q*.

q Qui originem ab urbe Roma habent, ſi alio loco domicilium conſtituerunt, munera ejus ſuſtinere debent. *l.* 3. *ff. de mun. & hon.*

Incola & his magiſtratibus parere debet, apud quos incola eſt: & illis, apud quos civis eſt. Nec tantum municipali juriſdictioni in utroque municipio ſubjectus eſt, verum etiam omnibus publicis muneribus fungi debet. *l.* 29. *ff. ad municip.*

SECT. VIII.

Of the Functions and Duties of thoſe who have any Office or Imployment about the publick Revenue.

The CONTENTS.

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3. *In what manner the Taxes ought to be diſtributed in the ſeveral Diviſions and Diſtricts of the Kingdom.*
4. *The Changes which happen in Places, change the Proportions of the Taxes.*
5. *The Diſtribution of the Taxes ought to be made without reſpect of Perſons.*
6. *The Officers who ſettle the Proportions of the ſeveral Places, ought to receive no Preſents.*
7. *The Duty of the Aſſeſſors, who regulate the Aſſeſſments of particular Perſons.*
8. *They ought to regard no other Recommendation beſides that of Juſtice.*
9. *The Aſſeſſors cannot leſſen their own Aſſeſſments, nor thoſe of their Relations.*
10. *They cannot impoſe either more or leſs than what is ordained.*
11. *Divers Perſons appointed for levying the Taxes.*
12. *Duty of the Receivers.*
13. *Another Duty of Receivers.*
14. *Duty of the Collectors.*
15. *Thoſe who are Receivers and Collectors ought to give diligent Attendance, and not to delay thoſe who come to make Payments.*
16. *Several other Duties of thoſe who are imployed in impoſing and levying the publick Taxes.*
17. *Duties of thoſe who are imployed in levying the Duties on Goods and Merchandizes.*

IT is neceſſary to diſtinguiſh two ſorts of Moneys which compoſe the publick Revenue. Thoſe which are raiſed on Perſons, or on Lands, ſuch as the Tax which is laid on the real and perſonal Eſtates *a*; and thoſe which are

1. *Two ſorts of Receipts of two ſorts of publick Moneys.*

a Stipendium a ſtipe appellatum eſt, quod per ſtipes id eſt modica æra colligatur. Idem hoc etiam

are levied on Goods and Merchandize *b*. And it is alſo neceſſary to diſtinguiſh the different Functions which reſpect the levying of theſe ſeveral ſorts of Moneys. For as to the Tax on Lands and perſonal Eſtates, there is the Function of the Perſons who are concerned in diſtributing and aſcertaining the ſeveral Proportions that particular Places and Perſons are to pay of the general Tax; and the Function of the Perſons who collect it. And altho theſe two ſorts of Functions may chance to be ſometimes confounded in the ſame Perſons, as ſhall be hereafter obſerved, yet they are diſtinct in themſelves, and oblige the Perſons to Duties of different ſorts. And as to the Moneys which are raiſed on Goods and Merchandizes, there is no other Function beſides that of levying them. For as to the Impoſition thereof, which is nothing elſe but the Taxation of the Duties which are to be paid for each kind, it depends on the Regulation which the Prince makes therein.

etiam tributum appellari Pomponius ait. Et ſane appellatur ab intributione tributum, vel ex eo quod militibus tribuatur. *l.* 27. §. 1. *ff. de verb. ſignif.*

Cenſus fundi. *l.* 2. *C. ſine cenſ. vel rel. fund. comp. non poſſ. toto titulo. ff. de cenſibus.*

b Ex præſtatione vectigalium nullius omnino nomine quicquam minuatur, quin octavas more ſolito conſtitutas omne hominum genus quod commerciis voluerit intereſſe, dependat. *l.* 7. *C. de vectigal. & comm.*

II.

2. The Method and Order of laying on the Tax on real and perſonal Eſtates.

The Tax on real and perſonal Eſtates is impoſed and laid on in *France* by five different Degrees. The firſt is the Order of the King, by which he regulates the Sum which he intends ſhall be raiſed throughout the Kingdom on all thoſe who are ſubject to the ſaid Tax. The ſecond is a ſecond Order, which allots to the ſeveral Provinces the Proportion of the ſaid Tax which each Province is to bear; which is made by Generalities. The third is that of the Diſtribution, which is made by the Officers of each Generality among the ſeveral Diviſions or Elections which depend on the ſaid Generality. The fourth is the Allotment which the Officers of the reſpective Diviſions or Elections make of the Proportion that is to be bore by the reſpective Towns, Boroughs, and Pariſhes of each Diviſion or Election. The fifth and laſt is that of the Aſſeſſments which are made in each Town, and in each Place of the ſeveral Inhabitants within the ſame, by thoſe who are employed in that Function, whether they be called Sheriffs, Conſuls, Aſſeſſors, or by other Names *c*.

c Delegatio quæ ab ampliſſima præfectura in diverſas Provincias ex more quotannis emittitur. *l. ult. Cod. de can. larg. titul.*

See the fortieth, forty firſt, and forty ſecond Articles of the Regulation in January, 1634.

[The Method obſerved in *England* for raiſing and levying the Tax on Lands and perſonal Eſtates is thus: The Parliament fixes the Sum Total that is to be raiſed throughout the Kingdom; as alſo the Proportions thereof which each County, City, Borough, Town, or other Place, is to pay; and likewiſe aſcertains the Pound-Rate which all real and perſonal Eſtates within the Kingdom are to be charged with towards raiſing the ſaid Sum. And the Act of Parliament appoints Commiſſioners for the reſpective Counties, Cities, and other Places within the Kingdom, for the more effectual raiſing and levying the ſaid Tax. And the ſaid Commiſſioners at their firſt general Meetings, do aſcertain and ſet down in Writing the ſeveral Proportions which are to be charged upon every Hundred, Lathe, Wapentake, Rape, Ward, or other Diviſion, towards making up the whole Sum charged upon the whole County, City, or other Place for which thy are appointed Commiſſioners. And they likewiſe appoint Aſſeſſors for each Pariſh, Townſhip, or Place within their reſpective Diviſions; who are with all Care and Diligence to aſſeſs the full Sum given them in charge reſpectively, by an equal Pound-Rate upon all real and perſonal Eſtates within the Limits, Circuits, and Bounds of the reſpective Pariſhes or Places for which they are appointed Aſſeſſors. And the ſaid Aſſeſſors when they carry in their Aſſeſſments to the Commiſſioners, do at the ſame time alſo return the Names of two or more able and ſufficient Perſons living within the Limits and Bounds of the ſaid Pariſhes, Townſhips, and Places, to be Collectors of the Moneys which have been aſſeſſed; for whoſe Fidelity the Pariſh or Place in which they are imployed as Collectors is anſwerable. The ſaid Collectors pay in the Moneys which they collect and levy to the Receiver-General, or his Deputy; who pays the ſame into the Exchequer. *See the Act for the Land-Tax.*]

III.

3. In what manner the Taxes ought to be diſtributed in the ſeveral Diviſions and Diſtricts of the Kingdom.

The Duties of the Officers who are charged with the Diſtribution of the ſeveral Proportions of the General Tax which each Place is to be charged with, conſiſt in taking as exact an Information as is poſſible, of what Share every Town, and every Pariſh is able to bear of the Sum Total that is to be raiſed. Which depends on the Number of its Inhabitants, on their Profeſſions and Imployments, their Goods, their Trade, the Number of thoſe who are exempt, the Extent of their Territory, its Quality, and on other Conſiderations which may help to regulate the Share which every Place ought to bear of the General Tax, in proportion to its Conveniences and Inconveniences, and to the common Charge that is laid upon the whole *d*.

d It is by this Proportion that the Charge of each Place ought to be regulated.

IV.

IV.

4. The Changes which happen in Places, change the Proportions of the Taxes.

Since there often happen divers Changes which may increaſe or diminiſh the Advantages of one Place in reſpect of another, and cauſe in ſome Places Loſſes which may entitle them to an Eaſement in the Taxes, or Changes which may give occaſion to augment their Charge; it is the Duty of the ſaid Officers to inform themſelves every Year of the ſaid Changes: As if there have happened in ſome Places great Damages by Hail, by Froſt, by Inundations, by Barrenneſs, or other Loſſes which have deſtroyed the whole Crop, or a part of it; if there have been any Diſtempers that have ſwept away great numbers of the People; if many of the Inhabitants, or ſome of the wealthieſt among them, have left the Place, or if on the contrary they have had an Acceſſion of new Inhabitants; if there be any Perſons who have a Right of Exemption, or who claim it right or wrong; if any new Grant has been made to the Place, whereby its Trade is increaſed, ſuch as that of holding Fairs or Markets, and of all other Changes of the like nature, that they may alter the Proportions of the Taxes, and may either eaſe or lay a heavier Charge on the Places according as the Changes which have happened to them may require *e*.

e Since every Place bears its Charge in proportion to the Goods, and the Conveniences and Inconveniences of the Inhabitants, the Charge ought to be leſſer or greater, according as conſiderable Changes may give occaſion thereto; and in order to have an exact Information thereof, the proper Officers who are elected for that purpoſe ought to viſit the ſeveral Pariſhes.

See the third and fourth Artitles of the Regulation in March 1600, *and the fortieth and forty third Articles of the Regulation in* January 1634.

V.

5. The Diſtribution of the Taxes ought to be made without reſpect of Perſons.

It is alſo a Duty of the ſaid Officers not to augment or diminiſh the Proportion of any Pariſh on account of any Advantages which may redound to themſelves thereby, either in conſideration of their own Intereſts, or of thoſe of their Relations, or of their Friends, or of other Perſons whom they are deſirous to ſerve; as if they themſelves, or any of their Relations or Friends had any Lands or Goods in a Pariſh, or if they had any particular Intereſt to have its Proportion of the Taxes diminiſhed. For the Liberty which the ſaid Officers have to regulate the ſeveral Proportions of the reſpective Places, is not to make them to depend wholly on their Will and Pleaſure, but that they may regulate the Charge of every Pariſh in proportion to what the Inhabitants of that Pariſh ought in juſtice to bear *f*.

f This Duty, as all the others of the ſaid Officers, is of the Law of Nature, which obliges Perſons to render Juſtice without reſpect of Perſons; and it is part of their Oath.

See the hundred thirty ſixth Article of the Ordinance of Charles V. *in the Year* 1379.

By the Roman *Law Exemptions which were obtained by unfair Means were puniſhed by Fire.*

His noſtræ ſerenitatis edictis, civitatum tabulariis erit flamma ſupplicium, ſi cujuſdam fraude, ambitu, poteſtate, injuſtam cujuſpiam profiteantur immunitatem: ac non ſecundum præcedentem definitionem omnes omnino, abolita ſpecialium immunitatum gratia, neceſſitas tributariæ functionis, firmata cenſitorum peræquatorumque Provincialium judicum peræquatione conſtrinxerint. *l. 1. C. de immun. nem. conced. v. l. 2. eod.*

VI.

6. The Officers who ſettle the Proportions of the ſeveral Places ought to receive no Preſents.

Seeing the ſettling and aſcertaining the Proportions of the Tax with which the ſeveral Places are to be charged, is an Act of Juſtice, the Abuſe of which turns to the Prejudice of thoſe who are over-rated by means of an unjuſt Eaſement granted to others; it is therefore expreſly forbidden to thoſe who exerciſe theſe Functions to take any Preſents of what nature ſoever they may be. And the Perſons who are found to have their hands polluted with ſuch Filthineſs will incur the Puniſhments which the Laws have provided in that Caſe, and which the Circumſtances may deſerve *g*.

g There needs no expreſs Law to prohibit an Abuſe of this kind: But ſeeing it has been frequently practiſed, the ſame is provided againſt by the hundred and fifty ſecond Article of the Ordinance of Orleans, which prohibits all Officers any ways employed in the Taxes and Aids to demand or take any Preſent whatſoever, whether it be in Money, Veniſon, Wild Fowl, Cattle, Grain, Hay, or other thing whatſoever, directly or indirectly, upon pain of forfeiting their Salaries, without any Abatement or Mitigation thereof to be made by the Judges.

VII.

7. The Duty of the Aſſeſſors, who regulate the Aſſeſſments of particular Perſons.

After that the Proportion which each Place is to bear of the ſaid Tax has been ſettled and adjuſted, the Perſons who are appointed to diſtribute the ſame among the ſeveral Inhabitants of the ſaid Place, ought to regulate their Aſſeſſments. And their firſt Duty is to write down in a Roll or Liſt the number of the Perſons who are liable to be taxed, to inform themſelves exactly of thoſe who have Exemptions, or who have been diſcharged from their Aſſeſſ-

Aſſeſſments, or a part thereof, to enquire into the Changes which have augmented or diminiſhed the Number of the Inhabitants, into the Loſſes that every one may have ſuſtained, or the Acceſſion of Goods which they may have had by ſome Succeſſion or otherwiſe. And they ought to receive and examine the Memorials and Writings which are offer'd to them by any one, as Proofs of the Facts which may oblige them to moderate his Aſſeſſment; and they ought to regulate all the ſeveral Aſſeſſments according to Equity, without regard to the Credit or Authority of any Perſon, or to other Conſiderations that may induce them to favour ſome more than others: but their Aſſeſſments ought to be ſettled in ſuch a manner as that the Burden laid upon the Rich may diminiſh that of the Poor, and that every one may bear his Part of the Burden in protion to his Eſtate and his Induſtry, and according as his Condition and the State of his Family render his particular Charges greater or leſſer *h*.

h The Taxes ought to be diſtributed, and the Aſſeſſments made, on the foot of this Proportion. And this is what is called in the Ordinances, the Strong helping out the Weak, or the Rich the Poor.

See the Ordinance of Orleans, *Art.* 123. *and that of* Blois, *Art.* 341.

Quoniam tabularii civitatum per colluſionem potentiorum ſarcinam ad inferiores transferunt, jubemus ut quiſquis ſe gravatum probaverit, ſuam tantum priſtinam profeſſionem agnoſcat. *l.* 1. *C. de cenſib. & cenſitor.*

Altho this Text relates to Taxes on Lands, yet it may be applied to the Caſe of this Article.

By a Law of the Theodoſian *Code, thoſe who had been over-rated in their Aſſeſſments had a right to get them moderated and regulated according to Equity.*

Qui gravatos ſe a peræquatoribus conqueſti ſunt, & injuſto oneri impares eſſe proclamant, competitionis habeant facultatem, ut quid remiſſum gratia, quid interceptum fuerit fraude, convincant: & ex eo levamen accipiant, quod per deformia, & criminoſa commercia ſibi impoſitum eſſe deplorant, ut aliis demeretur. Sed in eo tempus placuit definiri, ne plures fruſtra litibus premerentur, ſi nullis intercepta metis actio tolleretur. *l.* 4. *C. Theod. de cenſ. per æq. & inſpec.*

VIII.

8. They ought to regard no other Recommendation beſides that of Juſtice.

This general Duty of thoſe who ſettle the Aſſeſſments of particular Perſons implies that of having regard to no other Recommendation beſides that which every particular Perſon may have from the Condition of his Eſtate and of his Affairs, and of diſcharging or eaſing no body whatſoever but with this view. For otherwiſe they would do an Injuſtice to thoſe whoſe Aſſeſſments ſhould be encreaſed by this Diminution *i*.

i This is a Conſequence of the preceding Article.

IX.

9. The Aſſeſſors cannot leſſen their own Aſſeſſments, nor thoſe of their Relations.

If the Aſſeſſors ſhould have juſt cauſe to demand ſome Eaſement in their own particular Aſſeſſments, or if any of their near Relations ſhould have juſt Cauſe to apply for the ſame Eaſe and Relief in their Aſſeſſments; they could not do juſtice to themſelves, nor to their Relations. But as for their own proper Aſſeſſments, they ought to apply to a Court of Juſtice for Redreſs therein; and their Relations ought to make the ſame Application for what concerns them, according to the Uſages and the Regulations in ſuch Caſes *l*.

l Seeing it is a kind of Judicial Function which they exerciſe in this Caſe, they cannot adminiſter Juſtice to themſelves, nor to their Relations.

See the tenth Article of the Regulation of the Tax for the Year 1600.

[In *England* the Aſſeſſors are always aſſeſſed by the Commiſſioners within their reſpective Diviſions. And in caſe any Perſons think themſelves over-rated in their Aſſeſſments, they may appeal to the Commiſſioners within ſix Days after Demand; and ſuch Appeals being once heard and determined by the Commiſſioners, are final, without any further Appeal upon any pretence whatſoever. *See the Acts of Parliament for the Land Tax.*]

X.

10. They cannot impoſe either more or leſs than what is ordained.

We may ſet down as another general Duty, and which is common to all thoſe who are concerned in ſettling and adjuſting the Proportions and Aſſeſſments, either of the reſpective Diviſions, or of particular Perſons, that they ought to regulate the ſame in ſuch a manner as that there be no Impoſition of any greater Sum than what they are charged with, and likewiſe that there be no Deficiency of the Sum to be raiſed for want of having aſſeſſed the reſpective Diviſions and the ſeveral Inhabitants of each Diviſion at a full Proportion of the Sum Total that is to be raiſed. And if they ſhould add to the Sums that are ordained to be levied, either Impoſitions of another kind, or greater Sums, it would be a Miſdemeanour that would be puniſhable according to the Quality of the Fact, and the Circumſtances *m*.

m It is prohibited to the Aſſeſſors and other Officers of the Taxes, upon pain of Death, to impoſe any more Money than what is contained in the Warrants and Commiſſions, and that which is allowed for collecting the Monies, and making up the Rolls, and for the other Charges.

See the Ordinance of Lewis XII. *of the eleventh of* November 1508.

XI.

11. Divers Perſons appointed for levying the Taxes.

As there are divers Officers who regulate the Proportions of the Taxes where-

wherewith the Generalities and the Elections are to be charged, and other Perſons who in each Place or Diviſion ſettle the Aſſeſſments of the particular Inhabitants; ſo there are alſo ſeveral Officers who receive the Monies levied in each Generality, and in each Election; and other Perſons who levy and collect the Monies which are aſſeſſed in each particular Place. And theſe Receipts and Collections oblige thoſe who are charged therewith to the different Duties, which ſhall be explained in the Articles which follow *n*.

n See the following Articles.

XII.

12. *Duty of the Receivers.*

The principal of theſe Officers are the Receivers General, who are charged with the Receipt of all the Monies collected on account of the Taxes within a Generality, and which ought to be paid into their hands by the particular Receivers of the reſpective Elections. And it is to theſe particular Receivers that the Collectors are to pay in the Aſſeſſments of the particular Perſons living within the Bounds and Limits of the Places for which they are appointed Collectors. Thus the firſt Duties of the Receivers General and Particular are to receive the Sums that ought to be paid in to them in the manner that is preſcribed them, and to convey or remit the Monies which belong to their Receipts: to wit, the Particular Receivers ought to tranſmit the Monies which they receive to the Office of the Receivers General; and the Receivers General ought to pay the ſaid Monies into the King's Exchequer within the time that is preſcribed *o*, without detaining in their hands on any pretence whatſoever any part of the Monies which they have received; whether it be that there was a greater Sum levied than ought to have been, or that they repreſent ſome Perſons as being inſolvent, altho they have received the Payments made by them, and conceal them, or by other ways. For theſe Miſdemeanours are a kind of Crime, of which notice ſhall be taken in its due place.

o Diu minime penes ipſos ſuſceptores maneat facta collatio; ſed ſtatim quodcunque a provincialibus fuerit exolutum, ſacris theſauris inferatur. *l.* 7. *C. de ſuſcept. præp. & arcar.*

Omnem ſummam auri vel argenti, & reliquarum ſpecierum quæ ſacris largitionibus ex more penduntur. Statim ut exactio fuerit celebrata, ad theſauros uniuſcujuſque provinciæ, vel ad proximos referri ſub obſignatione tabularii cæterorumque quos ſollicitos eſſe debere præcedentia juſſa decreverunt, & theſaurorum præpoſitis conſignari præcipimus: ut exinde ad ſacrum comitatum integer omnium titulorum numerus dirigatur. *l.* 1. *C. de can. larg.*

XIII.

13. *Another Duty of the Receivers.*

The Duty of the Receivers, and more eſpecially of the particular Receivers in the ſeveral Diviſions, obliges them to join to the Care and Vigilance their Function requires, the Temperaments of Humanity, and not to uſe any Violence, which may make the legal Ways of Conſtraint which they are allowed to uſe, more harſh and ſevere than is neceſſary; whether it be by the too great Frequency of Seizures, Executions, Impriſonments, and other ways of Compulſion uſed at unſeaſonable Times, or by Law-Suits, with a view only to occaſion Charges, or by other vexatious ways *p*.

p See the following Article, and the Text that is quoted on it.

XIV.

14. *Duty of the Collectors.*

As to thoſe who are charged with levying the Aſſeſſments of particular Perſons, Conſuls, Collectors, or others, whether they be the ſame Perſons who make the Aſſeſſments, or different Perſons, they are obliged in making this Collection to uſe all the Moderation that is conſiſtent with their Duty, and not to proceed to the Diſtreſs and Sale of Goods, and to the other compulſory Means which they are impower'd to uſe, except when they find themſelves neceſſarily obliged to have recourſe to theſe Ways for procuring Payment; and not to make uſe of them, as many do, with a view only to multiply Charges, and to reap Profit thereby, and to make the Expences ſo much the greater, as the Conjuncture of the Time, or other Circumſtances, may render the Payments more difficult *q*. And it is likewiſe their Duty not to ſeize or diſtrain the things that are neceſſary for Food and Raiment, for the Culture of Lands, for the Exerciſe of the Trade or Profeſſion of the Perſons who are aſſeſſed, according as the Laws and Ordinances have prohibited the diſtraining of theſe ſorts of things *r*; and

q See the hundred and twenty ſecond Article of the Ordinance of Orleans.

Non acerbum ſe exactorem, nec contumelioſum præbeat, ſed moderatum, & cum efficacia benignum, & cum inſtantia humanum. *l.* 33. *ff. de uſur.*

r Veſtis relinquenda eſt debitori, & ex mancipiis quæ in eo uſu habebit, ut certum ſit, eum pignori daturum non fuiſſe. *l.* 6. *ff. de pign. & hyp.*

Res quas neminem credibile eſt pignori ſpecialiter daturum fuiſſe, generali pacti conventione quæ

and they ought to abſtain from all manner of Concuſſion and Violence, and not to exact any thing of the Perſons aſſeſſed beyond the Sum at which they are aſſeſſed, whether it be under pretext of making the Payment thereof eaſy to them, or as Intereſt for the Delay they grant them, or upon any other pretence whatſoever. But they ought on the contrary to facilitate the Payments, either by receiving ſmaller Sums upon account, or waiting till Harveſt-time, or for other convenient Seaſons, when the Perſons who are aſſeſſed may be able to raiſe Money. And as to the Payments which the Collectors are bound to make to the Receivers, their principal Duty conſiſts in not detaining in their hands the Monies which they have collected; which happens more readily and more frequently to theſe ſorts of Perſons than to the Receivers: For the Collectors being for the greateſt part Men of leſs Wealth and Subſtance than the Receivers, ſome of them apply the King's Money to their own particular Affairs, and run in Debt to the Publick.

de bonis tuis facta eſt, in cauſa pignoris non fuiſſe rationis eſt. *l.* 1. *C. quæ res pign. obl. poſſ. vel non.*

Executores a quocumque judice dati ad exigenda debita, ea quæ civiliter poſcuntur: ſervos aratores, aut boves aratorios, aut inſtrumentum aratorium pignoris cauſa de poſſeſſionibus non abſtrahant. *l.* 7. *C. eod.*

Pignorum gratia aliquid quod ad culturam agri pertinet, auferri non convenit. *l.* 8. *eod.*

If thou at all take thy Neighbour's Raiment to pledge, thou ſhalt deliver it to him by that the Sun goeth down. For that it is his Covering only, it is his Raiment for his Skin, wherein ſhall he ſleep. Exod. 22. 26, 27.

No Man ſhall take the Nether or the Upper Milſtone to pledge; for he taketh a Man's Life to pledge. Thou ſhalt not pervert the Judgment of the Stranger, nor of the Fatherleſs, nor take a Widow's Raiment to pledge. Deuter. 24. 6, 17.

They drive away the Aſs of the Fatherleſs, they take the Widow's Ox for a Pledge. They reap every Man his Corn in the Field, and they gather the Vintage of the Wicked. They cauſe the Naked to lodge without Clothing, that they have no Covering in the Cold. They pluck the Fatherleſs from the Breaſt, and take a Pledge of the Poor. Job 24. 3, 6, 7, 9.

When there is a neceſſity to proceed by Diſtreſs and Execution, there ſhall be left to the Perſons upon whom the Diſtreſs is made, one Cow, three Ewes or two She-Goats, to help to maintain them, unleſs it be that the Debt for which the Diſtreſs is made, ariſes from the Sale of the ſame Beaſts, having lent the Money to buy them: And beſides there ſhall be left to the Perſon upon whom the Diſtreſs is made, a Bed to lie on, and a Sute of Cloths to wear. *Ordinance of* 1667. *Title* 33. *Art.* 14.

See the fifteenth and ſixteenth Articles of this Title, and the Ordinance of *Orleans*, Art. 28. that of *Blois*, Art. 37. the Edict of the ſixteenth of *March* 1593, and other Regulations.

XV.

It is a general Duty, and common to all thoſe who are employed in levying and receiving the Publick Monies, to be diligent and aſſiduous in their Function, and not to delay thoſe who have any Payments to make, and who by their Delay may be put to Expences on account of their ſtay, or ſuffer ſome other Damages. And if the Delay ſhould be with deſign to put the Perſons who were come to pay, to Charges, this Miſdemeanour would be puniſhed according to the Circumſtances. And if thoſe Perſons who ſhould have a Payment to make would prevent any bad Conſequences that might ariſe from their Non-Payment, they may guard againſt any Inconvenience of this kind by making a Tender of the Money in due Form *s*.

15. *Thoſe who are Receivers and Collectors ought to give diligent Attendance, and not to delay thoſe who come to make Payments.*

s Suſceptores publicos abſque omni mora aurum cenſemus ſuſcipere, ne quis per hanc occaſionem ſumptus facere compellatur. Nam ſi ſolvere volens a ſuſcipiente fuerit contemptus, teſtibus adhibitis conteſtationem debebit proponere ut, hoc probato, & ipſe ſecuritatem debitam, commiſſi nexu liberatus, cum emolumentis accipiat: & qui ſuſcipere neglexerit, ejus ponderis quod debebatur, duplum fiſci rationibus per vigorem officii præſidis inferre cogatur. *l.* 1. *C. de ſuſcept. præp. & arcar.*

Humanitatis neceſſitate commoti. *l.* 9. *ff. eod.*

Aurum ſive argentum quodcumque a poſſeſſore confertur, arcarius vel ſuſceptor accipiat: ita ut provinciæ moderator, ejuſque Officium ad crimen ſuum noverit pertinere, ſi poſſeſſoribus ullum fuerit ex aliqua ponderum iniquitate illatum diſpendium: & quidquid ex provinciis ad noſtrum dirigitur ærarium, id ad illuſtres viros ærarii noſtri comites relatione deferatur. *l. ult. C. eod.*

XVI.

Beſides theſe general Duties of all theſe Perſons who are charged with the Diſtribution and Collection of the Publick Taxes, there are others of ſeveral ſorts which relate to the manner of exerciſing their Functions. Thus the Officers who ſettle the Proportions of the reſpective Places or Diviſions, have their Rules preſcribed to them as to the manner in which they are to proceed, and how they ought to viſit the ſeveral Pariſhes when there is occaſion for their ſo doing, as in the Caſes explained in the fourth Article, and for other ſorts of Functions. Thus the Receivers have alſo their Rules laid down to them how to govern themſelves in their Receipts, as to the Forms of the Acquittances which they are to give; the manner of making up their Accounts, and other Matters of the like nature. And there are alſo other Rules which relate to the Functions of thoſe who ſettle the Aſſeſſments

16. *Several other Duties of thoſe who are imployed in impoſing and levying the Publick Taxes.*

ments of the ſeveral Inhabitants, or who collect the Money that is aſſeſſed. But theſe ſorts of Rules which are eſtabliſhed by the Ordinances, and the Edicts and Declarations publiſhed concerning theſe Matters *t*, not having the Character of the Rules that are to be explained in this Book, as has been already obſerved in another Place *u*, they ought not to be ſet down here; and it is eaſy for the Reader to find them in the ſaid Edicts and Ordinances.

t The Detail of theſe Rules is contained in the Ordinances.

See that of Francis I. *in the Year* 1517. *Art.* 45, 49. *in* 1535. *Art.* 11, 29. *in* 1517. *Art.* 47. *See that of* Lewis XII. *in* 1508. *See the States of* Orleans, *Art.* 140. *See that of* Charles VII. *in the Year* 1388. *Art.* 208.

Neminem ſuſceptionis munere functum ad idem munus adſtringi, niſi ſe prius vinculo ſolicitudinis ſuperioris abſolverit. Nam neque eos qui placuerint gravare, juſti eſt, neque eos qui diſplicuerint tenere, prudentis eſt. *l.* 4. *de ſuſcept. prap. & arcar.*

One may judge by this Text how great the Care and Vigilancy is which is required in thoſe who are employed in diſtributing and levying the Publick Taxes.

u See the End of the Preface.

XVII.

17. *Duties of thoſe who are imployed in levying the Duties on Goods and Merchandizes.*

The Duties of the Officers, and other Perſons who have the Charge of levying the Impoſitions which are laid on Goods and Merchandizes, and who are employed in gathering in the Duties on Salt, the Exciſe on Liquors, the Cuſtoms on Goods imported and exported, and other Impoſts of the like kind, are of a leſs Extent than the Duties of the Officers and other Perſons who are employed in the Diſtribution and Collection of the Taxes on Lands and Perſonal Eſtates. For as to thoſe other kinds of Contributions, the Impoſition conſiſts in the Tax which the Prince lays upon each kind of Goods and Merchandizes, and it is paid out of the things themſelves in the Places where the Duty ought to be paid. Thus the Duty of the Perſons who are concerned in levying the ſaid Impoſts, whether they be the chief Commiſſioners, or others imployed under them, conſiſts in not committing any Abuſes, in not exacting any greater Sum than what is due, in giving diligent Attendance at their Offices, that they may not delay thoſe who have Payments to make, in viſiting the Merchandizes in the preſence of the Owners, without ſpoiling them, diſordering them, or cauſing any manner of Damage to them; and finally in obſerving in the diſcharge of their Functions the Rules which are preſcribed them by the Ordinances *x*.

x Exact no more than that which is appointed you. Luke 3. 13.

The Opportunities and the Conveniency which thoſe Perſons who are employed in collecting theſe Impoſts have of exerciſing Violence and Extortion, oblige thoſe who have the naming of them, and the Officers who are their Judges, to watch narrowly their Conduct, and to keep them within the Bounds of that Moderation which their Function requires, and which may be very conſiſtent with their Duty, as St. John *told the Publicans who conſulted him. It was becauſe of theſe Abuſes, which went even the length of Robbery, that the* Romans *made particular Laws for repreſſing them.* Quantæ audaciæ, quantæ temeritatis ſint Publicanorum factiones, nemo eſt qui neſciat. Idcirco Prætor compeſcendam eorum audaciam hoc edictum propoſuit. Quod familia Publicanorum furtum feciſſe dicetur, item ſi damnum injuria fecerit, & id ad quos ea res pertinet, non exhibetur: in dominum ſine noxæ deditione judicium dabo. *l.* 12. *ff. de public. & vectig. & comm.*

TITLE VI.

Of the Demeſnes of the Sovereign.

BEFORE we proceed to explain what is meant by this Word, the Demeſnes of the Sovereign, it is neceſſary to obſerve that the Prince may have two ſorts of Goods; thoſe which he has in the Quality of Sovereign, and which depend on the Sovereignty, and thoſe which properly belong to his Perſon independently of his Title of Sovereign. Thus in *France* the Lands which are annexed to the Crown are the firſt of theſe two ſorts; thus the Lands and other Goods which the Prince acquires by Succeſſion are of the ſecond.

If by the Word, the Sovereign's Demeſnes, were to be underſtood in general all the Eſtate and all the Rights which he may have, the Demeſnes would comprehend the Goods of both theſe kinds; and in this caſe it would be neceſſary to diſtinguiſh two ſorts of Demeſnes; that which we call in *France* the Demeſnes of the Crown, and that of the Eſtate belonging properly to the Perſon of the Prince independently of his Quality of Sovereign, in the ſame ſenſe that we give ſometimes to the Word Demeſne, when we ſpeak of the Poſſeſſions of particular Perſons.

If on the contrary we will take this Word, the Demeſnes of the Sovereign, in the Senſe which it ſeems to have in the Ordinances, it will be underſtood

only of the Demeſnes of the Crown; for they declare whatever is Part of the King's Demeſne to be inalienable, excepting in the Caſes which ſhall be hereafter mentioned *a*. Which reſtrains the Senſe of this Word to the Goods which depend on the Crown, ſeeing it is only thoſe which the Ordinances have forbid to be alienated, and that nothing hinders the Sovereign from diſpoſing as he pleaſes of the Goods which belong to him as his own by any other Title; unleſs it be that the ſaid Goods have been annexed to the Crown by the way which the ſame Ordinances have eſtabliſhed, and of which notice ſhall be taken in its proper place *b*.

This Word, the Demeſnes of the Sovereign, ſignifies therefore commonly with us the Goods which depend on the Sovereignty, and not thoſe which belong to the Prince as his own private Property by ſome other Title, and which we may call if we pleaſe his private Demeſne. Thus in *France* we commonly underſtand by the King's Demeſne, not only the Lands annexed to the Crown, but alſo the Rights of another nature, ſuch as the Right of Forfeiture, that of Succeſſion to the Eſtates of Aliens, as alſo to the Eſtates of thoſe who die without any Heir, the Right to the Succeſſions of Baſtards; and we likewiſe compriſe therein other Rights, ſuch as the Exciſe and Cuſtoms, which the Ordinances themſelves ſeem to place in the number of the Goods belonging to the King's Demeſnes; ſeeing there are Edicts which have ordained ſome of the Goods of the Demeſne to be alienated, and have comprehended therein the Alienation of the Exciſe. According to this Meaning, which takes in the Exciſe and Cuſtoms as Part of the Demeſnes, it would ſeem that we might likewiſe compriſe in it all the other ſorts of Rights which compoſe the Publick Revenue, and which have been explained in the foregoing Article, ſeeing they are Rights which depend on the Sovereignty, and which augment the Goods, and the Revenues thereof, and make as it were a Patrimony for the Prince, according to the Expreſſion of the *Roman* Law, where they call by the Name of Patrimonial Lands, thoſe which belong to the Prince by virtue of that Quality *c*.

Beſides the Rights of the Sovereign which bring him in a Revenue, and which for this reaſon are naturally a part of his Demeſne, we reckon commonly in *France* among the Rights of the Demeſne thoſe which are called the Rights of Juſtice, altho there be only ſome of the ſaid Rights which bring in any Revenue, the others producing none at all; which obliges us to diſtinguiſh here theſe two different kinds of Rights of Juſtice.

We call in general Rights of Juſtice, certain Rights which are either a part of the Right of adminiſtring Juſtice, or which are Conſequences of it. Thus the Rights of appointing Officers for the Adminiſtration of Juſtice, of having Courts of Juſtice, Priſons, Pillories, Gibbets, of reaping the Profit of Confiſcations and of Fines, are Rights that are called Rights of Juſtice, and which do naturally belong only to the Sovereign, as that of adminiſtring Juſtice does. But ſince it is the Uſage in *France*, that many Lords have the Rights of Juſtice which the Kings have granted them within the Bounds of their Lands, they have alſo theſe ſorts of Rights which we have juſt now mentioned, but in a different manner; for we diſtinguiſh three kinds of Juſtice or Juriſdiction, the higheſt, the middlemoſt, and the loweſt, which have their different Rights, and which it is not our Buſineſs to explain here, ſeeing this Matter, which depends on Cuſtom and Uſage, does not come within the Deſign of this Book. We ſhall only obſerve here, that theſe Rights of Juſtice being of two ſorts, one of thoſe which produce no Revenue, ſuch as the Right of having Courts, or other Places, for the Adminiſtration of Juſtice, Pillories, and Gibbets; and the other of thoſe which produce a Revenue, ſuch as the Right to Forfeitures and Fines: we ſhall ſet down in this Title among the Rights of the Demeſne of the Sovereign, only the Rights of Juſtice which produce ſome Revenue, taking this Word Demeſne in the Senſe which ſignifies properly the Patrimony of the Prince, that is to ſay, his Goods, his Rights, and his Revenues. Thus what ſhall be ſaid in this Title of theſe ſorts of Rights muſt be underſtood to be within the Bounds of the Lands which belong to the King, and of which the Juriſdiction has not been alienated from

a See the 14th Article of the 1ſt Section.
b See the 24th Article of the 1ſt Section.
c Fundi Patrimoniales, & qui ex emphyteutico jure ad domum noſtram diverſis generibus, devoluti ſunt, ſic eis, qui eos popoſcerint, cedunt, ut commiſſi metus eſſe non poſſit. Neque enim magis commodamus noſtra, quam tradimus ea jure dominii: ita tamen, & ea quæ in noſtra poſſeſſione poſiti præſtiterint, & in poſterum ſolvant. *l. 4. C. de fund. patrim. V. T. h. T.*

the Crown. For in the Lands belonging to the Lords of Mannors who have a Juriſdiction within themſelves, the ſaid Rights belong to them.

It follows from all that has been ſaid of the Goods and Rights of the Demeſne, that it is neceſſary to diſtinguiſh the Meaning of theſe two Words, *Goods* and *Rights*. For the Word Goods is more general, and every thing that is a Right of the Demeſne is alſo part of the Goods thereof. But there are Goods of the Demeſne which ought not to be comprehended under the Name of Rights. Thus the Crown-Lands are Goods but not Rights of the Demeſne. But ſeeing theſe two Words *Goods* and *Rights* are often taken in one and the ſame Senſe, and that it is eaſy to diſtinguiſh that which is only part of the Goods, from that which is properly ſpeaking a Right, we ſhall make uſe of theſe two Words in this Title, in ſuch a manner as to avoid all Equivocation which may render the Senſe dubious.

It remains only that we ſhould diſtinguiſh the Matters which are to compoſe this Title, which we have divided into eight Sections. The Firſt, where we ſhall explain the Nature and the Kinds in general of the Rights of the Demeſne. The Second, where we ſhall treat particularly of the Right of Forfeiture. The Third ſhall be of the Right of Succeſſion to Perſons who have no Heir, of vacant Goods, and of Waifs. The Fourth ſhall be of the Right of Succeſſion to the Eſtates of Aliens. The Fifth of the Right of Succeſſion to Baſtards. The Sixth ſhall contain the Rules common to the ſeveral ſorts of Goods and Rights of the Demeſne. The Seventh ſhall contain the Privileges of the Exchequer. And the Eighth ſhall treat of that which the Sovereign may have independently of that Quality, and as his private Patrimony or Demeſne.

SECT. I.

Of the Nature and Kinds in general of the Rights of the Demeſne.

The CONTENTS.

1. *Definition of the King's Demeſne.*
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18. *The Appennages are made on condition of Reverſion in caſe of Failure of Male-Iſſue.*
19. *The Goods of the third kind are alſo inalienable.*
20. *The Demeſne is impreſcriptible.*
21. *There are ſome Rights which can belong only to the Demeſne, and others which become Part of the Demeſne by Changes.*
22. *How Lands that were not a part of the Demeſne may become ſo.*
23. *The Prince diſpoſes of the Goods not yet annexed to the Demeſne.*
24. *How the private Goods of the Prince become part of the Demeſne.*
25. *Two Ways of uniting and incorporating Lands into the Demeſne.*
26. *In doubtful Caſes the Cauſe of the Exchequer is not favoured.*

I.

THE Demeſne of the Sovereign conſiſts of the Goods and of the Rights which he poſſeſſes by virtue of that Quality *a*. 1. *Definition of the King's Demeſne.*

a Sacrum patrimonium. *l. ult. C. de vectig. & comm.*

Omnes omnino quocunque titulo poſſidentes, quod delegatio ſuper indicti nomine videtur, amplexa velut canones cogantur inferre ut ne qua ſit dubietas, hac aperte definitione decernimus, ut id potius canonis vocabulo poſtuletur. Nulla igitur domus vel ſacri patrimonii vel emphyteutici juris vel hominum privatorum, etiam ſi privilegium aliquod habere doceatur ab hac neceſſitate ſejuncta ſit: quæ jam non extraordinarium, ut hactenus, ſed ipſis facientibus canonicum nomen accepit. *l.* 1. *C. de indict.*

II. This

II.

2. The Demeſne is different from the private Patrimony of the Prince.

This Demeſne is diſtinguiſhed from that of the Goods and Rights which the Sovereign may have by any other Title, and which may be called his private Demeſne *b*, of which we ſhall treat in the eighth Section.

b Privatum patrimonium. *l. 2. C. de off. com. rer. priv.*

Quoties alicui colonorum agrum privati patrimonii noſtri placuerit venumdari; non unus tantum, qui forte conſortibus ſuis gravis ac moleſtus exiſtat, ſed alii quoque duo vel plures ex ſimili origine ac jure venientes in ſupradicta emptione ſocientur. *l. ult. C. de agric. & dom. vel fiſc.*

III.

3. Three ſorts of Goods of the Demeſne.

The Demeſne of the Sovereign, which belongs to him in that Quality, is compoſed of three different kinds of Goods, which are explained in the three following Articles *c*.

c See the following Articles.

IV.

4. The firſt is of Lands and Immoveables.

The firſt ſort of Goods of this Demeſne, are the Immoveables which belong to the Sovereign, either by the Eſtabliſhment of the Eſtate, or by Conqueſt, or by other ways *d*, as is explained in the 22d and following Articles. And we muſt comprehend under this firſt kind, the Lands which the Sovereign may have acquired by a private Title, ſuch as Succeſſion, Donation, or otherwiſe, when the ſaid Lands have been annexed to the Crown in the manner which ſhall be explained in the ſame Articles.

d Fundi patrimoniales & qui ex emphyteutico jure ad domum noſtram diverſis generibus devoluti ſunt. *l. 4. C. fund. patrim. V. T. h. T.*

Variæ cauſæ ſunt, ex quibus nuntiatio ad fiſcum fieri ſolet. Aut enim ſe quis quod tacite relictum eſt, profitetur capere non poſſe, vel ab alio præventus defertur, vel quod mors ab hæredibus non vindicatur: vel quod indignus quis hæres nunciatur: vel quod princeps hæres inſtitutus, &c. *l. 1. in princip. ff. de jure fiſc.*

V.

5. The ſecond is of the publick Revenue.

The ſecond ſort of the Goods of the Demeſne are the ſeveral Duties and Impoſitions which compoſe the publick Revenue of the State, ſuch as thoſe which have been treated of in the preceding Title *e*.

e Tributa, Vectigalia, &c. *See the ſecond Section of the preceding Title.*

VI.

6. The third is of ſeveral other Rights of divers kinds.

The third ſort of the Goods of the Demeſne comprehends all the other different Rights of the Prince, ſuch as the Rights of Forfeiture, of Succeſſion to thoſe who have no Heirs, of Succeſſion to the Eſtates of Aliens, of Succeſſion to Baſtards; the Rights of Frank-Fees, of new Acquiſitions, of Mortmain; the Rights of the Sovereign on the Seas, to Foreſts, Hunting, Fiſhing; the Rights of Juſtice which bring in ſome Revenue, according to the Remark which has been made in the Preamble of this Title; the Duties and Revenues which the King draws from the Offices belonging to his Demeſne; ſuch as thoſe of Regiſters and Notaries Publick; the Caſualties of other Offices, and other Duties and Revenues of the Demeſne, which have almoſt all of them this in common, that the Revenues of this third ſort depending on uncertain Events, are a kind of caſual Revenue *f*.

f See concerning the Rights of Forfeiture, of Succeſſion to thoſe who leave no Heir behind them, of Succeſſion to the Eſtates of Aliens, and of Succeſſions to Baſtards, the four following Sections; touching the Rights of Frank-Fees, of new Acquiſitions, and of Mortmain, the fifteenth Article of the ſecond Section of the ſecond Title. And as to the Rights of the King on the Seas, to Foreſts, Hunting, and Fiſhing, ſeeing they contain a Detail of arbitrary Rules which are to be found in the Ordinances, and which do not come within the Deſign of this Book, we ſhall not make any Collection of them here; and it ſufficeth to remark in general the Order of the ſaid Rights. But ſeeing there are Rules of Policy relating to the Matters of the Seas, of Foreſts, of Hunting and Fiſhing, which are within the Deſign of this Book, we ſhall explain them in the eighth Title. And as for the Rights of Juſtice, it is a Matter which does not belong to the Deſign of this Book; becauſe, as has been ſaid at the End of the Preamble of this Title, theſe Rights belonging to the Lords of the Manor, who have the Juriſdiction within their own Bounds, are regulated by Cuſtom and Uſage; and thoſe of the King, which may come within the Deſign of this Book, ſuch as Forfeitures, Fines, and others, are explained each of them in their proper Place.

VII.

7. Goods compriſed under the firſt kind.

We muſt comprehend under the firſt kind of Goods of the Demeſne certain other Immovables beſides Lands, ſuch as Houſes, Shops, Stalls, and other Buildings in publick Places, or Places vacant, and having no Owner, and which have been granted by the Prince, in conſideration of a certain Rent, by Alienations or Engagements which have been made thereof; ſuch as are in *Paris*, the Shops in the Palace, and in the Market-Places *g*. But we muſt not take in under this firſt ſort of Goods of the De-

g This is a Conſequence of the fourth Article.

meſne the publick Places, the Highways, and the other Things of this kind, which are out of the Commerce of particular Perſons, and deſtined to the Uſe of the Publick. For theſe ſorts of Immoveables producing no manner of Revenue, are not reckoned in the number of Goods; and the Rights which the Publick and the Sovereign have in them are of another Nature than the Rights which Property gives *h*.

h See the ſecond and third Articles of the firſt Section of Things.

VIII.

8. *Other Goods which come under the ſame kind.*

It is neceſſary likewiſe to comprehend under this firſt kind of Immoveables belonging to the Demeſnes, the Lands which are waſte, that is to ſay, which have never been cultivated, and which have no Owner: And alſo the Iſlands which are formed in the great and navigable Rivers, Tolls, Paſſages, Bridges, Ferry-Boats, Fiſheries, Mills, and other Things which depend on the Right to Rivers, and to the Highways *i*.

i Inſula quæ in flumine publico nata eſt, publica eſſe debet. *l. penult. in f. ff. de acq. rer. dom.*

This Text ſeems to be contrary to others of the Roman *Law, which ſay, That the Iſlands growing in Rivers do belong to the Proprietors of the neighbouring Grounds, according to their Proximity to the ſaid Iſlands, and in proportion to the Extent of their Grounds.*

Inſula quæ in mari nata eſt, (quod raro accidit) occupantis fit: nullius enim eſſe creditur. At inſula in flumine nata (quod frequenter accidit) ſiquidem mediam partem fluminis tenet, communis eſt eorum qui ab utraque parte fluminis prope ripam prædia poſſident: pro modo (ſcilicet) latitudinis cujuſque fundi quæ prope ripam ſit. Quod ſi alteri parti proximior ſit, eorum eſt tantum qui ab ea parte prope ripam prædia poſſident. §. 22. *inſt. de rer. diviſ. l.* 7. §. 3. *ff. de acq. rer. dom.*

Inſula eſt nata in flumine contra frontem agri mei, ita ut nihil excederet longitudo regionem prædii mei. Poſtea aucta eſt paulatim, & proceſſit contra frontes & ſuperioris vicini, & inferioris. Quæro, quod adcrevit, utrum meum ſit, quoniam meo adjectum eſt, an ejus juris ſit, cujus eſſet, ſi initio ea nata ejus longitudinis fuiſſet? Proculus reſpondit, flumen illud, in quo inſulam contra frontem agri tui eam natam eſſe ſcripſiſti, ita ut non excederet longitudinem agri tui, ſi alluvionis jus habet, & inſula initio propior fundo tuo fuit, quam ejus, qui trans flumen habeat, tota tua facta eſt, & quod poſtea ei inſulæ alluvione acceſſit, id tuum eſt etiam ſi ita acceſſit, ut procederet inſula contra frontes vicinorum ſuperioris atque inferioris, vel etiam ut propior eſſet fundo ejus qui trans flumen habet. *l.* 56. *eod.*

It would ſeem that in this laſt Law ſave one, de acqu. rer. dom. *a Diſtinction ought to be made of two ſorts of Rivers, thoſe which were for the Uſe of the Publick, and other leſſer Rivers. And likewiſe the Ordinances which reckon theſe Iſlands a part of the Demeſnes of the King, are reſtrained to thoſe which grow in great and navigable Rivers. So that it may be ſaid, that the Authors who are of opinion that theſe Ordinances are contrary to the* Roman *Law, have not made Reflection on this Text which we have juſt now quoted.*

See the King's Edict of the Month of April, 1683, *in which the antient Ordinances are mentioned.*

IX.

9. *Another Revenue of the ſame kind, the Mines.*

We may alſo comprehend under the Goods of this firſt kind, the Revenues which the Sovereign draws from Mines, and which are regulated to a tenth Part *l*.

l This tenth Part is regulated purſuant to the Roman *Law by the Ordinances of* Francis *the Second, bearing Date the 29th of* July, 1560; *of* Charles *the Ninth, dated the 26th of* March, 1563; *and others.*

Cuncti qui per privatorum loca ſaxorum venam laborioſis effoſſionibus perſequuntur, decimas fiſco, decimas etiam domino repræſentent: cætero modo propriis ſuis deſideriis vindicando. *l.* 5. *C. de metall.*

See the nineteenth Article of the ſecond Section of the ſecond Title.

X.

10. *Other Goods of the ſecond kind.*

If under the ſecond kind of Goods belonging to the Demeſne, which are the publick Revenue, we ſhould take in every thing that is called in *France* the King's Money, we might place in that Rank the Tenths which the Clergy pay to the King, the Impoſitions which are laid on in ſome Provinces by the name of Free Gift, the Money which is raiſed for the Maintenance of the King's Guards, the Subſiſtence of the Houſhold, and all the other Revenues of the like kind *m*.

m Noſtrum ærarium. *l. ult. C. de quadr. præſcr.*

Res fiſci noſtri. §. 9. *inſt. de uſucap.*

XI.

11. *Another Revenue of the ſame kind.*

We may likewiſe, with much more reaſon, place in this ſecond kind the Profits and Revenues which the Right of coining Money may produce, whether it be by raiſing the Value of the Bullion that is coined into Money, or by raiſing the Value of the Species. For the Right of coining Money belongs to the Sovereign alone *n*.

n Si quis nummos falſa fuſione formaverit, univerſas ejus facultates fiſco noſtro præcipimus addici. *In monetis enim tantummodo noſtris cudendæ pecuniæ ſtudium frequentari volumus; cujus obnoxii, majeſtatis crimen committunt.* Et præmio accuſatoribus propoſito, quicunque ſolidorum adulter poterit reperiri, vel a quocunque fuerit publicatus, illico omni dilatione ſummota, flammarum exuſtionibus mancipetur. *l.* 2. *C. de falſ. monet. V. tit. C. de muril. & gynac.*

XII.

XII.

12. *The Goods of the Demeſne are inalienable.*

There is this in common to all the Goods of the Demeſne of theſe three ſorts, that they are all of them inalienable, but in different Reſpects. For there are ſome of them which of their own Nature, and by their Quality are inalienable; and there are others which are inalienable only becauſe of the Privilege of the Sovereign, when he is become Maſter of them. We ſhall ſee in the Articles which follow this Diſtinction, and theſe different Effects in the three ſorts of the Goods of the Demeſne *o*.

o See the Edict of the 30th of June, 1539.
Intellecto jamdudum quod chariſſimus in Chriſto filius noſter Hungariæ Rex illuſtris alienationes quaſdam fecerit in præjudicium regni ſui & contra Regis honorem: nos eidem Regi dirigimus ſcripta noſtra, ut alienationes prædictas, non obſtante juramento ſi quod fecit de non revocandis eiſdem, ſtudeat revocare. Quia cum teneatur, & in ſua coronatione juraverit, jura regni ſui & honorem coronæ illibata ſervare: illicitum profecto fuit, ſi præſtitit de non revocandis alienationibus hujuſmodi juramentum & propterea penitus non ſervandum. *Cap. intellecto extra de jure jur.*
Nulli jam in poſterum licere præcipimus patrimoniales ſeu limitrophos, vel ſaltuenſes fundos qui per tractum orientis poſiti ſunt, ad jus transferre privatum: ſive dempto, ſive ſalvo canone juris fundorum immutatio poſtuletur, &c. *l.* 13. *C. de fund. patr.*
See the twentieth Article of this Section.

XIII.

13. *There are ſome Goods of the Demeſne inalienable in their own Nature, and others only becauſe of the Privilege of the Sovereign.*

Of all the different ſorts of Goods of the Demeſne, thoſe which by their Nature belong to the Sovereign, and cannot belong to other Perſons; ſuch as the publick Taxes, the Right of coining Money, and others, are naturally inalienable. And thoſe which in their own Nature might have belonged to other Perſons, ſuch as the Crown-Lands, are inalienable only becauſe they have paſſed to the Poſſeſſion of the Sovereign, and becauſe of his Privilege, and of their being appropriated to the Uſes of the State *p*.

p This Diſtinction reſults from the Nature of theſe ſeveral ſorts of Goods.

XIV.

14. *It is lawful to alienate the Goods of the Demeſne in two Caſes.*

Altho the Goods of the Demeſne be inalienable, yet if it happens that the Good of the Publick requires they ſhould be alienated, the Prince may alienate them. But that happens only in two Caſes: One is, that of Neceſſity in a Time of War. And the other is in order to give to the younger Sons of the Sovereign a Patrimony, which is called an Appennage *q*, and which it is juſt to take out of theſe ſorts of Goods for the ſaid younger Sons and their Male-Iſſue, who may in proceſs of time ſucceed to the Crown. But this Alienation is made only on the Conditions explained in the ſixteenth and eighth Articles.

q The Demeſnes of the Crown of France *cannot be alienated, except in two Caſes only: One is, for an Appennage to the younger Sons of the Houſe of* France; *in which Caſe they revert again to the Crown, if the ſaid younger Sons die without Male-Iſſue, in the ſame Eſtate and Condition they were in at the time of the ſaid Grant, notwithſtanding any Diſpoſition, Poſſeſſion, or any other Act, expreſs or tacit, that may have paſt or happened during the time of the Appennage. The other, for the raiſing of ready Money for the neceſſary Expences of a War, after Letters Patent have iſſued for this Purpoſe, and been regiſter'd in the Parliaments of* France, *in which Caſe there is a perpetual Power of Redemption. Ordinance of* February, 1566, *Art.* 2.
See the Ordinance of Blois, *Art.* 329. *See the twenty third Article of the ſecond Section of the ſecond Title.*

XV.

15. *A kind of Alienation of the Goods of the ſecond ſort.*

Altho the Goods which can belong to none but to the Sovereign be inalienable in their own Nature, ſuch as the Tax on real and perſonal Eſtates, the Exciſe, the Cuſtoms, and others; yet a ſort of Alienation is made of them when the King creates Rents or Annuities, which he ſells and aſſigns on the ſaid Revenues as occaſion requires; and theſe ſorts of Alienations are limited to the Sums regulated by the Edicts which ordain them, and affect thoſe Revenues only till the Redemption of the ſaid Rents: But the Fund of the ſaid Revenues remains always the King's; ſo that the annual Impoſitions of the ſaid Revenues, even for the Years in which the Purchaſers of theſe Annuities have the Benefit of them, are nevertheleſs collected as uſually in the King's Name, and by his Orders; and the Monies are returned into the hands of the Officers appointed to pay the ſaid Rents or Annuities *r*.

r See the Ordinances of April 1574, *of* September 1591, *of* February 1594, *and others.*
It is of this kind of Rents or Annuities that thoſe are which are paid at the Town-Houſe of Paris, *which are aſſigned on the Subſidies, and ſeveral other Funds.*

XVI.

16. *Alienations of the Goods of the Demeſne are made with the Charge of Reverſion.*

The Goods of the Demeſne cannot be alienated but upon condition of their reverting to the Crown whenſoever the Caſe falls out; and this Reverſion is different, according to the Cauſe

Cauſe of the Alienation, as ſhall be explained in the two following Articles.

XVII.

17. *Alienations for the Neceſſities of the War, are made with a Reſervation of a perpetual Faculty of Redemption.*

In the Caſe of alienating the Immoveables of the Demeſne for the Neceſſities of the War, the Goods alienated revert to the Sovereign, he reimburſing the Purchaſers of the Price of their Purchaſes. Thus, theſe Alienations are never made but with the Charge of a perpetual Faculty of Redemption: For which Reaſon the Purchaſers are looked upon to be a ſort of Mortgagees, and are obliged to preſerve the Goods and the Rights in their good Condition *t*.

t See the Ordinances cited on the 14th Article.

XVIII.

18. *The Appennages are made on condition of Reverſion in caſe of Failure of Male Iſſue.*

In the Caſe of an Alienation for an Appennage, the Reverſion has not place, except when the Cauſe of the Alienation and the Appennage comes to ceaſe. Which happens only in the Caſe where the Perſons on whom the Appennage was firſt ſettled, or their Male Succeſſors, die without Iſſue Male. And the ſaid Lands which were granted as an Appennage, ought in this Caſe to be reſtored in the ſame Condition in which they were at the time of making the Settlement, free from all the Charges and Debts of the Perſon on whom they were ſettled; for otherwiſe it would be in his power to annul the Right of Reverſion *u*.

u See the Ordinances quoted on the 14th Article.

XIX.

19. *The Goods of the third kind are alſo inalienable.*

The Alienations which have been ſpoken of in the preceding Articles, do not concern the Rights and caſual Revenues which have been explained in the ſixth Article; for thoſe Rights are inſeparable from the Sovereignty: And moreover, they do not agree with the two Cauſes which are the Foundation for alienating the Goods of the Demeſnes; but ſome of the ſaid Rights depending on the Right of Juſtice, ſuch as the Right of Forfeiture, and the Right of Succeſſion to thoſe who die without Heirs, they have paſſed to Lords of Manors, who have a Juriſdiction within their own Lands; and they belong alſo to the younger Sons of the Royal Family, who have Appennages ſettled on them in the ſame manner as the other Rights of the Lands given them for their Appennage *x*.

x This is a Conſequence of the Nature of thoſe Rights. See the 6th Article.

XX.

20. *The Demeſne is impreſcriptible.*

The ſame Reaſons which make the Goods of the Demeſne inalienable, render them likewiſe impreſcriptible; ſince they would be alienated, if they could be acquired by Preſcription. Thus, no particular Perſon can acquire the Property of them by the bare Effect of a long Poſſeſſion: For beſides the Conſequence of preſerving the Demeſne for the Good of the State, the Quality of the Sovereign making it impoſſible for him to look narrowly to the Preſervation of all the particular Goods belonging to his Demeſne, Preſcription ought not to run againſt him *y*.

y See Art. 12. of this Section, and Art. 2. of the 5th Section of Poſſeſſion, and of Preſcriptions in the Book of the Civil Law in its Natural Order.

The Goods of the Demeſne are declared to be impreſcriptible by the Edict of Francis *the Firſt, of the 30th of* June, 1539. *even altho they had been poſſeſſed for a hundred Years; altho by the* Roman *Law, the Funds belonging to the Exchequer, and to the Prince's Demeſne, might have been preſcribed by a Poſſeſſion of forty Years.*

Nullum jus privatum vel publicum in quacunque cauſa, vel quacunque perſona, quod prædictorum quadraginta annorum extinctum eſt jugi ſilentio moveatur. *l. 4. C. de præſcr. 30, & 40 an.*

Jubemus omnes qui in quacunque Diœceſi, aut in quacunque Provincia, vel quolibet ſaltu (vel civitate) fundos patrimoniales, vel templorum, aut agnothetici, ſeu relevatorum jugorum, vel cujuſcunque juris per quadraginta jugiter annos (poſſeſſione ſcilicet non ſolum eorum qui nunc detinent, verum etiam eorum qui antea poſſederant, computanda) ex quocunque titulo, vel etiam ſine titulo hactenus poſſederunt, vel poſtea per memoratum quadraginta annorum ſpatium poſſederint, nullam penitus ſuper dominio memoratorum omnium fundorum vel locorum vel domorum a publico actionem, vel moleſtiam, aut quamlibet inquietudinem formidare, ſed impoſitum canonem, pro qualitate juris, cujus prædia ſunt vel loca, per ſingulos annos ſolventes, pro certo habeant ſuum eſſe quod poſſident, vel poſtea poſſederint. Ita ut omnibus ad excludendam omnem quolibet modo ex publico movendam quæſtionem, nuda ex quocunque titulo, vel etiam ſine titulo corporalis quadraginta annorum jugis poſſeſſionis exceptio poſſit ſufficere; hoc etiam adjiciendo, ut illi quoque qui adempto canone hujuſmodi fundos ab initio principali juſſione datos ſibi fuiſſe confirmant: ſi per quadraginta annos adempti canonis beneficium jugiter poſſederunt: nec canonem cujus ademptionem quadraginta (ſicut dictum eſt) annorum, poſſeſſio teſtatur, poſſint penitus profligari: eo quod noſtræ pietati placuit in utroque caſu, id eſt tam ſalvo, quam adempto canone, poſſeſſorum noſtrorum jura in eo ſtatu in quo per quadraginta annos, ſicut dictum eſt, jugiter manſerunt, abſque ulla innovatione durare. *l. ult. C. de fund. patrim.*

It was only the Tribute or Tax upon the Land that was impreſcriptible.

Jubemus eos qui rem aliquam per continuum annorum quadraginta curriculum ſine quadam legitima interpellatione poſſederint, ne poſſeſſione quidem rei ſeu dominio nequaquam removeri: functiones autem, ſeu civilem Canonem, vel aliam quampiam publicam collationem eis impoſitam dependere compelli, nec huic parti cujuſcunque temporis præſcriptionem oppoſitam admitti. *l. 6. C. de præſtr.* 30 *vel* 40 *ann. For it is a Right whereof the Uſe and Cauſe do never ceaſe.*

XXI.

21. *There are ſome Rights which can belong only to the Demeſne, and others which become part of the Demeſne by Changes.*

It reſults from the preceding Articles, that of all theſe ſorts of Goods of the Demeſne, there are ſome which have never belonged to any other but to the Demeſne, ſuch as the Exciſe, the Cuſtoms and other Impoſts, which could never belong to particular Perſons, and are in uſe only for the benefit of the Publick, and by virtue of the Authority of the Powers who are veſted with the ſupreme Government, and have the Right of impoſing them; and there are others of the ſaid Goods which have been in the Commerce of particular Perſons, and are become Part of the Demeſne by Changes, ſuch as Lands annexed to the Crown *z*.

z This is a Conſequence of the different Natures of thoſe Rights. See the following Article.

XXII.

22. *How Lands that were not a part of the Demeſne may become ſo.*

The Lands united to the Crown are of three ſorts. The firſt is of thoſe which are part of the antient and original Demeſne appropriated to the Kings for their Uſe and for their Expences; and we may put down in this number that which has been added to to the Crown by Conqueſt. The ſecond is of thoſe which the Kings have acquired by Forfeitures, by the Death of Perſons dying without Heirs, by inheriting the Eſtates of Aliens, or by ſucceeding to Baſtards. And the third is of the Lands which have fallen to them by Succeſſion, or other Titles. And theſe two laſt ſorts of Goods become part of the Demeſne by the Union which incorporates them into the Demeſne, as ſhall be explained in the 24th and 25th Articles *a*.

a See the three following Articles.

XXIII.

23. *The Prince diſpoſes of the Goods not yet annexed to the Demeſne.*

The Goods which the King acquires by any one of the Ways explained in the preceding Article, are not united immediately to the Demeſne; for thoſe which ariſe from the Rights of Forfeiture, of Succeſſion to thoſe who die without Heirs, of Succeſſion to the Eſtates of Aliens and of Baſtards, being Profits and Revenues which the King might diſpoſe of, they are not conſidered as a Capital which becomes immediately a part of the Poſſeſſions of the Demeſne; but the King diſpoſes of them as he thinks fit, either by giving them away, or by keeping and uniting them to the Demeſne in the manner explained in the two following Articles *b*.

b By the Roman *Law the Prince diſpoſed of the Goods belonging to what they called his private Patrimony.*

Fundi patrimoniales, & qui ex emphyteutico jure ad domum noſtram diverſis generibus devoluti ſunt, ſic eis, qui eos popoſcerint, cedunt, ut commiſſi metus eſſe non poſſit. Neque enim magis commodamus noſtra quam tradimus ea jure dominii: ita tamen, ut ea quæ in noſtra poſſeſſione poſiti præſtiterint & in poſterum ſolvant. *l. 4. C. de fund. patrim. V. T. h. T.*

Since it often happens that the Goods which fall to the King by Forfeiture, by the Death of Perſons who leave no Heirs behind them, by the Death of Aliens and of Baſtards, are Goods ſubject to Rights which the Lords of Mannors have therein, the King parts with them, that he may not be ſubject to the ſaid Duties, or to make any amends for the ſame to thoſe Lords of the Mannor to whom they ſhould be due. And to juſtify this, they quote an Ordinance of Philip the Fair, *which directs this Courſe to be taken, and that the King ſhould rid his hands of thoſe Eſtates within a Year and a Day.*

XXIV.

24. *How the private Goods of the Prince become part of the Demeſne.*

The Goods which the King has acquired by particular Titles, and thoſe which are fallen to him by ſome of the Titles mentioned in the preceding Article, become part of the Demeſne, when they have been held and poſſeſſed in the ſame manner and on the ſame Conditions on which he holds and poſſeſſes the Goods of the Demeſne. Thus all the Goods which are expreſly ſet apart, annexed and incorporated for the uſe and benefit of the Crown, or which have been poſſeſſed and managed by the Receivers and Officers of the King, for the ſpace of ten Years, and enter'd into their Books of Accounts, are reputed, and are in reality the Goods of the Demeſne *c*.

c Theſe are the Words of the 2d Article of the Ordinance of February 1566. *touching the Demeſne. And in the* 13*th Article of the ſame Ordinance it is ſaid, that the foregoing Articles ſhall be held as a Law and Ordinance, as well for the antient Demeſne of the Crown, as for other Lands ſince accrued and fallen to the King.*

Fiſcus cum in privati jus ſuccedit, privati jure pro anterioribus ſuæ ſucceſſionis temporis utitur: cæterum poſteaquam ſuccеſſit habebit privilegium ſuum. Sed utrum ſtatim atque cœpit ad eum pertinere nomen, an vero poſtquam convenit debitorem, an poſtquam relatum eſt inter nomina debitorum quæritur

ritur ——— Puto tamen exinde privilegio eſſe locum, ex quo inter nomina debitorum relatum nomen eſt. *l.* 6. *ff. de jure fiſci.*

This Text agrees with the ſaid Ordinance.

XXV.

25. Two Ways of uniting and incorporating Lands into the Demeſne.

It follows from the preceding Article, that there are two ways of uniting and incorporating into the Demeſne Lands and other Immoveables. The one is expreſs, when the King declares that he unites and incorporates into the Demeſne the Lands which he might have otherwiſe diſpoſed of: and the other is tacit, when he ſuffers the Lands, which it was in his power to give away, and which were not annexed to the Demeſne, to be annexed and incorporated in it in the manner explained in the 24th Article *d*.

d Rerum nobis notitia intimetur, ut juſſu noſtro vacantia vel aliæ res nomine occupentur ærarii. Quæ forma etiam in parte bonorum vel in una alterave re ſeu actione una vel etiam pluribus ſervetur. *l. ult. C. de bon. vac. & incorpor.*

Si quando aut alicujus publicatione, aut ratione juris aliquid rei noſtræ addendum eſt rite atque ſolemniter per comitem rerum privatarum, deinde per rationales in ſingulis quibuſque provinciis commorantes incorporatio impleatur, & diligens ſtilus ſigillatim omnia adſcribat. *l.* 3. *eod.*

See the foregoing Article.

XXVI.

26. In doubtful Caſes the Cauſe of the Exchequer is not favoured.

It may be remarked as a laſt Rule of the Rights of the Demeſne, that altho the ſaid Rights be very favourable in their nature, and by reaſon of their being ſet apart for the Publick Good, altho they be inalienable, altho they be impreſcriptible, and that it is of Importance to the State that the ſaid Rights ſhould be preſerved; yet this Favour does not reach ſo far as to extend theſe Rights beyond their juſt bounds. And it is on the contrary for the Good of the Publick, and agreeable to Equity, that in the Caſes where upon due conſideration the Cauſe of the Exchequer may appear doubtful, one ſhould incline to the other Side. For the Favour of the Cauſe of the Exchequer does not go ſo far as to prefer a doubtful Pretenſion of the Officers of the Exchequer to the Intereſt of particular Perſons, which are found to be an equal Ballance with thoſe of the Exchequer, and which may have Equity on their ſide *e*.

e Non puto delinquere eum, qui in dubiis quæſtionibus contra fiſcum facile reſponderit. *l.* 10. *ff. de jure fiſci.*

Tantum etenim nobis ſupereſt clementiæ, quod ſcientes etiam fiſcum noſtrum ultimum ad caducorum vindicationem vocari, tamen nec illi pepercimus, nec auguſtum privilegium exercemus: ſed quod communiter omnibus prodeſt, hoc rei privatæ noſtræ utilitati præferendum eſſe cenſemus, noſtrum eſſe proprium ſubjectorum commodum imperialiter exiſtimantes. *l. un.* §. 14. *in f. C. de caduc. toll.*

See Art. 18. *of the 6th Section of the preceding Title, the Remark on Art.* 3. *of the 5th Section of this Title, and Art.* 14. *of Sect.* 7. *of this Title.*

SECT. II.

Of the Right of Forfeiture.

THE Reader may ſee concerning the Subject Matter of this Section, the 12th Article of the 2d Section of Perſons; the 11th, 20th, 25th, 33d, 34th, 35th, and 36th Articles of the 2d Section of Heirs and Executors in general, and the Remarks there made upon them; the 5th Article of the 4th Section, and the 1ſt Article of the 13th Section of the ſame Title, and the 14th Article of the 2d Section of Teſtaments.

The CONTENTS.

1. *Definition of Forfeiture.*
2. *Two ſorts of Forfeitures.*
3. *Fines.*
4. *In what manner Forfeitures and Fines are acquired.*

I.

1. Definition of Forfeiture.

Forfeiture is a Puniſhment, which is called by that Name, becauſe it deprives thoſe who have incurred it of all their Goods, and applies them to the Exchequer *a*.

a Damnatione bona publicantur, cum vita adimitur aut civitas. *l.* 1. *ff. de bon. dam.*

II.

2. Two ſorts of Forfeitures.

We muſt diſtinguiſh two kinds of Forfeitures. The firſt is of all the Goods; ſuch is that of Perſons condemned for Crimes which deſerve this Puniſhment; as are in *France* the Crimes of thoſe who are condemned either to Death, or to the Gallies for ever, or to perpetual Baniſhment out of the Kingdom *b*. The ſecond, of certain kinds

b Cum vita adimitur aut civitas. *l.* 1. *ff. de bon. dam.*

Qui rei capitalis damnati ſunt. *l.* 13. *ff. de bon. poſſeſſ.*

Qui rei poſtulati, vel qui in ſcelere deprehenſi, metu criminis imminentis mortem ſibi conſtituerunt: hæredem non habent. Papinianus tamen libro ſexto decimo reſponſorum ita reſcripſit, ut (ut) qui rei criminis non poſtulati, manus ſibi intulerint: bona eorum fiſco non vindicentur. Non enim facti ſceleritatem eſſe obnoxiam, ſed conſcientiæ metum in reo velut confeſſo teneri, placuit. Ergo aut

of things which are acquired to the Exchequer by contravening the Ordinances and Regulations which have eſtabliſhed this Penalty. Thus for example, Goods and Merchandizes are confiſcated when the Owners have defrauded the Publick of the Duties they were to have paid for them *c*.

aut poſtulati eſſe debent, aut in ſcelere deprehenſi: ut ſi ſe interfecerint, bona eorum confiſcentur. Ut autem divus Pius reſcripſit, ita demum bona ejus qui in reatu mortem ſibi conſcivit, fiſco vindicanda ſunt, ſi ejus criminis reus fuit, ut ſi damnaretur, morte aut deportatione adficiendus eſſet. *l.* 3. *ff. de bon. eor. qui.*

See Sect. 2. *Art.* 11. *of Heirs and Executors, and the Ordinance of* 1673. *Art.* 29. *of Defaults.*

c Pœna commiſſi. *l.* 3. *C. de vectig. & com.*

III.

3. *Fines.* We may place in the rank of Forfeitures the Condemnations of Perſons in Fines of certain Sums of Money for divers ſorts of Crimes and Offences, or for having defrauded the Prince of his Due. For theſe Fines being adjudged to him by the Sentences of Condemnation, they belong to him as well as the Forfeitures *d*.

d Mulctarum ſevera compendia ærario noſtro protinus eſſe quærenda nullus ignoret: niſi ipſe judex id, quod ad pœnam admiſſi facinoris exculpitur, vel publicis operibus, vel curſui publico, vel aliis neceſſariis cauſis ſpecialiter deputaverit. *l.* 5. *C. de modo mulct.*

The Judges may adjudge the Fines either to the King, or to the Lord of the Mannor within his Lands, or to Hoſpitals, or to Priſoners.

IV.

4. *In what manner Forfeitures and Fines are acquired.* Seeing Forfeitures and Fines are Puniſhments, they are not due till after a Sentence of Condemnation from which there lies no Appeal *e*.

e Provocationis remedio condemnationis extinguitur pronunciatio. *l.* 1. §. *ult. ff. ad Senat. Turpill.*

SECT. III.

Of the Right of Succeſſion to Perſons who leave no Heir behind them, of vacant Goods, of Waifs, and of Treaſures.

The CONTENTS.

1. *Definition of the Rights of Succeſſion to Perſons who leave no Heir.*
2. *Definition of vacant Goods.*
3. *The Right of Succeſſion to Perſons dying without Heirs, takes in all the Goods, Moveable and Immoveable.*
4. *Another ſort of vacant Goods.*
5. *Lands recovered from an Enemy.*
6. *Waifs or Strays.*
7. *Treaſures.*

I.

1. *Definition of the Right of Succeſſion to Perſons who leave no Heir.* BY the Right of Succeſſion to Perſons who leave no Heir behind them, is meant the Right which the Prince has to all the Goods of thoſe who die without lawful Heirs, and without making a Teſtament; for theſe Goods having no Owner, paſs to the Publick, and are acquired to the Prince who is the Head of it *a*.

a Scire debet gravitas tua, Inteſtatorum res qui ſine legitimo hærede deceſſerint, fiſci noſtri rationibus vindicandas: Nec civitates audiendas quæ ſibi earum vindicandarum jus veluti ex permiſſu vindicare nituntur: & deinceps quæcunque inteſtatorum bona civitatibus obtentu privilegiorum ſuorum occupata eſſe compereris, ad officium noſtrum eadem revocare non dubites. *l.* 1. *C. de bon. vac. & incorpor.*

Vacantia mortuorum bona tunc ad fiſcum jubemus transferri, ſi nullum ex qualibet ſanguinis linea, vel juris titulo legitimum reliquerit inteſtatus hæredem. *l.* 4. *eod.*

II.

2. *Definition of vacant Goods.* By vacant Goods are meant Goods of Perſons who die without Heirs, which is the Caſe explained in the foregoing Article; and the ſaid Goods are acquired to the Exchequer, if they are not claimed by Creditors: And there are likewiſe other ſorts of vacant Goods, which ſhall be taken notice of in the 4th Article *b*.

b Vacantia mortuorum bona. *l.* 4. *C. de bon. vac.*

III.

3. *The Right of Succeſſion to Perſons dying without Heirs, takes in all the Goods, Moveable and Immoveable.* The Right of Succeſſion to Perſons who die without Heirs, comprehends all ſorts of Goods, Moveables and Immoveables, Rents, Debts due to the Deceaſed, and in general all Goods and Effects of all kinds which did belong to him who dies without Heirs; and all theſe ſorts of Goods are acquired to the Prince *c*.

c This is a Conſequence of the firſt Article.

IV.

4. *Another ſort of vacant Goods.* We may conſider as a kind of vacant Goods, thoſe which for other Cauſes beſides the Death of Perſons who leave no Heir behind them, are without an Owner, ſuch as Lands and Houſes unoccupied and claimed by no body *d*.

d These ſorts of Goods are of the ſame Condition as Goods vacant by the Death of one who leaves no Heir behind him.

V.

5. *Lands recover'd from an Enemy.*

We muſt not reckon in the number of vacant Goods, the Lands which having been for ſome time in the poſſeſſion of Enemies, by an Uſurpation, or a lawful Conqueſt, which had ſtript the antient Proprietors of them, had been acquired to thoſe who by that Event were become Maſters of them. And if the Country thus conquer'd is reſtored again either by a Conqueſt, or by a Treaty of Peace, every Proprietor enters again to his Lands, as if he had always retained the Property of them *e*.

e Verum eſt, expulſis hoſtibus ex agris quos ceperint, dominia ad priores dominos redire; nec aut publicari aut prædæ loco cedere. Publicatur enim ille ager qui ex hoſtibus captus ſit. *l.* 20. §. 1. *ff. de capt. & poſtlim. reverſ.*

VI.

6. *Waifs, or Strays.*

Neither ought we to place in the number of vacant Goods, Moveable Things, which being loſt by their Owners, fall into the hands of thoſe who find them; for if they cannot diſcover the Owner, the things belong to the Finders, purſuant to the Rule explained in the 10th Article of the 2d Section of Poſſeſſion. But we muſt except from this Rule the Uſage in *France* as to Cattle which are loſt, and which we call Strays, which by the Cuſtoms and Uſage of *France* belong to the King as a Right of Juſtice, and to the Lord of the Mannor who has the Rights of Juſtice *f*.

f See the 10th Article of the 2d Section of Poſſeſſion.

§ This Diſtinction between Cattle and other things loſt, may be founded upon this, that Cattle are more eaſily loſt than other ſorts of things which it is eaſier to keep, and that therefore care ought to be taken to keep thoſe Cattle for their Maſters from whom they have ſtrayed; which is done with greater Fidelity, and with more Eaſe, by the Aid of Publick Juſtice than by particular Perſons. It is for this reaſon that the Cuſtoms of *France* do not adjudge thoſe Strays to the King, or to the Lords of the Mannor, till a certain time after they have been proclaimed, in order to find out the Owners, and to deliver to them their Cattle, they paying the Expence of their keeping, and other Charges, if there be any.

It may be obſerved on the word *Strays*, that by the antient Uſage in *France* they gave the name of Strays to Strangers or Aliens, perhaps for this reaſon, that no body knew whence they came, as no body knows from whence Cattle that are ſtrayed do come.

[*The time limited by the Law of* England *for acquiring a Right of Property in Strays, is a Year and a Day. And therefore it is that if a Horſe is taken as a Stray, the Lord of the Manor who took him has no right to work him within the Year; for until the Year and a Day be expired, he has no Property in him.* Rolls 1. Abridg. pag. 879.]

VII.

We may put down Treaſures in the number of Goods that are vacant, and which have no Owner; for Treaſures conſiſt of Money or other precious things, which are diſcovered in ſecret Places where the Owners had depoſited them for Safety, and of which there is no Proof to ſhew to whom they belong *g*. Thus theſe Treaſures being without any Owner, our Uſage in *France* has given to the King a Right in them, and has fixed this Right at a third Part, giving the other two thirds, the one to the Finder, and the other to the Owner of the Ground where the Treaſure was found.

7. *Treaſures.*

g Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat; ſic enim fit ejus, qui invenerit, quod non alterius ſit. *l.* 31. *ff. de acquir. rer. dom.*

§ We ſee by this Article that Treaſures, for want of Owners, have three aſſigned them; every one of whom has his third part, but in a different manner. The Proprietor of the Ground, in which the Treaſure is found, being Maſter of the Ground, ſeems to be likewiſe Maſter of all that is in the Ground, and he is in a manner in poſſeſſion of it, altho he is ignorant that the Treaſure is in his Ground, and that in order to poſſeſs it it ſeems neceſſary to have an Intention ſo to do. *Neratius & Proculus (&) ſolo animo non poſſe nos adquirere poſſeſſionem, ſi non antecedat naturalis poſſeſſio. Ideoque ſi theſaurum in fundo meo poſitum ſciam, continuo me poſſidere, ſimul atque poſſidendi affectum habuero: quia, quod deſit naturali poſſeſſioni, id animus implet. Cæterum quod Brutus & Manlius putant, eum qui fundum longa poſſeſſione cepit, etiam theſaurum cepiſſe, quamvis neſciat in fundo eſſe, non eſt verum. Is enim, qui neſcit, non poſſidet theſaurum, quamvis fundum poſſideat. Sed & ſi ſciat, non capiet longa*

ga poſſeſſione: quia ſcit alienum eſſe. Quidam putant, Sabini ſententiam veriorem eſſe: nec alias eumqui ſcit, poſſidere, niſi ſi loco motus ſit; quia non ſit ſub cuſtodia noſtra. Quibus conſentio. l. 3. §. 3. ff. de acquir. vel amit. poſſ.

Some antient and able Lawyers have been of opinion, as appears from this Law, that the Poſſeſſor of a Ground in which a Treaſure is, acquires by a long Poſſeſſion both the Ground and alſo the Treaſure. And it is moſt certain, that on one hand the Treaſure hath no other Poſſeſſor, and on the other hand that every Poſſeſſor has a general Intention to poſſeſs every thing that is in his Grounds. And whether he has acquired them by a legal Title or by a long Poſſeſſion, he has always an Intention, even an expreſs one, to poſſeſs, and to have to himſelf all the Rights which are annexed to his Right to the Ground; and this implies the Right to the Treaſure. So that it ſeems ſtrange, that in one of the Cuſtoms in *France*, where mention is made of Treaſures, they are adjudged to belong to the King in his own Grounds, or to the Lord of the Mannor in his, without ſaying any thing of the Proprietor of the Ground, or even of the Finder of the Treaſure. Thus the Right which the Proprietor of the Ground has to the Treaſure found in it, ſeems to admit of no Difficulty.

Next to the Right which the Proprietor of the Ground has to the Treaſure, that of the Finder is wholly natural, and built upon two Foundations; one is the divine Providence which directs and orders the ſaid Events, and which by putting into his hands that which is found in the Treaſure, ſeems to give it him; and this Event is called *Dei beneficium*, in that ſingle Law of the Code *de theſauris*: And the other is, becauſe that if it were not for the Finder, the Right of the Proprietor of the Ground would be altogether uſeleſs to him: ſo that it is but juſt that the Finder ſhould have a ſhare in the Treaſure. *Nemo in poſterum ſuper requirendo in ſuo, vel alieno loco theſauro, vel ſuper invento ab alio, vel a ſe, effuſis precibus pietatis noſtræ benignas aures audeat moleſtare. Nam in* ſuis *quidem locis unicuique, dummodo ſine ſceleratis ac puniendis ſacrificiis, ut alia qualibet arte legibus odioſa theſaurum (id eſt condita ab ignotis Dominis tempore vetuſtiori mobilia) quærere, & invento uti, liberam tribuimus facultatem: ne ulterius Dei beneficium invidioſa calumnia perſequatur: ut ſuperfluum ſit hoc precibus poſtulare, quod jam lege permiſſum eſt: & imperatoriæ Majeſtatis videatur prævenire liberalitas poſtulanda. In* alienis *vero terrulis nemo audeat invitis, immo nec volentibus, vel ignorantibus dominis opes abditas ſuo nomine perſcrutari. Quod ſi nobis ſuper hoc aliquis crediderit (eſſe) ſupplicandum, aut præter hujus legis tenorem in alieno loco theſaurum ſcrutatus invenerit (totum) hoc l. corum Domino reddere compellatur: & velut temerator legis ſaluberrimæ puniatur. Quod ſi forte vel arando, vel alias terram alienam colendo, vel quocunque caſu, non ſtudio perſcrutandi, in alienis locis theſaurum invenerit; id quod repertum fuerit, dimidia retenta, altera dimidia data, cum locorum domino partiatur. Ita enim eveniet, ut unuſquiſque ſuis fruatur & non inhiet alienis.* l. un. C. de theſ.

As for the Right of the Exchequer, the Foundation upon which it is built is neither ſo clear nor ſo natural; and this Right was not ſo much as known in the antient *Roman* Law, which gave nothing to the Prince beſides the Treaſures found in his own Grounds, leaving all the other Treaſures, one half to the Finder, and the other half to the Owner of the Ground. It is true, there were ſome Conſtitutions of the Emperors which eſtabliſhed the Right of the Exchequer to Treaſures *a*; but they were aboliſhed by the Emperor *Leon*, who reſtored the antient Law by that Law of his, which is the only one in the Code *de theſauris*. And *Juſtinian*, who has inſerted into his Code only that Law, confirms thereby the antient Law, and even ratifies it expreſly in his Inſtitutes, and by many Texts of the antient Lawyers, which

a Quicunque theſaurum invenerit, & ad fiſcum ſponte detulerit, medietatem conſequatur, inventi alterum tantum fiſci rationibus tradat: ita tamen, ut citra inquietudinem quæſtionis omnis fiſcalis calumnia conquieſcat. Haberi enim fidem fas eſt his qui ſponte obtulerint, quod invenerint. Si quis autem inventas opes offerre noluerit, & aliqua ratione proditus fuerit: a ſupradicta venia debebit excludi.

Quiſquis theſauros & condita ab ignotis dominis tempore vetuſtiore, monilia quolibet caſu repererit, ſuæ vindicet poteſtati, neque calumniæ formidinem, fiſcali aut privato nomine ullis deferentibus pertimeſcat. Non metalli qualitas, non reperti modus ſub aliquo periculum quæſtionis incurrat. In hac tamen naturali æquitate animadvertimus quoddam temperamentum adhibendum, ut ſi qui in ſolo proprio hujuſmodi contigerit, integro id jure præſumat, qui in alieno in quartam repertorum partem eum, qui loci dominus fuerit, admittat. Ne tamen per hanc licentiam quiſquam aut aliena effodiat aut in locis non ſui juris per famam ſuſpecta rimetur. *C. Theod. de theſ.*

he has collected in his Digeſts *b*.

b **Theſauros** quos quis in loco ſuo invenerit, Divus Hadrianus naturalem equitatem ſecutus, ei conceſſit, qui eos invenerit. §. 39. *inſt. de rer. div.*

At ſi quis in alieno loco non data ad hoc opera, ſed fortuito invenerit; dimidium domino ſoli conceſſit, & dimidium inventori. Et convenienter, ſi quis in Cæſaris loco invenerit, dimidium inventoris & dimidium eſſe Cæſaris ſtatuit. Cui conveniens eſt ut ſi quis in fiſcali loco, vel publico vel civitatis invenerit, dimidium ipſius eſſe debeat, & dimidium fiſci vel civitatis. *d.* §.

V. l. 7. §. 12. *ff. ſolut. matr.*

Si in locis fiſcalibus, vel publicis, religioſiſve, aut in monumentis theſauri reperti fuerint; Divi fratres conſtituerunt, ut dimidia pars ex his fiſco vindicaretur. Item ſi in Cæſaris poſſeſſione repertus fuerit, dimidiam æque partem fiſco vindicari: deferre autem ſe nemo cogitur, quod theſaurum invenerit, niſi ex eo theſauro pars fiſco debeatur; qui autem cum in loco fiſci theſaurum invenerit, & partem ad fiſcum pertinentem ſuppreſſerit, totum cum altero tanto cogitur ſolvere. *l.* 3. §. *penult. & ult. ff. de jure fiſci.*

Quæ quidem lex cum olim lata fuerit, victa autem poſt modum a cupiditate quæ multas egregias res labefactat, ad eademque ſuo vigore privata ſit; nunc ab imperatoria noſtra majeſtate in integrum reſtituitur. Jubebat autem illa ut qui indefoſſum theſaurum incidiſſet, ſi prædium in quo inventus eſſet, ad principem pertineret, alioquive publicum eſſet, illum ex æquo cum fiſco partiretur. Si vero locus, unde theſaurus in lucem prodiiſſet, neque ad principem pertineret, neque publicus, ſed alterius cujuſpiam eſſet, is æqualibus partibus inter inventorem prædiique dominum divideretur: denique ſi inventoris prædium eſſet, ipſi res inventa univerſa cederet. Atque hæc quidem lex illa ſanciit. Verum perverſa cupiditas haud ſcio quomodo illa circumſcripta, iniquoque lucro fiſco donato, illi in hunc uſque diem inventum theſaurum attribuit, legemque otioſam reddidit, ad quid hinc contingit. Qui alicubi reconditos latere theſauros ſciunt, dum alios laboribus ſuis gaviſuros, ſe autem fruſtra illos ſubituros, quin & interdum acerbis examinationibus ſubjiciendos conſiderant, illos inveſtigare negligunt, itaque in perpetuum recondita manent & pereunt, quæ in lucem producta magnam hominibus erunt utilitatem allatura. Jubemus ergo, *uti deinceps* ſecundum veteris legis æquitatem judicetur: & quando theſaurus aliquis inventus fuerit, ſi locus ubi inventus fuerit, in publicis Imperatoriſve fundis ſit, inventor illum cum fiſco partiatur: ſi vero alterius cujuſpiam ſit, ſimili modo ipſum & inventor, & loci, in quo theſaurus inventus, dominus inter ſe dividant. *Nov.* 51. *Leonis.*

Altho the Novels of the Emperor Leon *be not received nor collected in the Body of the* Roman *Law, yet there are two things remarkable in this Novel of his. One is, that the Emperor ſeverely condemns there the Avarice and the want of Charity in thoſe Perſons, who inſtead of giving to the Poor hoard up Treaſures; which is not to be extended to Caſes which oblige People to uſe this Precaution, as in a time of War, or other Danger, which may give a juſt occaſion for laying up things of Value in Safety. And the other is, that he charges alſo thoſe with a criminal Covetouſneſs,* perverſa cupiditas, *who had invented the Right of the Prince to Treaſures, contrary to the Tenour of the antient Laws which have been juſt now cited.*

But altho we have not in *France* any Ordinance which expreſly gives to the King a Share in Treaſures, yet the Officers of the Demeſnes have begun many Law-Suits in relation to this Matter, which have been attended with Judgments and Decrees, whereby one third part of the Treaſure is given to the King, or to the Lord of the Mannor, a third to the Finder, and a third to the Owner of the Ground. Which is conformable to the Cuſtoms that have regulated this Matter; the greateſt part of them giving to the King, or to the Lord of the Mannor, one third of the Treaſure, another third to the Finder, and the other third to the Owner of the Ground; and a Moiety of the Treaſure to the Lord of the Mannor, when the Finder is the Owner of the Ground. But there is one Cuſtom which in this Caſe gives to the Finder two thirds; and nothing can be more juſt and equitable, ſeeing he ought to have one third as Finder, and another third as Proprietor of the Ground where the Treaſure was found.

We ſhall not enlarge here on the Diſtinction which is made by ſome between Treaſures which conſiſt of Gold, and others. In order to eſtabliſh the King's Right to thoſe which conſiſt of Gold, they quote an Ordinance of St. *Lewis*, which others ſay never was, and which in effect is not to be met with: So that that Thought is without Foundation.

[The antient Common Law of *England* in relation to Treaſures, ſeems to have been the ſame with the *Roman* Law, which gives all Treaſures to the Finders; but afterwards the ſame were appropriated to the uſe of the King, as it were by conſent of all Nations. *Cum igitur theſaurus in nullius bonis ſit, & antiquitus de jure naturali eſſet inventoris, nunc de jure gentium efficitur ipſius Domini Regis.* Bracton de legibus Angliæ, lib. 3. cap 3. §. 4. Briton. fol. 26. They diſtinguiſh between Treaſures found at Land, and thoſe found in the Sea; and ſay, that if a Treaſure be found in the Sea, the Finder ſhall have it. And this Diſtinction is alſo taken notice of by my Lord *Coke* in his 2d *Inſtit. pag.* 168. where he ſays, that if Treaſure be found in the Sea, the Finder ſhall have it at this Day. But he allows Wrecks of the Sea to belong to the Crown. *Ibid. pag.* 167.]

SECT.

SECT. IV.

Of the Right to the Eſtates of Aliens.

WE ſhall not repeat here what was neceſſary to be explained concerning the Right to the Eſtates of Aliens in the Matters of Succeſſion, which the Reader may ſee in the ſeveral Places where the ſame is mentioned, *viz.* Art. 11. of the 2d Section of Perſons; the 9th, 18th, 23d, and 31ſt Articles of the 2d Section of Heirs and Executors in general; the 2d Article of the 13th Section of the ſame Title; and the Remark on the 31ſt Article of the 2d Section, and the 13th Article of the Preface to the 2d Part of the Civil Law in its Natural Order, which treats of Succeſſions.

The CONTENTS.

1. *Definition of the Right to the Eſtates of Aliens.*
2. *Who are Aliens.*
3. *There are ſome Countries who enjoy the Right of Naturalization in others.*
4. *Particular Strangers are naturalized by the King's Letters Patent.*
5. *Exception as to the Right of Succeſſion to Aliens.*
6. *Another Exception.*

I.

1. *Definition of the Right to the Eſtates of Aliens.*

The Right to the Eſtates of Aliens, is that Right by which the Prince acquires the Eſtates left in his Dominions by Aliens who were not naturalized *a*.

a Peregrini capere non poſſunt (hæreditatem) *l.* 1. *C. de hæred. inſt. l.* 6. §. 2. *ff. eod.*
Nec teſtari. *l.* 1. *in verba* cives Romani. *ff. ad leg. falſ.*

II.

2. *Who are Aliens.*

Strangers, who are likewiſe called Aliens, are thoſe, who, being born in another Country, and Subjects of another Kingdom than that of which they are Inhabitants, have not been naturalized *b*.

b See Art. 9. *of the* 2d *Section of the* 2d *Title.*

III.

3. *There are ſome Countries which enjoy the Right of Naturalization in others.*

We do not reckon in the number of Strangers or Aliens in a Kingdom, whoſe Eſtates fall to the Crown, thoſe who are Subjects of another Country, to which the ſaid Kingdom has granted the Right of Naturalization *c*.

c Sciendum eſt eſſe quaſdam colonias Juris Italici. *l.* 1. *ff. de cenſib.*
Antoninus pius cognominatus (ex quo etiam ad nos appellatio hæc pervenit) jus Romanæ civitatis prius ab unoquoque ſubjectorum petitus, & taliter ex iis qui vocantur perigrini, ad Romanam ingenuitatem deducens, hoc ille omnibus in commune ſubjectis donavit. *Nov.* 78. *C. ult.*
Altho theſe Texts do not reſpect the Naturalization granted to Strangers, but other Rights granted to Provinces to which they did not belong; yet we may apply the Example thereof to this Article.

IV.

4. *Particular Strangers are naturalized by the King's Letters Patent.*

Particular Strangers, who have not the Privilege explained in the preceding Article, may be naturalized in a Kingdom by Letters Patent of the Prince, which have the Effect of making them to be of the ſame Condition with thoſe who are born in it *d*.

d See Art. 9. *of the* 2d *Section of the* 2d *Title.*
[*We have already obſerved, that there is a great difference made by the Law of* England *between* Denization, *which is by the King's Letters Patent, and* Naturalization, *which is by Act of Parliament. For if he who is infranchiſed or denizated by the King's Letters Patent, had Iſſue in* England *before his Denization, that Iſſue is not inheritable to his Father. But if his Father be naturalized by Act of Parliament, ſuch Iſſue ſhall inherit.* Coke's 1 Inſtit. fol. 129. a.]

V.

5. *Exception as to the Right of Succeſſion to Aliens.*

The Children of Strangers, born in a Kingdom in which their Father was an Alien, having their Origin in that Kingdom, are Subjects thereof; and they have in it the Rights of Naturalization, as if their Father had been naturalized a Subject of it, and they ſucceed to him, altho he dies an Alien *e*.

e See Art. 3. *of the* 4*th Section of Heirs and Executors in general. The ſame Equity requires that the other Relations of Strangers ſhould be admitted to ſucceed to them, if they are natural born Subjects of* France. *And the Reaſon of not ſuffering the Wealth that is within the Kingdom to go to Strangers, ceaſes with reſpect to them.*
See the ſame 3d *Article of the* 4*th Section of Heirs and Executors in general, and the* 31*ſt Article of the* 2*d Section of the ſame Title, and the Remarks there made upon it.*
[By an Act of Parliament in *England*, made 11 *&* 12 *Guil.* 3. *cap.* 6. the Children of Aliens, who are born within any of the King's Realms or Dominions, are enabled to inherit the Eſtates of their Anceſtors, either Lineal or Collateral, notwithſtanding their Father or Mother were Aliens.]

VI.

6. *Another Exception.*

Altho the Goods of Strangers who die in *France*, belong to the King, and

and what they leave behind them cannot go to their Heirs; yet the Kings of *France* have excepted from this Rule foreign Merchants who come to certain Fairs in the Kingdom; and they leave the Goods which they may chance to have in *France* at the time of their Death, either to their Heirs of Blood, or their Heirs by Teſtament *f*.

f See Art. 3. of the fourth Section of Heirs and Executors in general, and the Remark there made upon it; as alſo the Ordinances of March 1463, *and* March 1583.

SECT. V.

Of the Right of Succeſſion to Baſtards.

WE ought to make here the ſame Remark which has been made in the foregoing Section, That we ſhall not repeat here what has been ſaid concerning the Succeſſion to Baſtards in the Matters of Succeſſion, which the Reader may have recourſe to. See Art. 3. of the 1ſt Section of Perſons; the 12th Article of the Preface to the 2d Part of the Civil Law in its Natural Order; and the 8th, 17th, 22th, and 30th Articles of the 2d Section of Heirs and Executors in general.

The CONTENTS.

1. *Definition of the Right of Succeſſion to Baſtards.*
2. *Right of Succeſſion to Baſtards, is a ſort of Succeſſion to Perſons who have no Heirs.*
3. *The Legitimation of a Baſtard by a ſubſequent Marriage of his Father with his Mother, ſets aſide any Claim which the Crown may have to his Eſtate on the ſcore of Baſtardy.*

I.

1. Definition of the Right of Succeſſion to Baſtards.

By the Right of Succeſſion to Baſtards, is meant the Right by which the Sovereign acquires the Eſtates of Baſtards who die without leaving behind them any Children lawfully begotten, and without making a Teſtament *a*.

a See the Article cited in the Preamble of this Section.

II.

2. Right of Succeſſion of Baſtards, is a ſort of Succeſſion to Perſons who have no Heirs.

The Right of Succeſſion to Baſtards is, as it were, a kind of Succeſſion to Perſons who have no Heirs. For it is the want of Heirs which makes the Eſtates of Baſtards to go to the Prince; for they not having named any Teſtamentary Heirs or Executors, which they might have done if they were under no other Incapacity, they cannot have any Heirs of Blood, except the Children begotten by them in lawful Wedlock. And if they have no Children, their Eſtates being without an Owner, they go to the Exchequer *b*.

b Baſtards having no Heirs, if they have not made a Teſtament, their Eſtates go to the Exchequer.

III.

3. The Legitimation of a Baſtard by a ſubſequent Marriage of his Father with his Mother, ſets aſide any Claim which the Crown may have to his Eſtate on the ſcore of Baſtardy.

When Baſtards are legitimated by the ſubſequent Marriage of their Father with their Mother, they are conſider'd as legitimate; and their Eſtates are not ſubject to this Right of Succeſſion to Baſtards, but they paſs to their Heirs of Blood; and they have alſo the Right of ſucceeding to them *c*.

c See, concerning this manner of Legitimation, Art. 17. of the 2d Section of Heirs and Executors in general, and Art. 22. of the ſame Section.

[This manner of legitimating Baſtards by a ſubſequent Marriage of their Father with their Mother, mentioned in this Article, altho the ſame was approved both by the Civil and Canon Law, and has been received in moſt other Countries, yet it has never taken place in *England*. And when it was propoſed in Parliament by the Biſhops in the Reign of *Henry* the Third, as being agreeable to the Laws of the Church, the ſame was rejected by the unanimous Conſent of all the Lords Temporal in Parliament. *Stat.* 20 *Hen.* 3. *cap.* 9. *Coke's* 2 *Inſt. pag.* 98.]

¶ We have reſtrained the Rule explained in this Article to Baſtards legitimated by a ſubſequent Marriage of their Father with their Mother. For the Legitimation by Letters Patent of the Prince has not the ſame Effect, and doth not make Baſtards capable of Succeſſion, as has been remarked on Art. 10. of the 2d Section of the 2d Title. But it might be ſtarted as a Queſtion, Whether a Baſtard, legitimated by Letters Patent of the Prince, leaving Goods behind him, without diſpoſing of them by Will, his Goods will fall to the King by virtue of his Right of Succeſſion to the Eſtates of Baſtards, or if they will go to the neareſt Relations of the Father or Mother of the ſaid Baſtard. The Difficulty lies in this, That by the Letters of Legitimation it is ſaid, that the King and his Succeſſors ſhall not pretend, by virtue of the Right of Succeſſion to Baſtards, to the Goods of the Baſtard who is thus legitimated; which ſeems to leave the ſaid Goods to thoſe to

whom they would have belonged, if the ſaid Perſon had not been a Baſtard, or had been legitimated by the Marriage of his Father with his Mother.

Upon this Queſtion, it might be urged in behalf of the Relations of the Father and Mother of the Baſtard, that the King having by his Letters of Legitimation renounced his Right, that Renunciation could be only in their favour. And to ſupport the King's Right, it might be ſaid, That the Stile of the Letters of Legitimation ought not to change the Nature of the Right of the Prince to the Succeſſion of Baſtards, which gives to the Prince the Eſtates of Baſtards, when they have not diſpoſed of them by Will; and that the ſaid Letters not having made any legal Relation between the ſaid Baſtard and the Relations of his Father and thoſe of his Mother, they have no manner of Title to be his Heirs at Law, unleſs it may be ſaid that that Clauſe of the Letters of Legitimation is to them inſtead of a tacit Grant which the King makes them of the Goods of the Perſon whom he had legitimated in this manner.

If this Queſtion did admit of any doubt; it would ſeem that it might be decided by the Rule explained in the laſt Article of the firſt Section of this Title *a*, which declares, that in doubtful Caſes it may be decided againſt the Exchequer. Which ought more particularly to take place in the Caſes which, as the preſent Caſe does, happen very ſeldom, and where it is the Will and Intention of the King himſelf that his Right ſhould ceaſe, unleſs that ſhould happen which is hardly poſſible, that no one of thoſe to whom the Eſtate of the Baſtard ſhould go by virtue of the Renunciation made by the King, would accept the ſaid Succeſſion on the ſcore of Relation. But if they incline to accept of the Succeſſion, it would ſeem that for the Reaſons juſt now remarked, they ought to exclude the King; and in this Caſe it happens that the Right of Succeſſion would not be reciprocal to the Baſtards, and to the Relations of their Father and Mother; for whereas in this Caſe the Relations of the Baſtard would ſucceed to him, if he ſhould die *inteſtate*, he on his part could not ſucceed to any one of them by the ſame Title, and he would be excluded from their Succeſſions by the other lawful Relations.

a See the laſt Article of the 7th Section of this Title, and the 18th Article of the 6th Section of the preceding Title.

SECT. VI.

Rules common to the ſeveral ſorts of Goods and Rights of the Demeſne.

WE have explained in the foregoing Sections the different ſorts of the ſaid Goods and Rights, and the Rules peculiar to every one of them; and ſeeing there are Rules common to all theſe kinds of Goods and Rights, they ſhall be the Subject-matter of this Section.

The CONTENTS.

1. *Diſtinction between the Goods and the Rights of the Demeſne.*
2. *The Rights of the Demeſne are inalienable, and impreſcriptible.*
3. *Two ſorts of Goods ariſing from the Rights of the Demeſne.*
4. *Diſpoſitions of the moveable Effects ariſing from the Rights of the Exchequer.*
5. *Diſpoſitions of the Immoveables ariſing from the Rights of the Exchequer.*
6. *Difference between the Rights and Immoveables of the Demeſne as to what concerns their Alienation.*
7. *Privilege of the Exchequer.*

I.

1. Diſtinction between the Goods and the Rights of the Demeſne.

Altho it may ſeem that the Goods and the Rights of the Demeſne are one and the ſame, yet it is neceſſary for the Uſe of the Rules of this Section to make a Diſtinction between them, which conſiſts in this, That the word *Goods* is more general than that of *Rights*. For whereas all the Rights of the Demeſne are in effect Goods belonging to it, there are Goods of the Demeſne which are not reckoned in the Number of Rights, ſuch as Lands. And it is not uſual to call a Dutchy, or other Land, that is annexed to the Crown, a Right of the Demeſne; but the Meaning of this Word, Right of the Demeſne, is reſtrained to theſe ſorts of Rights which are otherwiſe called Rights of the Exchequer, ſuch as the Rights explained in the preceding Sections. The Uſe of this Diſtinction will appear in the following Articles *a*.

a This Diſtinction reſults from what has been ſaid in the foregoing Sections, touching the Goods and Rights of the Exchequer.
See the End of the Preamble to this Title.

II.

II.

2. The Rights of the Demeſne are inalienable and impreſcriptible.

There is this common to all the Rights of the Demeſne, ſuch as the Taxes, Subſidies, Confiſcations, the Right of Succeſſion to thoſe who leave no Heir behind them, and other Rights, that they are inalienable and impreſcriptible. For theſe Rights are in their own nature eſſential to the Sovereignty, and do not enter into Commerce; in the ſame manner as the Power of the Government, of which they are Conſequences and Acceſſories, which cannot be ſeparated from it. Thus, neither Preſcriptions nor Alienations can put them out of the hands of the Prince *b*; but it is not the ſame thing as the Lands of the Demeſne, as ſhall be ſhewn in the 6th Article.

b See Sect. 2. of the 2d Title, and Art. 12, 15, 19, and 20. of the 1ſt Section of this Title; and the Remark made on the 19th Article concerning the Rights of Forfeitures and Succeſſion to thoſe who die without Heirs.

III.

3. Two ſorts of Goods ariſing from the Rights of the Demeſne.

Seeing the Rights of the Demeſne produce Profits and Revenues, which are ſo many ſorts of Goods, it is neceſſary likewiſe we ſhould diſtinguiſh the Goods ariſing from thoſe Profits into two kinds; one of Immoveables, and the other of Moveables. Thus, the Rights of Forfeiture, of Succeſſion to Perſons dying without Heirs, of Succeſſion to Aliens, and to Baſtards, acquire to the Prince the Moveables, and the Immoveables of Perſons condemned, of Perſons dying without Heirs, of Aliens, and of Baſtards *c*. And we muſt diſtinguiſh in theſe two ſorts of Goods, the ſeveral Uſes which the Prince makes of them, which depends on the following Rules.

c This is the natural Effect of theſe Rights, and of the Diſtinction of theſe two ſorts of Goods.

IV.

4. Diſpoſitions of the moveable Effects ariſing from the Rights of the Exchequer.

The Moveables and mobiliary Effects, other than the Monies ariſing from the Rights of Forfeiture, of Succeſſion to Perſons dying without Heirs, to Aliens, and to Baſtards, are in effect Goods of the Demeſne, ſince they belong to the Exchequer. But ſeeing there is not any one of theſe ſorts of Goods which would belong to the Exchequer, if they remained in their own nature, unleſs there were among them Jewels or other Moveables of ſuch Price and Value, as to deſerve to be ranked among the Moveables of the Crown; there are three Ways to diſpoſe of them: One by ſelling them, in order to apply the Money to the Payment of the Debts, and of the other Charges of the Goods which fall to the Prince by virtue of theſe Rights, and to give the Overplus to the Prince, paying the Moneys into the hands of the Receivers of the Revenues of the Demeſnes. A ſecond is, by leaving thoſe mobiliary Effects to the Farmers of the Revenue, if they are comprized in their Leaſes, with the Charge of acquitting the Debts to which the ſaid Goods are ſubject. And the third, by delivering over thoſe Goods, with the ſame Charge of acquitting the Debts to which they are liable, to the Perſons to whom the Prince gives a Grant of them *d*.

d It is in one of theſe three Manners that, according to the Uſage in France, *the King exerciſes his Right on thoſe Moveables.*

We muſt diſtinguiſh from the mobiliary Effects ariſing from the Rights mentioned in this Article, the Goods and Merchandizes acquired by the Confiſcations, whereof mention has been made in the 10th Article of the 6th Section of the 5th Title.

V.

5. Diſpoſition of the Immoveables ariſing from the Rights of the Exchequer.

The Immoveables acquired by the ſame Right, are likewiſe in one ſenſe Goods of the Demeſne, ſeeing they are as it were Fruits and Revenues thereof; and that all Revenues are the Goods of the Patrimony of the Perſon who has right to enjoy the Fund out of which the ſaid Revenues iſſue; but they have not for all that the Nature of the Goods of the Demeſne, which are part of the Patrimony of the Sovereign, ſo as to be inſeparable from it, and to be in all reſpects in the ſame Condition with the other Immoveables annexed to the Crown, and which make a part of the Demeſne. For ſince theſe Immoveables, which proceed from the Rights of the Exchequer, are Profits and Revenues, of which the Sovereign may diſpoſe as he thinks good, he may either give them away, in which Caſe they will never become part of the Demeſne; or he may unite and incorporate them into it, as has been ſaid in the 23d and following Articles of the firſt Section. And in this Caſe they will be of the ſame Condition with the other Immoveables of the Demeſne *e*.

e See Art. 23, &c. of the 1ſt Section.

VI.

6. Difference between the Rights and Immoveables of the

Whether they be part of the antient Demeſne, or newly annexed to it, are not ſo abſolutely inalienable, as the

Demeſne, as to what concerns their Alienation.

Rights of the Demeſne are: For whereas the Rights being eſſential to the Sovereignty, they cannot be ſeparated from it *f*; the Immoveables not being of the ſame nature, may be alienated in the Caſes explained in the 14th Article of the 1ſt Section.

f See the 2d Article.

VII.

7. Privilege of the Exchequer.

There is this likewiſe common to the Goods and to the Rights of the Demeſne, that as for the Recovery, the Preſervation and the Uſe of the ſaid Goods and Rights, the Demeſne of the Sovereign hath divers Privileges, which are called Privileges of the Exchequer, which ſhall be the Subject-matter of the following Section *g*.

g See the following Section.

SECT. VII.

Of the Privileges of the Exchequer.

The CONTENTS.

1. *Difference between the Rights and Privileges of the Exchequer.*
2. *Two ſorts of Privileges of the Exchequer.*
3. *Firſt Privilege of the Exchequer, that its Rights are inalienable and impreſcriptible.*
4. *Another Privilege, that the Exchequer is always reputed ſolvent.*
5. *The Exchequer is exempt from all Contributions.*
6. *It has the Pre-emption of Metals.*
7. *The Exchequer has always a tacit Mortgage.*
8. *The Exchequer is preferred to prior Creditors on the Goods acquired by the Debtors after its Credit.*
9. *There is no Peremption of a Suit begun at the Inſtance of the Exchequer.*
10. *The Cauſes of the Exchequer are reviewed upon producing new Deeds or Writings.*
11. *When Goods of the Exchequer are adjudged to the higheſt Bidder, others are allowed to out-bid them within a certain time.*
12. *The Exchequer warrants not the Defects of the Things it ſells.*
13. *The Exchequer is diſcharged from the Debts due from the Goods it ſells, and the Creditors have their recourſe againſt the Purchaſer.*
14. *The Exchequer is not favoured in doubtful Caſes.*

I.

1. Difference between the Rights and Privileges of the Exchequer.

WE muſt not confound the Rights of the Exchequer with its Privileges. For whereas the Rights of the Exchequer are natural Conſequences of the Sovereignty, and belong to the Prince by virtue of his Title of Sovereign; the Privileges of the Exchequer are only Conſequences of the ſaid Rights, which relate to the Preſervation of them, or the ways of exerciſing them. Thus, the Rights of Forfeiture, of Succeſſion to Perſons who die without Heirs, of Succeſſion to Aliens and to Baſtards, of levying Taxes, and all the other Rights of the Sovereign, which have been explained in the 2d Section of the ſecond Title, and in the firſt Section of this Title, are not Privileges, ſeeing they belong naturally to the Sovereign; but the manner of levying the Taxes on perſonal Eſtates by Diſtreſs of Goods, preferably to other Creditors, is a Privilege *a*.

a This Difference reſults from the Nature of the Rights, and from that of the Privileges.

II.

2. Two ſorts of Privileges of the Exchequer.

The Privileges of the Exchequer are of two ſorts: One is of thoſe which ariſe naturally from the Quality of the Rights of the Exchequer. And the other is of thoſe which have not that Character, but derive their Origin from ſome Laws, and ſome Uſages. Thus, for example, the Privilege which the Exchequer has of being reputed always to be ſolvent, as ſhall be ſhewn in *Art.* 4. is a natural Conſequence of a Rule which diſtinguiſhes the Condition of the Exchequer, from that of all ſorts of private Perſons, as to what concerns Solvency, or Inſolvency. For whereas every private Perſon may either be already or become inſolvent, it is impoſſible that the Exchequer ſhould become inſolvent, ſince it hath always by means of the publick Money, and out of the Goods of all the Subjects, the neceſſary Funds for all the Charges thereof. Thus, on the contrary, the Privilege of the Exchequer, which gives it the preference before Creditors, who have Mortgages of a prior Date to that of the Exchequer, in the Caſe which ſhall be explained in Art. 8. is not a Privilege which follows naturally from the Rights of the Exchequer; but it is an Exception to the Rule, which aſſigns to Creditors who have Mortgages their

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Rank according to the Dates of their reſpective Mortgages, even prior to the Exchequer. And this Exception has been eſtabliſhed in favour of the Exchequer, by a Law which may be termed arbitrary. For it was not eſſential to the Condition of the Exchequer to have this Right, or this Privilege *b*.

b The Diſtinction of theſe two ſorts of Privileges reſults from their Cauſes, and from their Characters, as will appear by the Articles which follow.

III.

3. Firſt Privilege of the Exchequer, that its Rights are inalienable and impreſcriptible.

The firſt of the Privileges of the Exchequer, among thoſe of the firſt of the two ſorts explained in the preceding Article, is that which renders inalienable and impreſcriptible the Rights of the Exchequer, mentioned in the 2d Article of the foregoing Section. For it is a Privilege of the ſaid Rights, that they cannot be alienated; and this Privilege, which diſtinguiſhes the ſaid Rights from thoſe of private Perſons, is a neceſſary Conſequence of the Nature and Uſe of the ſaid Rights, which are appropriated to the Prince for the Good of the Publick *c*.

c As this Privilege is a part of the Nature of thoſe Rights mentioned in Art. 12, 13, &c. of Sect. 1. ſo we have there explained in what Senſe the Goods and Rights of the Exchequer are inalienable and impreſcriptible. To which we muſt add what is ſaid touching the Goods and Rights of the Exchequer in the preceding Section, and particularly in Art. 5, and 6. of this Section.

IV.

4. Another Privilege, that the Exchequer is always reputed ſolvent.

It is likewiſe by a Privilege of the ſame nature and of the firſt kind, that the Exchequer is always reputed to be ſolvent, and is never obliged to give Security in the Caſes where private Perſons, even the moſt ſubſtantial, are obliged to do it. Thus, if Legataries being deſirous to make ſure of their Legacies, which ought to be paid in hand, ſhould hinder the Executor from touching the Goods of the Inheritance, he would be obliged either to pay the Legacies, or to give the Legataries Security for their Payment. But if the Prince were Heir to a Succeſſion charged with the like Legacies, or that in the Caſe of a Succeſſion, the Goods whereof had fallen to the Exchequer by Right of Forfeiture, of Succeſſion in default of Heirs, of Succeſſion to Aliens, or Baſtards, or in other Caſes, there ſhould be any ſuch like Cauſe which would oblige a private Perſon to give Security; the Exchequer in all theſe Caſes would be exempt from it. For it cannot happen that the Exchequer ſhould become inſolvent, as has been explained in the 2d Article *d*.

d Semper ſatiſdare cogitur cujuſcunque ſit dignitatis, vel facultatum quarumcumque hæres. *l.* 1. §. 1. *ff. ut legat. ſeu fideic. ſerv. cauſ. cav.*

Si ad fiſcum portio hæreditatis pervenerit, ceſſabit iſta ſtipulatio, quia nec ſolet fiſcus ſatiſdare. *d. l.* 8. §. 18.

Fiſcus ſemper idoneus ſucceſſor & ſolvendo. *l.* 2. *in f. ff. de fund. dot.*

V.

5. The Exchequer is exempt from all Contributions.

We ought to place likewiſe in this Rank the Exemption of the Prince from all Contributions on account of the things which are for his Uſe, and for the Uſe of the Exchequer. Thus the Lands belonging to the Crown do not contribute to the Land-Tax. Thus the Farmers of the Exciſe and Cuſtoms cannot demand any Duties for the Goods and Merchandizes which are deſtined for the uſe of the Prince, or of the Exchequer. And this Exemption is not ſo much a Privilege as a Franchiſe or Immunity naturally belonging to the Sovereignty, which cannot be ſubject to Charges impoſed only for its Uſe and Benefit *e*.

e Fiſcus ab omnium vectigalium præſtationibus immunis eſt. *l.* 9. §. *ult. ff. de public. & vectig.*

Privatæ rei noſtræ privliegiis permanentibus, nihil extra ordinem prædia jure perpetuo conſignata ſuſtineant: neque adjectis ſæpius ac præter primum delegationis canonem poſtulatis afficiatur impendiis, quandoquidem neque aurario canoni ſub privilegiis æſtimato, aliquid ex ea jubentibus nobis præbitionum diverſitate decutitur: & pari cum cæteris æſtimari ſorte non convenit, quas præter annonarias functiones æſtimatas perpetua penſitationum prærogativa nexuerunt. *l.* 10. *C. de excuſ. mun.*

Evidenter atque abſolute jubemus ne fundi ad patrimonium noſtrum pertinentes, ſeu conductionis titulo ſeu perpetuo jure teneantur, aliquid præter ordinem ſuperindicti vel pretii nomine de ſordidis quibuſcunque muneribus agnoſcant. Nam & hoc a divis principibus imperatum eſt, & a noſtra ſerenitate reparatum. *l.* 15. *eod.*

VI.

6. It has the Preemption of Metals.

We may likewiſe reckon in the number of the Privileges of the firſt kind, that which the Prince hath to be preferred before all private Perſons in the buying of Metals which may be neceſſary for his Service, ſuch as Gold, Silver, Copper, Iron, Lead, and other Metals, for coining Money, for Artillery, and other Uſes. Thus, when the Rights of the Demeſne in Mines are not ſufficient for all the ſaid Uſes, the Metals which remain to the Proprietors of the Lands where the Mines are, are naturally appropriated to the ſaid Uſes for the Good of the Pub-

Publick; and that for the Reaſons explained in Tit. 2. Sect. 2. Art. 19. And the Prince in this Caſe takes them at their true Value *f*.

f Quidquid amplius colligere potuerint, (*metallorum*) fiſco potiſſimum diſtrahant, a quo competentia ex largitionibus noſtris pretia ſuſcipiant. *l.* 1. *C. de metall. & met.*

VII.

7. The Exchequer has always a tacit Mortgage.

There is alſo another Privilege of the Exchequer, which may be ranked among thoſe of the firſt kind. It is that which in all the Caſes where the Exchequer is Creditor, gives it a tacit Mortgage on the Eſtate of the Debtor, altho there be no expreſs Covenant for it. Thus, for example, the Farmers and others who contract for the Rights of the Demeſne, and all who are under any Engagement to the Exchequer, by Leaſes, Sales, Letting and Hiring, or by other Covenants, mortgage all their Goods by the bare Effect of the Obligation which conſtitutes them Debtors; altho no expreſs mention be made of the Mortgage: For the Conſequence of the Rights of the Exchequer makes all lawful Ways for aſcertaining the Recovery of them to be natural and neceſſary; and there can be no Way more lawful than the Mortgage of the Goods of the Debtors *g*.

g Fiſcus ſemper habet jus pignoris. *l.* 46. §. 3. *ff. de jure fiſci.*

Certum eſt ejus qui cum fiſco contrahit, bona veluti pignoris titulo obligari, quamvis ſpecialiter id non exprimatur. *l.* 2. *C. in quib. cauſ. pig. vel hyp. tac. contr.*

Si in te jus fiſci cum reliqua (ſolveres) debitoris pro quo ſatisfaciebas, tibi competens judex adſcripſit & tranſtulit: ab his creditoribus quibus fiſcus potior habetur, res quas eo nomine tenes, non poſſunt inquietari. *l.* 7. *C. de priv. fiſci.*

V. l. 2. *C. de priv. fiſci.*

¶ It may be remarked on this Article, that the Mortgage of the Eſtates of Debtors to their Creditors, is in general ſo juſt and natural, that it ought to belong to all ſorts of Creditors, from the moment the Debt is contracted; and that even for thoſe Debts which are purely perſonal, every Creditor ought to have a Mortgage on all the Goods of his Debtor, altho no ſuch thing has been expreſly ſtipulated; becauſe the Obligation of the Perſon is nothing elſe but his Engagement to pay; which implies the Means of getting Payment, which cannot be had but out of the Goods of the Debtor. But becauſe it is juſt that in a concurrence of Mortgages, the eldeſt ſhould be preferred, and that it ought not to depend on the Colluſion which is eaſily to be practiſed between a Creditor and his Debtor, to have the Mortgage antedated, which might be eaſily done if it were to be contained in a private Writing under the Hand and Seal of the Party; it has therefore been wiſely eſtabliſhed in *France*, that the Mortgage which was acquired in the *Roman* Law by a bare Covenant, without the Preſence or Intervention of any publick Officer, cannot be acquired except by Acts or Deeds which have the publick Character of the Authority of Juſtice, which is that of the Prince. And it is for this reaſon, that in order to grant a Mortgage to a Creditor on the Eſtate of his Debtor, it is neceſſary to have a Contract or an Obligation executed before a publick Officer, who has a right to give it, or a Condemnation in Judgment by a Judge who has the ſame Power; for a Condemnation by Arbitrators would not be ſufficient for that purpoſe. So that it may be ſaid of the tacit Mortgage of the Exchequer, that according to the Law of this Kingdom, it is not ſo much a Privilege as a natural Right; ſince on one part it cannot be preſumed of the Sovereign, that he would cauſe the Obligation of his Debtor to be antedated; and on the other part it is in the Perſon of the Sovereign that the Authority which gives the Mortgage reſides. See upon this and the following Articles, and as to what concerns the Privilege of the Exchequer in Mortgages, the 19th and following Articles of the 5th Section of Pawns and Mortgages.

VIII.

8. The Exchequer is preferred to prior Creditors on the Goods acquired by the Debtors after its Credit.

In the ſame matter of Mortgages, the Exchequer hath another Privilege, which may be placed among thoſe of the ſecond kind; and that is the Preference which the Laws have given it on the Goods acquired by its Debtors after their Obligation to it. For the Exchequer is preferred on thoſe Goods to prior Creditors, to whom the Debtors had mortgaged all their Goods preſent and future *h*.

h Si quis mihi obligaverat, *qua habet habituruſque eſſet*: cum fiſco contraxerit, ſciendum eſt, in re poſtea acquiſita, fiſcum potiorem eſſe debere, Papinianum reſpondiſſe. Quod & conſtitutum eſt. Prævenit enim cauſam pignoris fiſcus. *l.* 28. *ff. de jure fiſci.*

See Art. 22. *of Sect.* 5. *of Pawns and Mortgages.*

IX. It

IX.

9. *There is no Peremption of a Suit begun at the Inſtance of the Exchequer.*

It is alſo by a Privilege of this ſecond kind, that altho it be a general Rule, that all Inſtances in Law-Suits determine by a Peremption, that is, by letting the Cauſe lie dormant without any Judicial Proceeding therein for the ſpace of three Years; the Cauſes of the Exchequer are excepted out of this Rule, and the Suit which has been commenced for the Recovery of its Rights may be revived and continued after the Expiration of three Years; whereas, according to the common Rule, it would be neceſſary to begin the Suit anew *i*.

i Exceptis tantummodo cauſis quæ ad jus fiſcale pertinent, vel quæ ad publicas reſpiciunt functiones. *l.* 13. §. 1. *C. de judic.*

See concerning this Privilege the following Article, and the Remark upon it.

X.

10. *The Cauſes of the Exchequer are reviewed upon producing new Deeds or Writings.*

In the ſame Order of Judicial Proceedings, it is another Privilege of the Exchequer, that altho it be a general Rule, that thoſe who have been condemned by a Sentence or Decree, from which there lies no Appeal, cannot deſire to be heard againſt the Sentence, upon pretence of having diſcovered new Deeds and Writings which they have a mind to produce anew, unleſs the ſaid Writings had been concealed by the Fraud of the adverſe Party; the Exchequer is excepted from this Rule, and may deſire to be heard againſt any Sentence or Decree, if its Right is founded on Writings which have not been before produced, altho the adverſe Parties could not be charged with having detained thoſe Writings. For the Exchequer not having been ſufficiently defended, it is but juſt, becauſe of the Conſequence of the Intereſt thereof, that the Cauſes which may have hindred the eſtabliſhing of its Right, ſhould not be prejudicial to it, and ſhould not be imputed to a want of Vigilance and Care in the Prince, who has the ſame Intereſt in a Cauſe of the Exchequer, as if it were his own proper Cauſe *l*.

l Imperatores Antoninus, & Verus reſcripſerunt, quamquam ſub obtentu novorum teſtamentorum, reſtitui negotia minime oportuit, tamen in negotio publico ex cauſa permittere ſe hujuſmodi inſtrumentis uti. *l.* 35. *ff. de re judic.*

It is uſual to compare the Exchequer to Minors; and as Minors who have not been defended, and whoſe Writings have not been produced, may be relieved againſt Sentences and Decrees, and get them to be annulled, if they can by new Writings eſtabliſh their Right; it is juſt likewiſe that the Exchequer ſhould have the ſame Right: So that this Privilege might for this Reaſon be ranked in the number of thoſe of the firſt kind; and perhaps it might be reaſonable to place there likewiſe for the ſame Reaſon the Privilege which has been explained in the preceding Article.

XI.

11. *When Goods of the Exchequer are adjudged to the higheſt Bidder, others are allowed to outbid them within a certain time.*

We may likewiſe place among the Privileges of the ſecond kind, that which the King has in *France* of receiving within a certain time after his Farms have been adjudged to the higheſt Bidder, Perſons who bid more, to the amount of a third Part of the Price; and in the ſame manner in the Caſe where the Goods of the Demeſne have been adjudged to the higheſt Bidder, the Uſage in *France*, is to admit within a limited time Perſons to bid for them, if they raiſe the Price a third more *m*.

m Si tempora quæ in fiſcalibus auctionibus vel haſtis ſtatuta ſunt, patiuntur: cum etiam augmentum te facturam eſſe profitearis, adi rationalem noſtrum, ut juſtam uberioris pretii oblationem admittat. *l.* 4. *C. de fid. & jur. haſt. fiſci.*

Si civitas nullam propriam legem habet de iadjectionibus admittendis, non poſſe recedi a locatione vel venditione prædiorum publicorum jam perfecta; tempora enim adjectionibus præſtita ad cauſas fiſci pertinent. *l.* 21. *in f. ff. ad municip.*

Si ſine ulla conditione prædia vendente republica, perfecta venditione, nulla ratione vereris ne adjectione facta offerri tibi dominium poſſit; tempora enim adjectionibus præſtituta ad cauſam fiſci pertinent, niſi ſi qua civitas propriam legem habeat. *l.* 1. *C. de vend. reb. civ.*

See the Ordinances touching this Matter.

XII.

12. *The Exchequer warrants not the Defects of the things it ſells.*

It is alſo by another Privilege of the ſame kind, that in Sales made by the Exchequer, it does not warrant the Defects of the things ſold *n*.

n Illud ſciendum eſt Edictum hoc non pertinere ad venditiones fiſcales. *l.* 1. §. 3. *ff. de ædil. ed.*

¶ This Privilege, according to our Uſage, doth not diſtinguiſh the Condition of the Sales made by the Exchequer from thoſe made of the Goods of particular Perſons by an Order of a Court of Juſtice; and it is not ſtrictly ſpeaking a Privilege in our Uſage: For all the Sales of Goods, Moveables and Immoveables, made by Order of a Court of Juſtice, and by Cant or Auction, ſuch as that of the Goods of a Succeſſion that is abandoned to the Creditors, of Moveables ſeized by a Diſtreſs, and other Sales of the like nature, are made publickly by Cant or Auction, and always on the condition that thoſe things be ſold ſuch as they are; becauſe the ſaid Sales not being made by the Owners of the Goods, thoſe who expoſe them to Sale, are ignorant of the Qua-

Qualities and Defects of the things ſold. Thus, when a Sale is made of the Effects of a Succeſſion that is abandoned to the Creditors in which there are Debts due to the Eſtate; they are ſold without any Warranty; not ſo much as of the Payments which may have been made by the Debtors; and they never fail to inſert in the Advertiſements for the Sale, that the things will be ſold without any Warranty. So that as the Sales made by the Exchequer are made by Cant or Auction, and after due Publication, in the ſame manner as Sales by Order of a Court of Juſtice, and that the ſame Reaſons hold in the one as well as the other; it is but juſt that there ſhould be likewiſe no Warranty of theſe ſorts of Sales; and it is uſual to ſell in this manner the Eſtates that fall to the Exchequer, when there are Debts owing to the Eſtate which is ſold.

XIII.

13. *The Exchequer is diſcharged from the Debts due from the Goods it ſells, and the Creditors have their recourſe againſt the Purchaſer.*

It is a Conſequence of the Rule explained in the preceding Article, that the Perſons who purchaſe the Goods ſold by the Exchequer, ſhould be anſwerable for the Debts to which the ſaid Goods may be liable; for it is on this Condition that they are ſold to them, and the Creditors can have no Action againſt the Exchequer *o*.

o Eum qui bona vacantia a fiſco comparavit, debere actionem quæ contra defunctum competebat, excipere. *l.* 41. *ff. de jur. fiſc.*

Æs alienum, hæreditate nomine fiſci vendita ad onus emptoris bonorum pertinere, nec fiſcum creditoribus hæreditariis reſpondere, certum & abſolutum eſt. *l.* 1. *C.* 1. *de hæred. vel act. vend.*

See the Remark on the foregoing Article.

XIV.

14. *The Exchequer not favoured in doubtful Caſes.*

All theſe Privileges which we have juſt now explained, and all the general Conſiderations which make the Rights of the Exchequer to be reckoned favourable, have not the Effect to render the Cauſe of the Exchequer in general more favourable than that of private Perſons, who have an Intereſt to diſpute ſome Right of the Exchequer; neither in a doubtful Caſe ſhould the Judge always incline to favour the Exchequer: For tho it be true, that the publick Intereſt ought to be preferred to that of private Perſons, and that becauſe of the ſaid Intereſt all the Rights of the Exchequer are very favourable, yet the Favour of that Intereſt conſiſts in maintaining theſe Rights intire, and in the exerciſe of each Right in all the Caſes where it may be reaſonable to extend it. But in Doubts concerning the Extent of the ſaid Rights, when the Conſideration of the Equity which may be found in the Intereſts of particular Perſons, counterballances the Intereſt of the Exchequer, it makes another ſort of Publick Good, which the Prince will conſider more than his own private Good; by preferring to the little Intereſt he may perhaps have in the Caſes where theſe Doubts ariſe, the Intereſt of particular Perſons, which is to them proportionably of much greater Importance than the ſmall Profit which might accrue to the Exchequer is to the Prince. So that in theſe ſorts of Difficulties, one may, according to Equity, not favour the Cauſe of the Exchequer, purſuant to the Rule explained in another Place *p*.

p See Art. 26. *of Sect.* 1. *of this Title, and Art.* 18. *of Sect.* 6. *of the preceding Title.*

Quod communiter omnibus prodeſt, hoc rei privatæ noſtræ utilitati præferendum eſſe cenſemus, noſtrum eſſe proprium ſubjectorum commodum imperialiter exiſtimantes. *l. un.* §. 14. *in f. C. de cad. toll.*

SECT. VIII.

Of the Patrimony or private Demeſne of the Prince.

The CONTENTS.

1. *Definition of the private Demeſne of the Prince.*
2. *The Demeſne comprehends that which the Prince acquires by Succeſſion to his Relations.*
3. *And that which he acquires by Donation, or by Teſtament.*
4. *And the Purchaſes he makes with his own proper Goods.*
5. *The private Goods of the Prince may be annexed to the Demeſne.*
6. *The Privileges of the Prince for his own private Patrimony.*
7. *The Prince may alienate his own proper Goods.*
8. *The private Patrimony of the Prince is exempt from all Contributions.*
9. *Other Privileges of the Exchequer which do not ſuit with the Patrimony of the Prince.*
10. *Privileges of the Patrimony or Demeſne of the Princeſs.*

I.

1. *Definition of the private Demeſne of the Prince.*

BY the private Demeſne of the Prince is meant here all the Goods he may have by other Titles beſides that of his Sovereignty *a*.

a Cæſaris ratio. *l.* 6. *in f. de jure fiſci.*

Poſ-

Poſſeſſio rei privatæ noſtræ. *l.* 3. *C. de fund. rei priv.*

Privatum patrimonium noſtrum. *l. ult. C. de agric. & mancip.*

II.

2. The Demeſne comprehends that which the Prince acquires by Succeſſion to his Relations.

The Goods which the Prince acquires by Succeſſion to Perſons of his Family, to whom he is Heir at Law, belong properly to the Prince himſelf, and not to the Exchequer. For he does not ſucceed as Sovereign, but as a Relation; ſo that the Publick has no Pretenſions to thoſe Goods *b*.

b The Quality of Sovereign does not deprive him of the Right of Succeſſion.

III.

3. And that which he acquires by Donation or by Teſtament.

It is the ſame as to Goods which the Prince ſhould acquire by Donation, by Teſtament or other Diſpoſition, which ſhould have regard only to his Perſon; for the Intention of the Donors and of the Teſtators, conſidering him only in his perſonal Capacity, the Exchequer would have no ſhare in Bounties of this nature. But if the Donation or Teſtamentary Inſtitution, or Legacies, or other Diſpoſitions ſeem to regard the Crown, and it were the Intention of the Donors or Teſtators, that the things given ſhould be annexed to the Crown, they would paſs to the Demeſne of the Crown, and would not go to the private Patrimony of the Prince *c*.

c He has the ſame Right as private Perſons to accept of Donations, and to be inſtituted Heir or Executor, or to receive a Legacy.

Si imperator ſit hæres inſtitutus, poſſe inofficioſum dici teſtamentum, ſæpiſſime reſcriptum eſt. *l.* 8. §. 2. *ff. de inoff. teſt.*

Et in legatis Principi datis legem Falcidiam locum habere merito Divo Hadriano placuit. *l.* 4. *C. ad l. falc.*

IV.

4. And the Purchaſes he makes with his own proper Goods.

If the Prince had made Acquiſitions upon other Titles, with Monies or other Effects ariſing out of his own Patrimony, whether by Exchange or otherwiſe, the Goods acquired by theſe Titles, would remain in his Patrimony *d*.

d This is a Conſequence of the preceding Articles.

V.

5. The private Goods of the Prince may be annexed to the Demeſne.

All theſe ſorts of Goods which the Prince acquires as his own private Patrimony, remain in this Nature, if it is his Pleaſure to poſſeſs them always by this Title. But if he unites and incorporates them into the Demeſnes of the Crown, either expreſly or tacitly, as has been explained in its Place, the ſaid Goods will change their Nature, and have that of the other antient Goods of the Demeſne *e*.

e See the Articles cited in the Remark on the preceding Article.

VI.

6. The Privileges of the Prince for his own private Patrimony.

During the time the private Goods of the Sovereign are not annexed to the Demeſne of the Crown, he has nevertheleſs, with reſpect to his own proper Goods, the Privileges of the Demeſne, ſo far as they may agree to him. For there are ſome that do not agree to him, and others which he may uſe, as ſhall be explained by the Rules which follow *f*.

f Quodcunque privilegii fiſco competit, hoc idem & Cæſaris ratio & Auguſtæ habere ſolet. *l.* 6. *in f. ff. de jure fiſci.*

See the laſt Article.

VII.

7. The Prince may alienate his own proper Goods.

Seeing the Privilege, which renders the Goods of the Demeſne of the Crown inalienable, is founded on the Neceſſity of preſerving the Poſſeſſion of them to the Sovereign for the Publick Good, to which they are deſtined; and it is not ſo highly neceſſary that he ſhould retain the Poſſeſſion of his own private Goods, becauſe they are not deſtined to the ſame Uſe; and on the contrary it is for his Intereſt that he ſhould have power to diſpoſe of them as he thinks fit; he has not the fruitleſs uſe of this Privilege, but he may alienate theſe ſorts of Goods, and the Alienation he makes of them is irrevocable *g*.

g See Art. 23. *of Sect.* 1. *of Tit.* 5.

By the Roman *Law the Lands belonging to the Exchequer might be alienated irrevocably.*

Univerſi cognoſcant has poſſeſſiones quas de fiſco noſtro comparaverunt, ſeu comparant, nullo a nobis jure retrahi, ſed propria firmitate poſſeſſas, etiam ad poſteros ſuos dominii perpetui durabilitate dimitti. *l.* 1. *C. de fund. rei. priv.*

Hi quibus patrimoniales poſſeſſiones per Aſianam & Ponticam Diœceſim, vel a nobis, vel a divis parentibus noſtris ſacra largitate donatæ ſunt, inconcuſſe poſſideant, atque ad ſuos poſteros tranſmittant; quod quidem non ſolum in hæredibus ſed etiam in contractibus omnis generis volumus cuſtodiri. *l. 6. C. de fund patrim.*

Retractare fiſcum quod ſemel vendidit æquitatis honeſtatiſque ratio non patitur. *l.* 2. *C. ne fiſc. rem quam vend. er. l.* 1. *eod.*

Fundi patrimoniales, & qui ex emphiteutico jure ad domum noſtram diverſis generibus devoluti ſunt, ſic eis, qui eos popoſcerint, cedunt, ut commiſſi metus eſſe non poſſit, neque enim magis commodamus noſtra, quam tradimus ea jure dominii: ita tamen, ut ea quæ in noſtra poſſeſſione poſiti præſtiterint, & in poſterum ſolvant. *l.* 4. *C. de fund. patrim.*

¶ By the Uſage in *France* the Goods belonging to the Demeſne are inalienable, as has been explained in Tit. 5. Sect. 1. Art. 12, *&c.* But the King may alienate his own proper Goods, which have not been incorporated into the Demeſne of the Crown. *See the ſame Sect* 1. *Art.* 23, *&c.*

In the Article we have mentioned only the Privilege which renders the Goods of the Demeſne of the Crown inalienable, and not that which renders them impreſcriptible. For whereas it is the Right and Intereſt of the Prince, altho he enjoys the Privileges of the Exchequer, not to uſe that Privilege which hinders Alienation; and on the contrary it is his Intereſt to have the Liberty of diſpoſing of his own private Patrimony; it is not in the ſame manner his Intereſt not to uſe the Privilege which renders the Goods of the Demeſne of the Crown impreſcriptible; and it would be on the contrary for his Intereſt to make uſe of this Privilege. But it may be queſtioned whether, as to Preſcription, the condition of the proper Goods of the Prince ought to be the ſame with that of the Goods of the Demeſne, which the Edict of *Francis* I. makes impreſcriptible, even altho they had been poſſeſſed for a hundred Years, as has been obſerved on Art. 20. of the firſt Section. For it is not of the ſame Conſequence as to the private Goods of the Prince which may be alienated, that they ſhould be impreſcriptible, as it is for thoſe which being part of the Demeſne of the Crown, are appropriated for the Good of the State; and even as to thoſe Goods, ſome have been of opinion that that Edict does not extend to them. But altho this Conſideration may render the Condition of the Goods of the Demeſne more favourable than that of the private Goods of the Prince, yet another Reaſon ought to ſecure them againſt Preſcriptions, at leaſt thoſe of ten, twenty, and thirty Years. For if theſe Preſcriptions do not run againſt Minors, becauſe they cannot defend themſelves; they ought for the ſame reaſon not to run againſt the Prince, becauſe of the Care and Application he is obliged to give to the Good of the State, and the Multitude of his Affairs, which do not allow him time to watch againſt Preſcriptions. And it was for this reaſon, that in the *Roman* Law, by which the Goods of the Prince, and alſo thoſe of the Exchequer, might be preſcribed, a Preſcription of forty Years was neceſſary, as has been remarked on Art. 20. of the 1ſt Section. It is for want of fixed Rules in our Uſage as to what concerns the Preſcriptions of the private Goods of the Prince, which have not been united and incorporated into the Demeſne, that we have abſtained from ſetting down any Rule about them; and we have thought proper to make only this Remark.

VIII.

8. *The private Patrimony of the Prince is exempt from all Contributions.*

Seeing the Privilege, which renders the Goods of the Demeſne of the Crown inalienable, does not ſuit with the Intereſt of the Prince for his own private Goods, he may abſtain from making uſe of it; ſo on the contrary he does make uſe of that Privilege which exempts the Goods of the Demeſne from all Contributions. For it is his Intereſt to make uſe of it for his own proper Goods; and he enjoys this Exemption with reſpect to every thing he poſſeſſes beſides the Demeſne of the Crown; and as he is the Diſpenſer of Exemptions, ſo he is entitled to take to himſelf in the firſt place what he gave to others *h*.

h See the Text cited in Tit. 4. *Sect.* 7. *Art.* 6, 11.

IX.

9. *Other Privileges of the Exchequer which do not ſuit with the Patrimony of the Prince.*

All the other Privileges explained in the preceding Section agree to the Prince for his own proper Goods; becauſe the Motives of thoſe Privileges are common to his private Rights, as well as to thoſe of the Demeſne *i*, excepting the Privileges explained in Art. 8, 11, 12. For as to the two laſt, they are proper only to the Exchequer, ſeeing the Prince may ſell and alienate his own private Goods in the ſame manner and on the ſame conditions as private Perſons may do. And as to the Privilege of the Mortgage explained in Art. 8. ſeeing it derogates from a general and equitable Rule, which has been eſtabliſhed purely as a peculiar Favour to the Cauſe of the Exchequer, it muſt be left to the Prince himſelf to conſider, whether he ſhould claim this Privilege for his own private Patrimony and Eſtate, if the Caſe ſhould fall out.

i See the Text cited in Art. 7.
See 1 Kings, Chap. 12.

X.

10. *Privileges of the Patrimony or Demeſne and*

meſne of the Princeſs.

and private Demeſne, as the Prince enjoyed *l*.

l Quodcunque privilegii fiſco competit, hoc idem & Cæſaris ratio & Auguſtæ habere ſolet. *l.* 6. *in f. ff. de jure fiſci.*

Principes eadem (Auguſtæ) Privilegia tribuunt quæ ipſi habent. *l.* 31. *ff. de legibus.*

See the preceding Article, and the Remark there made upon it.

By an Edict of Charles IX. *of* May 25. 1566. *it is ordained, that the Officers belonging to the Lands of the Demeſne or others aſſigned to the Queen, ſhall be called Officers of the King or Queen, whoſe Service, as is mentioned in the Preamble, is reputed to be that of the King.*

According to the Roman *Law, the Alienations and Grants made by the Princeſs, cannot be revoked.*

Sancimus omnes alienationes de aula procedentes, ſive a noſtra clementia, ſive a ſereniſſima Auguſta conjuge noſtra, ſive ab his qui poſtea digni fuerint nomine imperiali, ſive jam alienatum quiddam eſt, ſive poſtea fuerit, ſine omni inquietudine permanere—— Quia igitur multa ſcimus, tam noſmetipſos, quam ſereniſſimam Auguſtam conjugem noſtram, variis perſonis jam donaſſe & vendidiſſe, & per alios titulos aſſignaſſe & maxime ſacroſanctis Eccleſiis & xenonibus & Prochotrophiis, & Epiſcopis, & Monachis, & aliis innumerabilibus perſonis; eandem liberalitatem ex noſtra ſubſtantia, ſive ſereniſſimæ conjugis noſtræ eſſe confectam. Sancimus etiam eos firmo jure habere quod conſecuti ſunt, ita ut contra illos quidem nulla moveatur actio—— Cum enim multa privilegia Auguſta fortunâ meruit, & in donationibus ſine inſinuatione geſtorum omnem firmitatem habentibus & ſuper rebus quas pro tempore ſereniſſimus Princeps divinæ Auguſtæ conſtante matrimonio donaverit, vel ipſe a ſereniſſima Auguſta per donationis titulum conſequatur, ut maneat illico. Donatio plena, nullo alio confirmationis tempore expectando; ita & hoc videatur imperiale eſſe privilegium. *l.* 3. *C. de quadr. præſcr.*

TITLE VII.

Of the Means to have Plenty of all Things in a Kingdom; of Fairs, and Markets; and of Regulations to prevent the Dearth of Things that are moſt neceſſary.

IN order to explain the Subject Matter of this Title in the ſame manner that all the other Matters have been treated, we cannot omit conſidering in the natural Order of the Society of Mankind, what is the Rank and Uſe which this Matter hath therein. Which obliges us to make here a Reflection on the Divine Providence, of which the Uſe of this Matter hath been a Conſequence. Thus it is neceſſary to remark, purſuant to the Principles laid down in the firſt Chapters of the Treatiſe of Laws, in which we have explained the Plan of the Society of Mankind, and its Foundations; that as the Deſign of God in relation to Man, by deſtinating him to the End for which he has created him, implies the Uſe of the Ties with which Men are linked together for the Exerciſe of the ſecond Law; ſo he has multiplied in ſuch a manner their Wants, that the leaſt Neceſſities of Life demand the uſe of many things, and the Aid of many Perſons. So that for ſupporting the Life of every Man in particular, and for preſerving the Body of the Society which unites them all together, he has made neceſſary an infinite Number of different things, and many ſorts of Labours, in order to have thoſe things, and to render them fit for Uſe. It is with the ſame deſign that he has given to all theſe things different Natures, ſo that they cannot all of them be the Product of all Countries, and many of them grow only in certain Climates. Thus it is only by the Ties, and the Commerce which Nations have with one another, that each Nation can draw from the others, the things which it wants. And the ſame divine Providence which has made theſe different ſorts of things neceſſary to Men, has made the Uſe of every one of them to depend on a Chain of Uſes of many other things, in order to give it its proper Uſe; and at the ſame time on a like Chain of divers Labours of many Perſons, whether it be in order to get the ſaid things, or to put them in a condition for uſe.

It is by this Divine Diſpoſition of things, that as to what relates to the Wants of every particular Perſon, even their moſt neceſſary Wants, which are thoſe of Food, Raiment, and Remedies againſt the ſeveral ſorts of Diſeaſes, demand the uſe of an infinite number of things. Thus it is by the ſame Order, that we cannot draw from the Earth the Grain and other Fruits without cultivating it, without ſowing, reaping, and employing about it the whole Detail of Agriculture. And for this Agriculture it is neceſſary to have Tools and Inſtruments of Iron, which can be had only from Mines, and by the means of other different Labours; and it is alſo neceſſary to have the Uſe of ſeveral Animals, and of many other ſorts of things. Thus, before we can have the Uſe of Grain, it is neceſſary to have Mills, which muſt be made up of ſome ſort of

Building or other, and of ſome Machines, which require the Labour and Skill of many Arts, every one of which doth alſo for its own proper Uſe depend on other different Things, and on divers Labours. Thus, for the Uſe of Things which cannot be had in every Kingdom, Navigation is neceſſary; and this implies a Neceſſity of an infinite number of Arts, of Trades, and of Matters of ſeveral kinds. And as to what concerns the Wants of the Body of the Society, the State cannot ſubſiſt without the Uſe of Forces by Land and by Sea, as has been ſhewn in its proper place *a*. This Want alone demands the Uſe of Arms, Fortifications, Artillery, and that of many Machines, of Ships of War, not only for Defence of the Kingdom, but alſo for protecting and ſecuring the Trade of the Nation. And the publick Good requires likewiſe, for other Occaſions, the Uſe of many Things, and the Exerciſe of many Arts. Thus *Solomon*, who was ſo wiſe, ſo rich, and powerful a Prince, ſtood in need of the Aſſiſtance of Things and of Perſons, which he drew from other Princes, for the building of his Temple, notwithſtanding he had already the Materials which *David* his Father had left him *b*.

We may eaſily judge by theſe few Reflexions, what is the Extent of the Wants of Men, and the Multitude both of Things and of Labours, which render Arts, Commerce, and Ties neceſſary, not only between Perſons who compoſe one and the ſame State, but alſo between the Subjects of divers Princes, and between one Nation and another; that by theſe Intercourſes and Ties, they may procure and have in plenty in every Kingdom that which muſt be had from other Parts, and which it cannot have within it ſelf by Husbandry and other Arts; and that they may, in fine, imploy every thing that can be had by Agriculture and Trade.

The ſame Cauſes, which render the Means of having plenty of all Things in a Kingdom neceſſary, do in a ſingular manner require Precautions to be taken for having more eſpecially plenty of the Things that are moſt neceſſary for Life, ſuch as Grain and other Proviſions; and for preventing a Dearth of them, that the Poor may not be deſtitute of what is neceſſary for their Subſiſtence.

In order to have plenty of all theſe Things in a Kingdom, and to have the Uſe of them, it is neceſſary both to manure the Ground, that it may yield all thoſe things it is capable of producing, and to draw from foreign Countries thoſe which are wanting, and to uſe the other Precautions; which ſhall be the Subject-matter of this Title, which we have divided into four Sections. The firſt is, concerning the plenty of Things which grow in every Kingdom. The ſecond relates to the plenty of Things which muſt be fetched from other Parts: The third is of Fairs and Markets: And the fourth is touching the Means of preventing a Dearth of the Things that are moſt neceſſary.

a *See Tit.* 3. *as alſo Tit.* 2. *Sect.* 1.

b *And* Solomon *had threeſcore and ten thouſand that bare Burdens, and fourſcore thouſand Hewers in the Mountains: Beſides the Chief of* Solomon's *Officers which were over the Work, three thouſand and three hundred, which ruled over the People that wrought in the Work. And the King commanded, and they brought great Stones, coſtly Stones, and hewed Stones to lay the Foundation of the Houſe. And* Solomon's *Builders and* Hiram's *Builders did hew them, and the Stone-Squarers: So they prepared Timber and Stones to build the Houſe.* 1 Kings 5. 15, 16, 17, & 18.

And David *commanded to gather together the Strangers that were in the Land of* Iſrael, *and he ſet Maſons to hew wrought Stones to build the Houſe of God. And* David *prepared Iron in abundance, for the Nails for the Doors of the Gates, and for the Joinings; and Braſs in abundance, without weight: Alſo Cedar-Trees in abundance; for the* Zidonians, *and they of* Tyre, *brought much Cedar-Wood to* David. *And* David *ſaid,* Solomon *my Son is young and tender, and the Houſe that is to be builded for the Lord muſt be exceeding magnifical, of Fame and of Glory thoughout all Countries: I will therefore now make Preparation for it. So* David *prepared abundantly before his Death.* 1 Chron. 22. 2, 3, 4, 5.

See 2 Chron. chap. 1, 2, 3.

SECT. I.

Of what regards the Plenty of Things which grow in every Kingdom.

The CONTENTS.

1. *General Means for procuring Plenty.*
2. *The natural Order of the Tillage of the Ground.*
3. *It is neceſſary to cultivate the Lands, to make 'em yield what they are able to produce of greateſt Value.*
4. *Multiplication of Perſons is neceſſary for the Tillage of the Ground.*
5. *Protection due to thoſe who till the Ground.*
6. *Vagabonds and idle Perſons ought to be compelled to work.*
7. *The Uſe of Fairs and Markets.*

I.

1. *General Means for procuring Plenty.*

SINCE the principal Neceſſaries of Life are Food and Rayment *a*, it is chiefly of the Things neceſſary for theſe Uſes that Plenty ought to be procured in every Kingdom by thoſe who have the Government of it; and it is neceſſary likewiſe to take care, as much as is poſſible, that there be in the Kingdom abundance of all the other Things that are neceſſary for the other different Wants of the People. And this requires, in the firſt place, the Uſe of the ways that are proper for getting out of every Country all the Things it may yield for its own Wants, whether it be by tilling the Ground, or by a due Care of the Cattle neceſſary for the ſaid Tillage, and which may ſerve for Nouriſhment or for Clothing, or by the other ways which may contribute thereto: And theſe ſame Wants of Human Life demand alſo a Trade with foreign Countries, that the Inhabitants may fetch from thence what their own Country cannot produce.

a Verbo victus continentur, quæ eſui, potuique, cultuique corporis, quæque ad vivendum homini neceſſaria ſunt. Veſtem quoque victus habere vicem Labeo ait. *l.* 43. *ff. de verb. ſignif.*

Et cætera, quibus tuendi curandive corporis noſtri gratia utimur, ea appellatione ſignificantur. *l.* 44. *eod.*

II.

2. *The natural Order of the Tillage of the Ground.*

This Neceſſity of tilling the Ground, and of caring for the Cattle, requires that one ſhould be able to diſcern the Nature of the Grounds, in order to draw from them thoſe kinds of Fruits they are capable of producing: And as to the Fruits, to diſtinguiſh between thoſe of which a greater Quantity is neceſſary, and thoſe of which a leſſer Quantity might ſuffice; reſerving every where ſufficient for the Nouriſhment of the Cattle, and proportioning the Tillage to all theſe different Wants *b*.

b It is the natural and common Uſage to order the Tillage of the Land after this manner.

In Sorrow ſhalt thou eat of it all the Days of thy Life: Thorns alſo and Thiſtles ſhall it bring forth to thee; and thou ſhalt eat the Herb of the Field. Gen. 3. 17, 18.

III.

3. *It is neceſſary to cultivate the Lands to make 'em yield what they are able to produce of greateſt Value.*

If the Quality of the Lands be found to be ſuch, as that they are proper for yielding Fruits, or other Things, more precious than the Things that are moſt neceſſary for Nouriſhment and Clothing, which may be had elſewhere; it is for the Good of the State, and the Intereſt of particular Perſons, to cultivate therein thoſe ſorts of Things, whether it be to trade in them within the Kingdom it ſelf, or with Strangers, if they be in plenty enough *c*.

c This Choice depends on the Wants.

IV.

4. *Multiplication of Perſons is neceſſary for the Tillage of the Ground.*

All theſe Wants furniſh Imployment for the greateſt part of Mankind; and it is likewiſe the natural Order, that if there were no other neceſſary Labours in their Society, they ſhould all of them by their Nature be deſtined to thoſe Labours from which they draw their Suſtenance. Thus, in the firſt Ages Huſbandry and the keeping of Cattle were Imployments common to the richeſt Perſons. But becauſe there are many other Wants beſides theſe two ſorts, and that the Order of Society requires they ſhould all be provided for, the ſame Order has taken care to diſtinguiſh the Imployments of Men according to the different Functions which theſe ſeveral Wants render neceſſary. And ſeeing thoſe of Agriculture, and of the Care of Cattle, require the Labour of a great many more Perſons, the greateſt Number is deſtined to thoſe Functions by the Divine Providence *d*.

d This is the natural State of the Society of Mankind; and even in the State of Innocence, Man was imployed in tilling the Ground.

And the Lord God took the Man, and put him into the Garden of Eden, *to dreſs it, and to keep it.* Gen. 2. 15.

V.

5. *Protection due to thoſe who till the Ground.*

It reſults from the Truths explained in the preceding Articles, that as the principal Means of procuring Plenty in a Kingdom of every thing it is capable of bringing forth for the Uſe of the Society, is the Multiplication of Perſons who apply themſelves to Husbandry, and to the Care of Cattle; ſo in order to increaſe the Numbers of the ſaid Perſons, and to have plenty of Cattle and all kinds of Things which may be had from ſeveral Countries, it is the Duty of thoſe who are intruſted with the Government, to take all poſſible Care to promote and encourage the ſaid Multiplication, by the Ways which may have that effect *e*. As among others, by protecting thoſe Perſons againſt the Oppreſſions and Violences to which their Condition expoſes them, and which they ſuffer, either from ſome Lords of the Mannor, or from Perſons who, being

e This is a Conſequence of the preceding Article.

ſome

ſome way or other imployed in the Adminiſtration of Juſtice, either as Judges or inferior Officers, are ſo far from doing Juſtice to thoſe poor Labourers, that they oppreſs them with Vexations and Hardſhips, either by cauſing them to be over-rated in their Aſſeſſments that they may thereby eaſe themſelves, or by promoting Law-Suits againſt them, or by requiring of them Services or Labour which they do not owe *f*: Which on one hand renders their Condition hard and diſagreeable to them, and obliges them often to put out their Children to ſome other Calling; and on the other hand, it makes them loſe the Time they would otherwiſe imploy in Labour, and deprives them of the Means of furniſhing the neceſſary Expences for their Husbandry, and other neceſſary Charges.

f Execute Judgment in the Morning, and deliver him that is ſpoiled out of the hand of the Oppreſſor. Jer. 21. 12.

Deliver him that is oppreſſed out of the hand of the proud Man. Eccl. 4. 9.

VI.

6. Vagagonds and idle Perſons ought to be compelled to work.

It is likewiſe one of the Means to increaſe the Number of Perſons neceſſary for theſe Labours, or to hinder the Decreaſe of them, to puniſh thoſe who, by their Birth and Condition being deſtined to this Profeſſion, abandon it out of Idleneſs; which leads them either to Poverty, or to the commiſſion of Crimes, and often both to the one and the other of the ſaid Diſorders; which fills the Country with Vagabonds and the worſt ſort of Poor. And therefore it is that the Laws have taken care to inflict Puniſhments on Vagabonds and ſturdy Beggars, and to compel them to work, for the Good of the Publick, as ſhall be explained in its proper place *g*.

g Cunctis quos in publicum quæſtum incerta mendicitas vocaverit inſpectis, exploretur in ſingulis & integritas corporum, & robur annorum, atque inertibus & abſque ulla debilitate miſerandis neceſſitas inferatur, ut eorum quidem quos tenet conditio ſervilis proditor ſtudioſus & diligens dominium conſequatur: eorum vero quos natalium ſola libertas perſequitur, colonatu perpetuo fulciatur, quiſquis hujuſmodi lenitudinem prodiderit, ac probaverit: ſalva Dominis in eos actione, qui vel latebram forte fugitivis, vel mendicitatis ſubeundæ conſilium præſtiterunt. *l. unic. C. de mendic. val.*

Go to the Ant, thou Sluggard, conſider her Ways, and be wiſe: Which having no Guide, Overſeer, or Ruler, provideth her Meat in the Summer, and gathereth her Food in the Harveſt. How long wilt thou ſleep, O Sluggard? when wilt thou ariſe out of thy Sleep? Yet a little Sleep, a little Slumber, a little folding of the Hands to ſleep. So ſhall thy Poverty come as one that travelleth, and thy Want as an armed Man. Prov. 6. 6, 7, 8, 9, 10, 11.

VII.

7. The Uſe of Fairs and Markets.

It would not be enough to have Plenty in a Kingdom of all Things, which may be had in it, if this Plenty were not diſperſed over all the Kingdom for the Benefit of thoſe who may want them: And on the contrary, the ſaid Plenty would be burdenſome to the Provinces which ſhould be over-ſtocked with ſuperfluous Commodities, whilſt others remain deſtitute of the Aſſiſtance which they ought to have from them. Thus, for the common Good of the Kingdom, it is neceſſary that there ſhould be ways to make thoſe ſuperfluous Commodities paſs from one Place to another, and from one Province to the neighbouring Provinces, that the Inhabitants of each Province may have plenty of what they want. And this is done by means of Fairs and Markets, which ſhall be the Subject-matter of the third Section *h*.

h See the 3d Section.

There are Fairs in certain Towns, which ſerve likewiſe to draw Merchants from foreign Countries.

See Art. 9. of the following Section; and Art. 4. of the 3d Section.

SECT. II.

Of what relates to the Plenty of Things that are to be fetched from foreign Countries.

The CONTENTS.

1. *Commerce between one Country and another.*
2. *Definition of Commerce.*
3. *Commerce with Strangers ought to be carried on by bartering Commodities for Commodities, as much as is poſſible.*
4. *The Uſefulneſs of the Commerce with Strangers, by furniſhing them with Commodities, is an Argument for exporting as many of them as is poſſible.*
5. *The Choice to be made in trading with Strangers.*
6. *Two ways of trading in thoſe Things which come from foreign Countries.*
7. *It is more profitable to engage Strangers to come and trade with us, than for us to go to them.*
8. *Unlawful Commerce with Strangers.*
9. *The Uſe of Fairs and Markets.*

I.

1. *Commerce between one Country and another.*

IT is by Commerce between one Country and another, that Things which are wanting in one Kingdom, are brought into it from other Parts. And this Commerce is carried on different ways; as ſhall be explained by the following Articles, which ſee.

II.

2. *Definition of Commerce.*

Commerce is a reciprocal Communication between two Perſons; one of whom gives to the other one Thing, for another which he receives from him. And this Commerce is a Sale, if one of the two gives Money for the Thing he takes from the other; or an Exchange, if both the one and the other give other Things than Money *b*.

b See Sect. 1. *Art.* 1. *of the Contract of Sale, and Art.* 1. *of the Title of Exchange.*
See Tit. 12. *Sect.* 1. *Art.* 1.

III.

3. *Commerce with Strangers ought to be carried on by bartering Commodities for Commodities, as much as is poſſible.*

There is this difference between a Commerce carried on between the particular Subjects of one and the ſame Kingdom, and that which is negotiated between Subjects of different Kingdoms; that as to the firſt of theſe two ſorts of Commerce, it is indifferent, as to the Good of the Kingdom, whether the Commerce be carried on by Sale, in giving Money for Goods, or by Exchange, in giving one Commodity for another; becauſe the Money remains always in the Kingdom. But as to the ſecond ſort of Commerce, it is of importance to the Welfare of the State that the Commerce with Strangers be carried on by exchanging Goods for Goods, or by ſelling them Goods for their Money. For by this way, there accrues to the Publick a double Advantage, by keeping the Money within the Kingdom, and by bringing into it the Things which were wanting, diſcharging it only of its ſuperfluous Commodities *c*.

c The Romans *puniſhed ſeverely thoſe who, in trading with Strangers, gave them Gold for their Merchandizes.*
Si ulterius aurum pro mancipiis vel quibuſcunque ſpeciebus, ad Barbariem fuerit tranſlatum a mercatoribus, non jam damnis, ſed ſuppliciis ſubjugentur. *l.* 2. *C. de comm. & mercat.*

IV.

4. *The Uſefulneſs of the Commerce with Strangers, by furniſhing them with Commodities, is an Argument for exporting as many of them as is poſſible.*

It follows from this Uſefulneſs of Commerce with Strangers, by giving them Merchandizes rather than Money, that it is for the Good of a State whoſe Territories are able to furniſh Goods and Merchandizes over and above what is neceſſary for their own Conſumption, to improve the Manufacture of ſuch Commodities as are moſt proper for carrying on the Trade with Strangers; whether it be by ſupplying them with thoſe Commodities in their kinds, ſuch as Corn, Wine, and other Commodities of the like nature, or by transforming them into another nature, as by converting Flax into Linen-Cloth, Wool into Stuffs, and by making other Changes in this manner, in order to gain a double Profit, that of the Sale of the Goods and Merchandizes, and likewiſe that of the Price of the Labour of the Workmen who are imployed in ſeveral ſorts of Manufactures *d*.

d This is a Conſequence of the preceding Article.

V.

5. *The Choice to be made in trading with Strangers.*

If among the Strangers, with whom a Country may carry on a Trade, there be ſome who happen to have leſs ſtore than others of the Goods and Merchandizes with which the ſaid Country can furniſh them, and more Money than they can well draw from them; and if there be no other Reaſons for preferring to that Trade, that which may be carried on with other Countries, it is for the Good of the Kingdom to chuſe rather that Trade than others *e*.

e This is likewiſe a Conſequence of the 1ſt Article.

VI.

6. *Two ways of trading in thoſe Things which come from foreign Countries.*

It is neceſſary alſo to diſtinguiſh among the foreign Countries, from whence a Nation is obliged to fetch Goods or Merchandizes of all ſorts, the Countries in which they grow, from thoſe who buy them up to ſell them to others, in order to make a right Judgment whether it be more advantageous to go to the firſt, or to the others. And if for carrying on the ſaid Trades Navigation be neceſſary, which by reaſon of the Diſtance of the Place is perillous, it is for the Intereſt of the State, and it will be prudent for the Sovereign to protect the ſaid Trades, by appointing Ships of War for Convoys to the Merchant-Fleets *f*.

f This is alſo a Conſequence of the firſt Article.

VII.

7. *It is more profitable to engage* We *Strangers*

In trading with foreign Countries, it is neceſſary likewiſe to make a diſtinction between thoſe Countries to which

to come and trade with us, than for us to go to them.

we ſhould be obliged to tranſport the Goods and Commodities with which we are to furniſh them, and thoſe which would come and fetch away the Goods they want, and bring their own to us; for by this laſt way of Trading we ſhould avoid the Perils and Charges of Navigation, and of Carriage. Thus it is for the Good of the State to engage Strangers to trade with us in this manner, by making it eaſy and agreeable to them to come among us, and by taking care to have ſafe and convenient Harbours *g*.

g It is natural to chuſe out of theſe two Ways that which has the moſt Advantages.

VII.

8. *Unlawful Commerce with Strangers.*

All that has been ſaid concerning the Commerce treated of here, and which may be carried on with Foreign Countries, is to be underſtood of that Commerce which is not prohibited by any Law of the Kingdom. For if there is any Prohibition, either of trading at all, or of trading in ſome particular Commodities, ſuch as Arms *h*, or others, with certain Countries; thoſe who ſhould attempt to carry on any Commerce of that kind, would be puniſhed with Confiſcation of their Merchandizes, and be liable to the other Puniſhments which the Laws may have eſtabliſhed, or which the Quality of the Commerce, and the Diſobedience may deſerve *i*.

h Nemo alienigenis Barbaris cujuſcumque gentis ad hanc urbem ſacratiſſimam ſub legationis ſpecie, vel ſub quocunque alio colore venientibus, aut in diverſis aliis civitatibus vel locis, loricas, ſcuta, & arcus, ſagittas, & ſpathas, & gladios, vel alterius cujuſcunque generis arma audeat venundare. Nulla prorſus iiſdem tela, nihil penitus ferri vel facti jam, vel adhuc infecti, ab aliquo diſtrahatur. Perniciosum namque Romano Imperio, & proditioni proximum eſt, Barbaros, quos indigere convenit, telis eos, ut validiores reddantur, inſtruere. Si quis autem aliquod armorum genus quarumcunque nationum Barbaris alienigenis contra pietatis noſtræ interdicta ubicunque vendiderit, bona ejus univerſa protinus fiſco addici, ipſum quoque capitalem pœnam ſubire decernimus. *l.* 2. *C. qua res exp. non deb.*

i Mercatores tam imperio noſtro quam Perſarum Regis ſubjectos, ultra ea loca, in quibus fœderis tempore commemorata natione nobis convenit, nundinas exercere minime oportet; ne alieni regni (quod non convenit) ſcrutentur arcana. Nullus igitur poſthac imperio noſtro ſubjectus ultra Niſibin, Callinicum, & Artaxatan emendi ſeu vendendi ſpecies cauſa proficiſci audeat—— Sciente utroque, qui contrahit, & ſpecies, quæ præter hæc loca fuerint venundatæ, vel comparatæ, ſacro ærario noſtro vindicandas; & præter earum rerum ac pretii amiſſionem, quod fuerit numeratum, vel commutatum, exilii ſe pœnæ ſempiternæ ſubdendum. *l.* 4. *C. de commer. & mercat.*

Si quis inclytas nominatim vetuſtis legibus civitates tranſgredientes ipſi, vel peregrinos negotiatores ſine comite commerciorum ſuſcipientes fuerint deprehenſi: nec proſcriptionem bonorum, nec pœnam perennis exilii ulterius evadent. Ergo omnes pariter ſive privati, ſive cujuſpiam dignitatis, ſive in militia conſtituti, ſciant aut ſibi ab hujuſmodi temeritate penitus abſtinendum, aut ſupradicta ſupplicia ſubeundum. *l. ult. eod.*

Altho theſe Texts have not a preciſe Relation to this Rule, yet they may be applied to it; and it carries its Authority with it.

IX.

9. *The Uſe of Fairs and Markets.*

Seeing it is by the Uſe of Fairs and Markets, that the different Places and Provinces of a Kingdom are ſupplied with what is ſuperfluous in other Parts thereof, as has been already mentioned in the laſt Article of the preceding Section; the ſaid uſe of Fairs is alſo a means to procure plenty of thoſe Merchandizes which come from Foreign Parts, as ſhall be explained in the following Section *l*.

l See Art. 4 *and* 5. *of the following Section.*

SECT. III.

Of Fairs and Markets.

The CONTENTS.

1. *Definition of Fairs.*
2. *Definition of Markets.*
3. *The choice of fit Places for Fairs and Markets.*
4. *Places proper for Fairs, to which it is intended to draw Strangers.*
5. *Privileges of Fairs.*
6. *The Privilege of exempting thoſe who go to Fairs from all Arreſts.*

I.

1. *Definition of Fairs.*

BY a Fair is meant a Concourſe permitted by the Prince, of all ſorts of Perſons without diſtinction, for one or more Days, in a certain Place, there to ſell, buy, or exchange the Goods and Merchandizes which every one brings thither, and there to carry on the different Trafficks which the Perſons who are at the ſaid Fairs may happen to agree on *a*.

a It is not permitted to hold Fairs or Markets without the Permiſſion of the Prince, as has been taken notice of in Tit. 2. *Sect.* 2. *Art.* 16.

Nundinis impetratis a Principe, &c. *l.* 1. *ff. de nundin.*

II.

2. *Definition of Markets.*

By a Market is underſtood a reſort of all ſorts of Perſons without diſtinction, permitted by the Prince, on certain

tain Days of every Week, in certain Places, there to ſell, buy, or exchange whatever Goods and Merchandizes are brought thither, but principally Grain and Proviſions. Thus Markets are diſtinguiſhed from Fairs, in that the uſe of Markets is more neceſſary, and likewiſe more frequent; and in that they are reſtrained to fewer ſorts of Merchandizes, and to fewer Perſons *b*.

b Exercendorum mercatuum aut nundinarum licentia. *l. un. C. de nund. & mercat.*

III.

3. *The choice of fit Places for Fairs and Markets.*

The Uſe of Fairs and Markets being to draw to the Places appointed Goods and Merchandizes, for the Conveniency both of the Buyers and Sellers, they are appointed to be held in Places which have the moſt Conveniences for making them uſeful: which depends on the Eaſineſs of acceſs to the Places by good Roads, for the Carriage of the Merchandizes, and for the Conveniency of Perſons; on the Nearneſs of thoſe Places to the other Places from whence the Perſons muſt come; on convenient Lodging for Travellers; on the Facility of diſpatching other ſorts of Affairs there, which may oblige many Perſons to go to thoſe Places; and on the other Advantages which may render one Place more commodious for that purpoſe than another *c*.

c The Publick Utility requires it ſhould be ſo.

IV.

4. *Places proper for Fairs, to which it is intended to draw Strangers.*

As to the Choice of Places for holding Fairs, it is neceſſary to diſtinguiſh the Fairs held only for the benefit of the Inhabitants of ſome Province, or of a part of one, or even of ſeveral Provinces adjoining to the Place where the Fair is kept, from thoſe Fairs which are eſtabliſhed for drawing Strangers to it. For as to theſe, it is of importance for the Good of the Kingdom, to make choice of Frontier-Towns, to which Strangers may have eaſy Acceſs, either by Sea or by Rivers. Thus the Fairs held in Sea-Port Towns, or in Towns to which Strangers may have the eaſieſt acceſs, are the moſt profitable *d*.

d The ſame publick Benefit will require this Choice of Places.

V.

5. *Privileges of Fairs.*

It is for this end, of drawing Strangers to Fairs, that Privileges are granted them; for if the Fairs were deſtitute of the ſaid Privileges, Strangers might be diſcouraged from coming to trade there. And therefore in *France*, the Kings have granted in favour of ſome Fairs, the Privilege to Strangers who ſhall happen to die there, that the Goods they have in *France* ſhall go to their Heirs, or that they may diſpoſe of them by Teſtament *e*.

e See Art. 3. of Sect. 4. of Heirs and Executors in general, and the Remark there made upon it.

There are many Ordinances which grant to Foreign Merchants, and others, frequenting certain Fairs, an Exemption from all Cuſtoms, and other Impoſts, during the time of the ſaid Fairs.

VI.

6. *The Privilege of exempting thoſe who go to Fairs from all Arreſts.*

The ſame Motive of the Uſefulneſs of Fairs and Markets, has been the occaſion of granting other Privileges likewiſe to thoſe who frequent them, either on the account of Trade, or other Affairs. Thus it is not allowed to attach either their Perſons or their Equipages, their Merchandizes or other Goods, for their Debts, whilſt they are going to the Fairs, whilſt they remain there, or return from them *f*.

f Qui exercendorum mercatuum aut nundinarum licentiam vel veterum indulto, vel noſtra authoritate meruerunt: ita beneficio reſcripti potiantur, ut nullum in mercatibus atque nundinis ex negotiatorum mercibus conveniant, vel in venalitiis aut locorum temporali queſtu & commodo privata exactione ſectentur, vel ſub prætextu privati debiti aliquam ibidem concurrentibus moleſtiam poſſint inferre. *l. un. C. de nund. & mercat.*

There are ſome Cuſtoms which regulate this Privilege after this manner.

SECT. IV.

Of the Means to prevent the Dearth of Things that are neceſſary.

The CONTENTS.

1. *All things are neceſſary for ſome uſe.*
2. *What are the things neceſſary for the greateſt Wants.*
3. *What is meant by Dearth.*
4. *Cauſes of Dearth.*
5. *There is no hindring the raiſing of the Price in a Scarcity.*
6. *Precautions in Caſes of Scarcity.*
7. *Prohibitions to export Grain out of the Kingdom.*
8. *Monopolies.*
9. *A Combination among thoſe who have the Sale of certain things, to ſet them at a Price on which they agree.*
10. *Trade is prohibited to Officers and Gentlemen.*
11. *The Caſe of an univerſal Barrenneſs.*

I.

1. *All things are neceſſary for ſome Uſe.*

ALL things are neceſſary for ſome Uſe or other. For God has not made any thing that is altogether uſeleſs; and each thing hath its proper Uſe, according to its Nature, and the different Wants of Men *a*. Some things are common to all Men, and every one has the free uſe of them, ſuch as the Heavens, the Light, the Air, and the Water. Other things are the Property of ſome Perſons, and are acquired ſeveral Ways, of which that of Commerce is the moſt frequent. And as to theſe things, ſome of them are of ſuch a nature, that the Dearth of them is of no great importance to the Publick, ſuch as Jewels and other precious things, the uſe whereof is neceſſary only for things which the Generality of Mankind may be eaſily without. But there are others, where it is for the Good of the Publick that they ſhould be ſold at a cheap Rate, ſuch as the things neceſſary for Food and Clothing. For it is of conſequence to every one not to be without theſe things; and if there be a Scarcity of them, it is with difficulty that one can have them during the Dearth; ſo that it is chiefly as to theſe ſorts of things, that the Good of the State requires that the Dearth of them ſhould be prevented as much as poſſible.

a And God ſaw every thing that he had made, and behold it was very good. Gen. 1. 31.

All the Works of the Lord are exceeding good. Eccluſ. 39. 16.

See Mark 7. 37.

II.

2. *What are the things neceſſary for the greateſt Wants.*

Of thoſe ſorts of things which are neceſſary for Food and Raiment, the moſt neceſſary, and that without which it is impoſſible to live, is at leaſt Bread. Thus it is by the Dearth of Grain that the Publick ſuffers the moſt; and altho the Dearth of other things neceſſary for Food and Raiment be of much leſs Importance, yet it is for the Publick Good to procure ſuch a plenty of them, as that the People of the poorer ſort may have a ſufficient Quantity according to their Wants *b*.

b The greateſt Wants are thoſe of the things without which we cannot live, and which may be ſufficient for the moſt neceſſary occaſions.

Having Food and Raiment, let us be therewith content. 1 *Tim.* 6. 8.

III.

3. *What is meant by Dearth.*

By Dearth is underſtood a conſiderable Riſe of the Price of every thing, that is to ſay, of that which it is commonly worth, and which goes to ſuch an exceſs that the common People cannot have what they want of it *c*.

c The Dearth ſpoken of here is that which makes it either impoſſible, or very difficult, for the meaneſt of the People to have the Neceſſaries of Life that are thus riſen in their Price.

IV.

4. *Cauſes of Dearth.*

Seeing the Dearth of Grain is that which it is of the greateſt importance to prevent, it is chiefly in procuring plenty of all ſorts of Grain that the Miniſters and Officers ought to be moſt diligent and watchful; and as Dearth may proceed from divers Cauſes, ſo the Remedies againſt it are different, and more or leſs eaſy. For it may happen, either becauſe the Crop has been very ſmall, by reaſon of a Barrenneſs or other Accidents; or becauſe the Grain has been carried out of the Country, or is in the hands of Perſons, who having bought up all the Grain, raiſe the Price of it *d*.

d Theſe are the ordinary Cauſes of Dearth: To which we may add that which may happen by the Credit and Intereſt of certain Merchants who ſhould combine to monopolize one kind of thing, and to deprive others of the Liberty of ſelling it, which would be prejudicial to the Publick Good, and contrary to the Divine Law.

Hear this, O ye that ſwallow up the Needy, even to make the Poor of the Land to fail, ſaying, When will the new Moon be gone, that we may ſell Corn? And the Sabbath, that we may ſet forth Wheat, making the Ephah ſmall, and the Shekel great, and falſifying the Ballances by Deceit? That we may buy the Poor for Silver, and the Needy for a Pair of Shoes; yea, and ſell the Refuſe of the Wheat? *Amos* 8. 4, 5, 6.

He that withholdeth Corn, the People ſhall curſe him; but Bleſſing ſhall be upon the Head of him that ſelleth it. *Prov.* 11. 26.

See the 8th Article of this Section.

V.

5. *There is no hindring the raiſing of the Price in a Scarcity.*

If the Dearth proceeds from a Barrenneſs, or other Accidents, one cannot oblige thoſe who have Grain, to ſell it at the ordinary Price. For the Price of things ought to be different, according as they are in ſmall or great Quantities, and according to the Circumſtances of Times and Places *e*, and the Fruits may be ſold dearer in a Scarcity, for this reaſon among others, that it is but juſt that the Proprietors or Poſſeſſors of the Lands which produce them, may draw from them the Expences of the Tillage, and likewiſe ſome Profit, for the doing of which the uſual Price of a ſmall

e Nonnullam pretio varietatem loca temporaque adferunt. *l.* 63. §. *ult. ff. ad leg. falcid.*

Quan-

Quantity would not be ſufficient: and in this Caſe the reducing it to the ordinary Price, which would be an Injuſtice to the Proprietors, would not be ſufficient to procure Plenty of thoſe Goods, the Scarcity whereof had raiſed the Price of them; but it would be neceſſary to remedy that by the Ways explained in the following Articles.

VI.

6. Precautions in Caſes of Scarcity.

In the Caſes of Scarcity of Grain, beſides the Care of having it fetch'd from the next adjacent Places, from whence any Supply can be had, it is the Duty of the Magiſtrates to prohibit under ſevere Penalties, all Perſons from ſelling any Corn in Granaries on the Market-Days, and to oblige them to ſell it on thoſe Days only in the publick Market-Places, at the uſual Hours, and on other Days beſides the Market-days to ſell it in their Granaries at the Price of the preceding Market *f*.

f It is thus regulated by the Ordinances. See the Ordinance of Feb. 19. 1566. *Art.* 12. *As to the Caſe of Barrenneſs, ſee the laſt Article.*

VII.

7. Prohibitions to export Grain out of the Kingdom.

To prevent the Dearth of Grain, which might be occaſioned by exporting too great Quantities thereof out of the Kingdom, the Ordinances have taken the neceſſary Precautions therein, that a ſufficient Quantity be left in the Provinces, and that only what is ſuperfluous be carried out of the Kingdom, and that after having obtained leave from the King for ſo doing *g*.

g We revoke and annul all Grants and Conceſſions, whether they be general or particular, for the Exportation of Corn and other Grain, Goods and Merchandizes, out of our Kingdom, or any Country, Lands or Lordſhips within our Dominions; and do enjoin all our Subjects, and other Perſons, of what State and Condition ſoever they may be, not to export any Grain, upon pain of Confiſcation of the ſame, without our expreſs Leave and Permiſſion firſt had and obtained. Ordinance of *Francis* I. of *November* 20. 1539.

There are many other Ordinances relating to this Exportation of Grain.

VIII.

8. Monopolies.

To prevent the Dearth which might be occaſioned by thoſe who ſhould make themſelves Maſters of the Grain by Monopolies, that is, by buying up a great Quantity thereof, that they alone may have the Sale of it, and ſo be able to raiſe the Price of it; the Laws have enacted ſevere Penalties againſt thoſe who are guilty of this Crime, as ſhall be explained in its Place *h*.

h Jubemus, ne quis cujuſcumque veſtis vel piſcis, vel pectinum forte aut echini vel cujuſlibet alterius ad victum vel ad quemcumque uſum pertinentis ſpeciei, vel cujuſlibet materiæ, pro ſua authoritate vel ſacro jam elicito, aut in poſterum eliciendo reſcripto, aut pragmatica ſanctione, vel ſacra noſtræ pietatis adnotatione, monopolium audeat exercere: ſi quis autem monopolium auſus fuerit exercere, bonis propriis expoliatus perpetuitate damnetur exilii. *l. un. C. de monopol.*

See Art. 10. *of Sect.* 1. *Tit.* 15. *of this Book.*

See Art. 4. *of this Section, and the Texts there quoted.*

IX.

9. A Combination among thoſe who have the Sale of certain things, to ſet them at a Price on which they agree.

It is neceſſary to diſtinguiſh from Monopolies, another Cauſe of Dearth, which proceeds from a Combination among thoſe thro whoſe hands any ſort of Goods or Merchandize muſt paſs, before People can have the uſe of it, and who being according to the Order of the Civil Policy, the only Perſons of whom it can be bought, agree among themſelves to raiſe the Price of it. Thus it is of certain Merchants or Tradeſmen, that the things moſt neceſſary for Life are bought, which cannot be uſed till after they have been prepared for uſe; ſuch as Bread, and ſome other things of the like nature, of which they often raiſe the Price, altho the things they prepare for uſe be not riſen in proportion to the Price they ſet upon them. And there are alſo ſome Merchants and Tradeſmen who ingroſs Corn and other Merchandizes with the ſame View of raiſing the Price thereof; it is on account of theſe Abuſes, which may be reckoned in the number of Crimes, that the Laws have made Proviſion therein, in order to repreſs them, and to keep theſe ſorts of things at their juſt Price *i*.

i Ne quis illicitis habitis conventionibus conjuret, aut paciſcatur, ut ſpecies diverſorum corporum negationis, non minoris quam inter ſe ſtatuerint, venundetur.— Cæterarum præterea profeſſionum primates, ſi in poſterum aut ſuper taxandis rerum pretiis, aut ſuper quibuſlibet illicitis placitis, auſi fuerint convenientes hujuſmodi ſeſe pactis conſtringere: quadraginta librarum auri ſolutione percelli decernimus, &c. *l. unic. C. de monop.*

See the foregoing Article.

Proviſion has been made by an infinite number of Ordinances and Regulations for reſtraining the Abuſes mentioned in this Article, ſome of which are but ill obſerved in many Places.

X.

10. Trade is prohibited to Officers and Gentlemen.

The ſame Cauſes which have render'd it neceſſary to make Regulations for repreſſing the Crimes and Abuſes mentioned in the two preceding Articles, have likewiſe made it neceſſary to take away the Liberty of Commerce from Perſons, who by their Quality or the Authority of their Offices, or the Nature of their Functions, would be enabled to commit, in the carrying on of ſuch Commerce, two Injuſtices equally criminal, and contrary to the Publick Good;

the one of buying under the juſt Value, and the other of ſelling at too dear a Rate. And this is what the Laws have provided againſt, by prohibiting Gentlemen and Officers to have any hand in buying and ſelling Goods and Merchandizes *l*.

l Nobiliores natalibus, & honorum luce conſpicuos, & patrimonio ditiores, pernicioſum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius ſit emendi vendendique commercium. *l.* 3. *C. de commerc. & mercat.*

There are ſeveral Ordinances of many Kings, which prohibit all manner of Commerce to all ſorts of Officers, and to Gentlemen, and more eſpecially that of buying up Grain.

See Art. 14. *of Sect.* 2. *of Tit.* 11. *and Art.* 9. *Sect.* 1. *of Tit.* 11.

XI.

11. *The Caſe of an univerſal Barrenneſs.*

If the Dearth happens by reaſon of a general Barrenneſs in a Kingdom, or that it be even common to the neighbouring Nations, and that Wars, or other Obſtacles, hinder the getting Supplies of Corn from foreign Countries; it is too late to provide againſt ſuch Inconvenience, when there remains no more Corn that what will ſuffice for the preſent, or for a ſhort time. And ſeeing ſuch a Scarcity does ſometimes happen, tho but ſeldom, it would ſeem to be for the Publick Good that ſome Proviſion were made againſt ſuch Inconveniences; ſuch as laying up every Year out of the Corn that cannot be conſumed in the Kingdom, a certain Quantity according to its Plenty; or by fetching it from other Parts, in order to have a ſufficient ſtore thereof in reſerve in the publick Granaries, according to the Directions which ſhall be given therein by the Prudence and Wiſdom of the prime Miniſters *m*.

m Behold, there come ſeven Years of great Plenty throughout all the Land of Egypt. *And there ſhall ariſe after them ſeven Years of Famine, and all the Plenty ſhall be forgotten in the Land of* Egypt, *and the Famine ſhall conſume the Land. And the Plenty ſhall not be known in the Land, by reaſon of that Famine following, for it ſhall be very grievous —— Now therefore let* Pharaoh *look out a Man diſcreet and wiſe, and ſet him over the Land of* Egypt. *Let* Pharaoh *do this, and let him appoint Officers over the Land, and take up the fifth part of the Land of* Egypt *in the ſeven plenteous Years. And let them gather all the Food of thoſe good Years that come, and lay up Corn under the hand of* Pharaoh, *and let them keep Food in the Cities. And that Food ſhall be for ſtore to the Land againſt the ſeven Years of Famine which ſhall be in the Land of* Egypt, *that the Land periſh not thro the Famine.* Gen. 41. 29, &c.

Omnia quæ in horreis habentur, expendi volumus, ita ut non prius ad id frumentum extendatur expenſio, quod ſub præfectura tua urbis horreis infertur, quam vetera condita fuerint erogata, & ſi forte vetuſtate ſpecies ita corrupta eſt, ut per ſemet erogari ſine querela non poſſit; eidem ex nova portione miſcea-tur, cujus adjectione corruptio velata damnum fiſco non faciat. Ad iſtud autem negotium arbitratu ac judicio tuo, nobilis, prudens, fidelis, optime ſibi conſcius, pro integritate mentis opponatur cuſtos ac menſor: qui vel frumenta modio metiatur, vel juſtis æſtimationibus colligat quanta habeantur in condito. *l.* 1. *C. de cond. in publ. horr.*

Cum ad quamlibet urbem manſionemve acceſſeris, protinus horrea inſpicere te volumus, ut devotiſſimis militibus deputatæ & incorruptæ ſpecies præbeantur. Nam ſi per incuriam officii gravitatis tuæ ſartorum tectorum neglecta procuratione, aliqua pluviis infecta perierint, ad damnum tuum referentur. *l.* 2. *C. eod.*

TIT. VIII.

Of the Policy relating to the Uſe of the Seas, Rivers, Sea-Ports, Bridges, Streets, Market-Places, High-ways, and other Publick Places; and of what concerns Foreſts, Hunting, Fowling and Fiſhing.

HAVING explained in the preceding Titles that which relates to the general Order of the Government, we ſhall explain in this the general Policy of certain things which are of common uſe to this Society, and which it is neceſſary to diſtinguiſh from thoſe which every Perſon may conſume for his own private Uſe.

In order to diſtinguiſh theſe ſorts of things from all others, and to underſtand rightly the Policy of their Uſe, it is neceſſary, firſt, to obſerve, that there is nothing in the Univerſe, which God has not created for the Uſe of Man, and that every thing in it is proportioned to his Nature, and to his Wants. So that we ſee in the Structure of the World, and in the Order and Beauty of every thing contained in the Earth and in the Heavens, the Dignity of Man for whom all theſe things have been made, and the Relation which all this great Fabrick of the Univerſe hath to his Uſe, and to his Wants *a*. And in this infinite

a Leſt thou lift up thine Eyes unto Heaven, and when thou ſeeſt the Sun, and the Moon, and the Stars, even all the Hoſt of Heaven, ſhouldſt be driven to worſhip them, and ſerve them, which the Lord thy God hath divided unto all Nations under the whole Heaven. Deut. 4. 19.

Thou madeſt him to have Dominion over the Works of thine hands: thou haſt put all things under his Feet. Pſal. 8. 6. Gen. 1. 26. Heb. 2. 7.

See the Treatiſe of Laws, chap. 1. numb. 3.

mul-

multitude of things of all kinds, with which we are environed in this World, it is neceſſary to diſtinguiſh two different ſorts of them, and two different manners of the Uſe which God gives us of them. The firſt of theſe two ſorts of things, is of thoſe which are ſo neceſſary, that no body can live without having a free and continual Uſe of them, ſuch as the Air and Light; and it is becauſe of this Neceſſity, that the Air encompaſſes the whole Earth, which is the Habitation of Mankind, and that it is penetrated by the Light which comes from the Heavens; ſo that no body can be deprived of the Uſe of the Air, and of the Light, unleſs condemned to loſe his Life. And as to the manner of this Uſe, as it is of a continual Neceſſity, it is likewiſe ſo eaſily to be had, that it does not require any Induſtry or Labour; and every one has his proper uſe of theſe things independently of the Will of all others. Thus the Government has nothing to regulate in this matter. It can only take Precautions to keep the Air pure, and forbid the throwing out or expoſing any thing in the publick Places, which may infect it and render it unwholeſome.

The ſecond ſort of things, is of thoſe which are neceſſary to Men for Food, Raiment, for Habitation, and all other ſorts of Wants; which takes in the Earth, the Waters, and every thing they bear and bring forth, Grain, Fruits, Plants, Animals, Metals, Minerals, and all other things. And as for the manner of uſing all theſe things, it is diſtinguiſhed from the manner of uſing the Air and Light; in that all thoſe other things come to our Uſe, only by the means of ſome Labour and Induſtry, either in procuring them, or in fitting them for the Uſe that is to be made of them.

It is for this uſe of this ſecond kind of things, that ſeeing they are all neceſſary in the Society of Mankind, and cannot be had and put to any Uſe, except by Ways which demand different Ties and Intercourſes among Mankind, not only from one part of a Kingdom to another, but from one Country to another, and between Nations that lie the moſt remote from one another, God has taken care by the Order of Nature, and Men by the Civil Policy, to facilitate the ſaid Intercourſes. Thus it is by Nature, that one of the Uſes which God has given to the Seas, and to Rivers, is that of opening Ways of Communication with all the Countries in the World by Navigation. And it is by means of the Civil Policy, that Towns and other Places have been built, where Men aſſemble together, and have intercourſe with one another by means of Streets, Market-Places, and other publick Places proper for that purpoſe; and that the Inhabitants of every Town, every Province, every Kingdom, may have intercourſe with all other Perſons of what Country ſoever, by the means of High-ways. Thus for all theſe Intercourſes by Land and Water, it has been neceſſary to eſtabliſh Rules by this Policy; and theſe Rules ſhall make a part of the ſubject Matter of this Title. As for the other Rules of this Title, it is to be remarked, that beſides this Uſe of the Seas and Rivers, for the intercourſe of Men, they have another Uſe, which is likewiſe naturally common to all Men, that of the Fiſhery. The Surface of the Earth gives likewiſe naturally to Men the uſe of Hunting, eſpecially in the Woods and Foreſts; which have moreover another uſe of much greater Importance for the common Good, by the great Advantage the Publick draws from the Uſe of Timber for building Houſes and Ships, for warlike Engines, for the Artillery, for Bridges, for the Conſtruction of Publick Edifices, Churches, Palaces, and others. It is becauſe of theſe Uſes, that the Ordinances in *France* have eſtabliſhed a Policy, not only in relation to the King's Foreſts, and thoſe belonging to Churches, and to all ſorts of Communities, but alſo to thoſe which belong to particular Perſons; that they may be preſerved for the ſaid Uſes, as Occaſion ſhall offer. And as to what concerns the Uſe of Hunting and Fiſhing, in which the Liberty granted by the *Roman* Law was much greater than is allowed by ours *b*; ſeeing this Liberty given

b Eſt ſæpiſſime reſcriptum non poſſe quem piſcari prohiberi; ſed nec aucupari. *l.* 13. §. 7. *in f. ff. de injur.*

Jus piſcandi omnibus commune eſt, in portu fluminibuſque. §. 2. *inſt. de rer. diviſ.*

Omnia animalia, quæ terra, mari, cœlo capiuntur, id eſt, feræ beſtiæ, & volucres, piſces, capientium fiunt. *l.* 1. §. 1. *ff. de acq. rer. dom.*

Feræ igitur beſtiæ, & volucres, & piſces & omnia animalia, quæ mari, cœlo & terra naſcuntur; ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt, quod enim nullius eſt, naturali ratione occupanti conceditur: nec intereſt quod ad feras beſtias & volucres attinet, utrum in ſuo fundo aliquis capiat, an in alieno. §. 12. *inſt. de rer. diviſ.*

Dominium rerum ex naturali poſſeſſione cœpiſſe, Nerva filius ait, ejuſque rei veſtigium remanere de his quæ terra, mari cœloque capiuntur. Nam hæc protinus eorum fiunt, qui primi poſſeſſionem eorum

given to all Perſons without diſtinction would be attended with many Inconveniences, whether it were by diverting People from their Occupations, and encouraging Idleneſs, or by occaſioning Quarrels between thoſe who ſhould hunt or fiſh in the ſame Places, or becauſe of the Damage that would accrue to the Publick by fiſhing and hunting in certain Seaſons of the Year, or with certain Tackle, and in certain Manners, which would deſtroy the wild Beaſts and the Fiſh; it has been thought reaſonable to provide againſt them; and the Civil Policy in *France* has ſet bounds to this Liberty by ſeveral Ordinances, which regulate to whom the Liberty of Hunting and Fiſhing is permitted, which prohibit the Uſe of it in certain Manners, and certain Seaſons, and give other particular Directions therein.

It appears ſufficiently by theſe Remarks, what are the Matters to be treated of under this Title. Some may perhaps imagine, that ſeeing we have made mention here of the Policy relating to Foreſts, becauſe of the uſe of the Timber which grows in them, we ought likewiſe to have ſpoken here of Mines; but the uſe of Mines does not require a Policy, which has relation to the ſubject Matter of this Title: and we have put what concerns Mines in another Place, under another view, as alſo what relates to the Coin *c*.

It remains only that we ſhould put the Reader in mind, that in theſe Matters, as well as in many others, it is neceſſary to diſtinguiſh, as has been ſaid in the Preface, two ſorts of Rules; one of thoſe which are only Arbitrary, of which there is an ample Detail in the Ordinances, and which make particular Regulations; and the other is of the general Rules, which come within a narrower Compaſs, and are a part of the Law of Nature, and which contain the Principles of all the other Rules. It is to theſe general Rules that we intend to confine our ſelves, and to compoſe out of them this Title; whether they be found in the Ordinances of *France*, or be not to be met with there.

eorum adprehenderint. Item bello capta, & inſula mari enata, & gemmæ, lapilli, margaritæ in littoribus inventæ ejus fiunt, qui primus eorum poſſeſſionem nactus eſt. *l.* 1. §. 1. *ff. de acq. vel amitt. poſſeſſ.*

V. l. 3. *& l.* 55. *ff. de acq. rer. dom.*

Si quis in mari piſcari, aut navigare prohibeatur. ——Injuriarum actione utendum eſt. *l.* 2. §. 9. *ff. ne quid in loc. public.*

Si quis me prohibet in mari piſcari——Hic injuriarum conveniri poteſt. *l.* 13. §. 7. *ff. de injur. & fam.*

c See Art. 17, 18, 19. *of Sect.* 2. *of Tit.* 2.

And we ſhall divide the Title into two Sections. The firſt ſhall be concerning the ſeveral ſorts of things which ſerve for publick Uſes; and the ſecond ſhall contain the Rules of the Policy relating to theſe ſorts of things.

SECT. I.

Of the ſeveral ſorts of Things which ſerve for publick Uſes.

The CONTENTS.

1. *Two ſorts of Things which are for publick Uſe.*
2. *The Uſe of the Seas is common to all the World.*
3. *The natural Cauſe of this Uſe.*
4. *Lakes which are called Seas.*
5. *Rivers are of Publick Uſe.*
6. *And alſo Sea-Ports.*
7. *Bridges are of publick Uſe.*
8. *The Streets and Highways alſo of publick Uſe.*
9. *As alſo Market-Places and other publick Places.*
10. *Foreſts.*
11. *Hunting and Fiſhing.*
12. *The Policy concerning publick Places.*

I.

1. *Two ſorts of things which are for publick Uſe.*

THERE are two ſorts of Things deſtined to the common Uſes of the Society of Mankind, and which every one may freely uſe. The firſt is of thoſe that are ſuch by Nature; thus Rivers, Seas, the Banks of Rivers and the Sea-Shore, are for the common uſe of all Perſons *a*. The ſecond ſort is of thoſe which are of ſuch a nature, that tho the Uſe of them be naturally neceſſary in the Society, either for ſpiritual Matters, ſuch as Churches and Churchyards, or for Temporal Affairs, as the Streets, Highways, Market-Places, the Places where the Courts of Juſtice are held, Colleges, Town-Houſes, and other publick Places; yet the Uſe of them is not given to Men by Nature; but it is the Civil Policy that makes choice of, and appropriates the Places which ought to ſerve the Publick for all theſe different Uſes *b*.

a Naturali jure communia ſunt omnia hæc, aer, aqua profluens, & mare, & per hoc littora maris. §. 1. *inſt. de rer. diviſ.*

V. l. 2. §. 1. *ff. eod.*

Et quidem mare commune omnium eſt, & littora ſicuti aer. *l.* 13. §. 7. *ff. de injur. & fam.*

b Univerſitatis ſunt non ſingulorum quæ in civitatibus ſunt, theatra, ſtadia, & ſi qua alia ſunt communia civitatum. §. 6. *inſt. de rer. diviſ.*

II. Of

II.

2. *The Uſe of the Seas is common to all the World.*

Of all the Things deſtined to the common Uſe of Mankind, whether it be by Nature, or by the Civil Policy, there are none whereof the Uſe hath a larger Extent, and is more univerſal, than that of the Seas *c*, which are naturally common to the whole Univerſe. And it is for this reaſon, that Men have taken occaſion, from the Uſe of the Seas that lie open to all Nations of the World, to render themſelves Maſters of the Seas, and by that means to make Invaſions upon one another. When theſe Attempts are made by one Nation againſt another, it is only War that decides their Differences; and as to Enterprizes by Sea between the Subjects of one and the ſame Kingdom, or againſt the Rights of the Prince, Proviſion has been made in that matter by the Laws, of which mention ſhall be made in the ſecond Section.

c It is by means of the Seas that all the Nations of the World have Intercourſe with one another.

III.

3. *The natural Cauſe of this Uſe.*

This Uſe of the Sea, that is common to all the Nations of the World, is a pure natural Conſequence of the Divine Providence, which, having made the Uſe of Waters neceſſary for Men, diſtributes them to them by Showers of Rain, by Springs, Rivulets, and by Rivers, the continual Courſe of which demands a Diſcharge proportionable to their Quantity. It is in order to receive all theſe Waters that God has made the Sea, whoſe vaſt Extent receives them from all Countries *d*; and this Place where they diſcharge themſelves, which is common to them all, is at the ſame time an open Way by which they may have Intercourſe with one another; and God has moreover given to the Sea plenty of Fiſh, and of many Things uſeful to all Countries *e*. We ſhall explain in the ſecond Section the Policy relating to theſe different Uſes of the Seas.

d All the Rivers run into the Sea, yet the Sea is not full. Eccleſ. 1. 7.

e So is this great and wide Sea, wherein are Things creeping innumerable, both ſmall and great Beaſts. Pſal. 104. 25.

IV.

4. *Lakes which are called Seas.*

We may place in the Rank of Seas certain Lakes, which are of as large an Extent as many Provinces, and into which Rivers diſcharge themſelves; and ſome of theſe Lakes have the Name of Seas given them, ſuch as the *Caſpian* Sea *f*.

f There are Lakes of a leſſer Extent, which have gone by the Name of Seas. The Sea of *Tiberias*, John 6. 1.

V.

5. *Rivers are of publick Uſe.*

The Nature of Waters, which renders the Uſe of the Sea publick and common to all, renders alſo common and publick the Uſe of Rivers, in the manner that ſhall be explained in the 2d Section *g*.

g Flumina omnia & portus publica ſunt. §. 2. *inſt. de rer. diviſ.*

Riparum uſus publicus eſt jure gentium, ſicut ipſius fluminis. *l.* 5. *in prin. ff. de rer. div. & qual.*

Sed flumina pene omnia & portus publica ſunt. *l.* 4. §. 1. *ff. eod.*

Flumina publica. *l.* 1. §. 4. *ff. de flum.*

Flumina publica, quæ fluunt, ripæque eorum publicæ ſunt. *l.* 3. *in prin. eod. V. l.* 1. §. 3. *eod.*

VI.

6. *And alſo Sea-Ports.*

The Uſe of the Seas for Navigation, has made the Uſe of Sea-Ports neceſſary, which are Places proper for Ships to retire to, the Entry into them being eaſy, and they being convenient for lading and unlading Ships, and for affording them ſhelter againſt Storms. There are alſo Ports belonging to Rivers *h*.

h Ripæ publicæ ſunt. *l.* 3. *ff. de flum.*
See the Texts cited on the preceding Article.

VII.

7. *Bridges are of publick Uſe.*

Rivers and Brooks have rendred the Uſe of Bridges neceſſary for croſſing them; ſo that Bridges are of the Number of the Things deſtined to the publick Uſe *i*.

i Quæſitum eſt an is qui in utraque ripa fluminis publici domus habeat, pontem privati juris facere poteſt: reſpondit non poſſe. *l. ult. ff. de flumin.*

This Text ſpeaks only of Rivers of a publick Uſe, which would make the Uſe of Bridges publick alſo. So that it would not be the ſame thing in a Bridge which any particular Perſon ſhould make for his own Uſe over a Brook, in a Place in which the Publick had no manner of Intereſt.

See Art. 12. *of the following Section.*

VIII.

8. *The Streets and Highways alſo of publick Uſe.*

The Neceſſity of the frequent Intercourſes which Men have with one another, and of the tranſporting of Things from one Place to another, has made it neceſſary to have Streets in Towns and other Places, and Highways leading from one Place to another. Thus, the Streets and Highways are publick Places, free

free for the Use of all Persons without distinction *l*.

l Cuilibet in publicum petere permittendum id est, quod ad usum omnium pertineat; veluti vias publicas, itinera publica. Et ideo quolibet postulante de his interdicitur. *l.* 1. *ff. de loc. & itin. publ.*

Publici loci appellatio quemadmodum accipiatur, Labeo definit ut & ad areas, & ad insulas, & ad agros, & ad vias publicas, itineraque publica pertineat. *l.* 2. §. 3. *in prin. ne quid in loc. publ.*

Loca publica utique privatorum usibus deserviunt, jure scilicet civitatis, non quasi propria cujusque. *l.* 2. §. 2. *eod.*

IX.

9. *As also Market-Places, and other publick Places.*

The Use of Fairs and Markets, and that of other Conveniences for People to meet together for other Occasions, has made it necessary to have publick Market-Places, Exchanges, and other Places; which are all, in the same manner as the Places where Courts of Justice are held, Colleges, and Town-Houses, publick Places *m*.

m Universitatis sunt non singulorum, veluti quæ in civitatibus sunt theatra, & stadia, & similia, & si qua alia communia sunt civitatum. *l.* 6. §. 1. *ff. de rer. divis.*

X.

10. *Forests.*

Altho Forests be not of common and publick Use, as Seas, Rivers, and other Things spoken of in the preceding Articles; yet the Necessity of the divers Uses of the Timber growing in them, has made it necessary to establish a Policy concerning them, as shall be shewn *n*.

n See Art. 20. *of the following Section, and what has been said of Forests in the Preamble to this Title.*

XI.

11. *Hunting and Fishing.*

Hunting and Fishing having their Use and Extent, not only on the Lands proper to some Persons, but in general over the Earth and in the Waters, they are therefore considered as being of a publick Use, and have likewise this relation to the Publick, that it reaps a Benefit by the Produce both of the one and the other. And therefore the Civil Policy hath likewise prescribed Rules for them *o*.

o See Art. 3, 10, 21. *of the following Section.*

XII.

12. *The Policy concerning publick Places.*

All these different Uses which the Publick makes of these several sorts of Things, have their Policy settled by the Rules explained in the following Section.

SECT. II.

Of the Rules of Policy concerning Things which serve for publick Uses.

The CONTENTS.

1. *The Laws have regulated the Use of the Seas.*
2. *The Use of Navigation on the Seas.*
3. *The Use of Fishing in the Sea.*
4. *Who has the Right to Wrecks cast on Shore.*
5. *Divers Rules of the Policy relating to the Seas.*
6. *The Policy concerning the Sea-Ports.*
7. *The Policy concerning Rivers, the Advantage of making them navigable.*
8. *Prohibition to throw any thing into the Rivers that may be of prejudice to the Navigation.*
9. *The Banks of Rivers ought to be free for the Passage of the Horses who draw the Boats.*
10. *The Policy as to fishing in Rivers.*
11. *One cannot change the Course of the Water, nor divert it another way, nor do any other prejudice to the Rights of the Publick, and of particular Persons.*
12. *The Policy concerning Bridges.*
13. *Reparations of Bridges.*
14. *Three sorts of Ways.*
15. *The Policy concerning the Highways.*
16. *The Policy concerning the Streets, and other publick Places.*
17. *Reparation of the publick Places.*
18. *Penalties of Trespasses against the Policy concerning publick Places.*
19. *A Building made in a publick Place.*
20. *The Policy relating to Forests.*
21. *The Policy as to Hunting and Fowling.*

I.

1. *The Laws have regulated the Use of the Seas.*

Altho the Use of the Seas be common to all, as has been said in Art. 2, 3. of the preceding Section; yet the Liberty of the said Use ought to have its Bounds, to prevent the Inconveniences which would ensue, if every one using, as he thought fit, the Liberty of Navigation or of Fishing, the Use made thereof by some should be prejudicial to others, or there should be even Encroachments on the Rights of the Prince. And this is what the Ordinances in *France* have provided against *a*.

a See the following Articles.

Altho it seems agreeable to the Law of Nature, that

that the Uſe of the Seas ſhould be common to all, and that by the Roman *Law fiſhing in the Sea, and in Rivers, was permitted to all without diſtinction.* Flumina autem omnia & portus publica ſunt; ideoque jus piſcandi omnibus commune eſt in portu fluminibuſque. §. 2. *Inſt. de rer. div.* Si quis in mari piſcari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is qui in campo publico ludere, vel in publico balneo lavare, aut in theatro ſpectare arceatur: ſed in omnibus his caſibus injuriarum actione utendum eſt. *l.* 2. §. 9. *ff. ne quid in loco publ.*

It is likewiſe agreeable to the Law of Nature, that this Liberty, which is common to all, being a continual Occaſion of Quarrels, and of many bad Conſequences, ſhould be regulated in ſome manner or other; and there could be no Regulation more equitable, nor more natural, than leaving it to the Sovereign to provide againſt the ſaid Inconveniences. For as he is charged with the Care of the publick Peace and Tranquillity, as it is to him the Care of the Order and Government of the Society belongs, and it is only in his Perſon that the Right to the Things which may belong in common to the Publick, of which he is the Head, can reſide; he therefore, as Head of the Commonwealth, ought to have the Diſpenſation and Exerciſe of this Right, that he may render it uſeful to the Publick. And it is on this Foundation, that the Ordinances in France *have regulated the Uſe of Navigation, and of Fiſhing in the Sea and in Rivers.*

II.

2. *The Uſe of Navigation on the Seas.*

As to Navigation, ſeeing it might happen at Sea, as well as on Land, that Perſons may aſſociate together for ſome bad Deſign, and under pretext either of Commerce, or of the Service of the Prince againſt the Enemies of the State, might fit out Ships for ſome Enterprize prejudicial to the Kingdom, or its Allies; it is not allowed to equip Ships of War or Merchant-Men, whether in Peace or War, and to ſet out upon long Voyages, without the Knowledge and Permiſſion of the Admiralty *b*.

b See the Ordinance of Francis I. July 1517. *Art.* 22.

III.

3. *The Uſe of fiſhing in the Sea.*

As to Fiſhing in the Sea, it has been neceſſary to regulate the Uſe of it, either as to the Right and Liberty of fiſhing, or as to the different manners of fiſhing; and this has been taken care of by the Ordinances in *France*, which have declared certain manners of fiſhing unlawful *c*.

c See the Ordinance of March 1584. *Art.* 81, 82, 83. *and other Articles, and likewiſe the Ordinances relating to the Fiſhery.*

See the 10*th Article.*

[Several Regulations have been made by Acts of Parliament in *England*, for better preſerving Sea-Fiſh, and reſtraining ſuch Diſorders and Abuſes as tend to the Damage of the Fiſhery. *See Stat.* 3 *Jac.* 1. *cap.* 12. *and* 13 & 14 *Car.* 2. *cap.* 28. *and others.*]

IV.

4. *Who has the Right to Wrecks caſt on Shore.*

Seeing there often happen Shipwrecks at Sea, and the Things loſt are caſt on the Shore, and fall into the hands of thoſe who find them; the Laws have fixed a Time for the Owners to claim them: and if they do not appear within that time, the Prince has a Right in them, as he has in the other kinds of vacant Goods; and the Officers of the Admiralty, and the Finders of ſuch Things, have alſo their Rights to a ſhare in them, according as the ſame is regulated by the Ordinances *d*.

d By Art. 11. *of the Ordinance of* Feb. 1543. *of Things caſt on Shore out of the Sea, there is one third Part belongs to the Admiral, one third to the King, and a third to the Perſon who has taken them up out of the Sea. Which ſeems to be conformable to the Ordinances in relation to Treaſures, which divide them into three different Shares; one third to the King, a third to the Proprietor of the Ground, and a third to the Finder.*

See the Ordinance of March 1584. *Art.* 20, &c. *Theſe Ordinances allow only one Year for the Owners of the Things to claim them in, which in all likelihood has been taken from this Law.* Si quis navicularius naufragium ſe ſuſtinuiſſe adfirmet, provinciæ judicem, ejus videlicet in qua res agitur, adire feſtinet, ac probet apud eum teſtibus eventum: relatioque etiam ad ſublimiſſimam referatur præfecturam: ita ut intra anni ſpatium veritate revelata, competens diſpoſitio procedat. Quod ſi per negligentiam præfinitum anni ſpatium fortaſſe claudatur, ſupervacuas feraſque interpellationes emenſo anno placuit non admitti. *l.* 2. *C. de naufr.*

But the Year ſpoken of in this Law was not for this Caſe; and the firſt Law of this Title does not allot any ſhare to the Prince of the Things loſt by Shipwreck.

[In *England*, the Time allowed for Owners of Goods loſt in a Shipwreck to claim them, was formerly a Year and a Day; and if no Perſon appeared to claim them within that Time, they were to remain to the King, or to ſuch others to whom the Wreck belongeth. *Stat.* 3 *Ed.* 1. *c.* 4. But the Law in this particular has been render'd more favourable to the Owners of Goods loſt in this calamitous manner, by a ſubſequent Act of Parliament, 12 *Annæ*, entitled, *An Act for the preſerving all ſuch Ships, and Goods thereof, which ſhall happen to be forced on Shore, or ſtranded upon the Coaſts of this Kingdom, or any other of Her Majeſty's Dominions.* By which Act it is provided, that if the ſaid Goods ſhall not be legally claimed within the ſpace of twelve Months next enſuing by the rightful Owner, then publick Sale ſhall be made thereof; and if periſhable Goods, forthwith to be ſold, and after all Charges deducted, the Reſidue of the Monies ariſing by ſuch Sale, with a fair and juſt Account of the whole, ſhall be tranſmitted to the Exchequer, there to remain for the Benefit of the rightful Owner when appearing, who upon Affidavit or other Proof made of his or their Right thereto, to the Satisfaction of one of the Barons of the Exchequer, ſhall, upon his Order, receive the ſame out of the Exchequer. This Act was made only for three Years; but it has been ſince made perpetual by another Act, 4 *Georgii.*]

V.

5. *Divers Rules of the Policy relating to the Seas.*

There are alſo many other Rules relating to the Uſe of the Seas, the Regulations about Shipping, thoſe touching the Rights and Functions of Maſters of Ships, the Puniſhment of Crimes committed on the Sea; and all theſe Matters have

have their ſeveral Rules preſcribed by the Ordinances in *France*, which ſee.

VI.

6. The Policy concerning the Sea-Ports.

The Policy concerning Sea-Ports makes a part of that of the Seas; and proviſion has been made by the Ordinances in *France*, that the Sea-Ports be kept in good Order, and that neceſſary Repairs be made to keep them in the good Condition in which they ought to be *f*.

f See the Ordinance of Oct. 1508. *Art.* 18.

VII.

7. The Policy concerning Rivers, the Advantage of making them navigable.

The Policy of Rivers conſiſts in that which relates to the Fiſhery and Navigation of thoſe which are, or may be made navigable by ſome Pains and Labour. And it is of Importance to the Publick that they be made navigable, as much as poſſible, whether the Sovereign is willing to be at the Charge of it himſelf, or to leave it to thoſe who are willing to undertake it, he granting to ſuch Undertakers the Rights and Privileges which this Service may deſerve *g*.

g It is of very great Advantage to the Publick to render Rivers navigable; and there are Examples of Permiſſions granted to particular Perſons to undertake Works for this purpoſe, allowing them Rights and Privileges for their Reward.

[The making Rivers navigable, being a Work in which the Property of a great many particular Subjects muſt needs be concerned, the ſame cannot be effectually carried on in *England* without the Authority of an Act of Parliament, which impowers the Undertakers to make Cuts, Locks, Turn-Pikes, or other Works proper for ſuch Navigation, in the Lands of other Perſons; and appoints Commiſſioners to ſettle and adjuſt the Damages to be made good to the Owners and Occupiers of ſuch Lands where any Works ſhall be made for the ſaid Navigation. And the Expence of ſuch Works is either at the common Charge of the Counties which petition to have the River made navigable, or at the ſole Charge of the Undertakers; who, towards the Reimburſement of their ſaid Expence, are allowed to demand and exact a certain Duty or Toll on all Goods, Wares, and Merchandizes, as ſhall be carried up and down the ſaid River when render'd fit for Navigation. *See the ſeveral Acts for making Rivers navigable.*]

VIII.

8. Prohibition to throw any thing into the Rivers that may be of prejudice to the Navigation.

In order to preſerve the Navigation of Rivers, it is proper for the Government to prohibit and puniſh all Attempts which might hinder it, or render it inconvenient; whether it be by any Buildings, Fiſheries, Stakes, Flood-Gates, and other hindrances, or by diverting the Water from the Courſe of the Rivers, or otherwiſe. And it is likewiſe forbidden to throw into the Rivers any Filth, Dirt, and other Things which might be of prejudice to the Navigation, or cauſe other Inconveniences *h*.

h Ait prætor: *Ne quid in flumine publico ripave ejus facias; ne quid in flumine publico, neve in ripa ejus immittas, quo ſtatio iterve navigio deterior fiat.* l. 1. ff. de fluminibus.

Si flumen navigabile ſit, non oportere prætorem concedere ductionem ex eo fieri, Labeo ait, quæ flumen minus navigabile efficiat. Idemque eſt, & ſi per hoc aliud flumen fiat navigabile. *l.* 10. §. 2. *ff. de aqu. & aq.*

Deterior ſtatio, itemque iter navigio fieri videtur, ſi uſus ejus corrumpatur, vel difficilior fiat, aut minor, vel rarior, aut ſi in totum offeratur. Proinde ſive derivetur, aqua ut exiguior facta, minus ſit navigabilis: vel ſi dilatetur, aut diffuſa, brevem aquam faciat, vel contra ſic coanguſtetur, & rapidius flumen faciat, vel ſi quid aliud fiat quod navigationem incommodet difficiliorem faciat, vel prorſus impediat, interdicto locus erit. *l.* 1. §. 15. *ff. de flum.*

Quominus ex publico flumine ducatur aqua, nihil impedit, niſi Imperator aut Senatus vetet; ſi modo ea aqua in uſu publico non erit. Sed ſi aut navigabile eſt, aut ex eo aliud navigabile ſit; non permittitur id facere. *l.* 2. *eod.*

See the Ordinances of 1415. *Art.* 1, 3, 4. *and* 5May 1520. *Art.* 20. *of* Oct. 9. 1570. Decem. 1577. Jan. 1583. *Art.* 18.

IX.

9. The Banks of Rivers ought to be free for the Paſſage of the Horſes who draw the Boats.

The ſame Uſefulneſs of the Navigation of Rivers, demands the free Uſe of their Banks; ſo that in the Breadth and Length neceſſary for the Paſſage and Track of the Horſes which draw the Boats, there be neither Trees planted, nor any other Obſtacles in the way *i*.

i Ripæ publicæ ſunt. *l.* 3. *ff. de fluminibus.*

Prætor ait: *quominus illi in flumine publico, navem ratem agere, quove minus per ripam onerare, exonerare liceat, vim fieri veto.* l. 1. in prin. ff. ut in flum. publ.

Nemo igitur ad littus maris accedere prohibetur ..... dum tamen villis & ædificiis, & monumentis abſtineatur. *l.* 4. *ff. de diviſ. rer.*

Riparum uſus publicus eſt jure gentium ſicut ipſius fluminis. Itaque navem ad eas appellere, funes ex arboribus ibi natis religare, retia ſiccare, & ex mare reducere, onus aliquid in his reponere cuilibet liberum eſt, ſicuti per ipſum flumen navigare. *l.* 5. *ff. de rer. diviſ.*

See the Texts quoted on the foregoing Article, and the Ordinance of 1415. *Art.* 2. *of* May 1520. *Art.* 3.

X.

10. The Policy as to fiſhing in Rivers.

As to fiſhing in Rivers, the Government has taken care to regulate it; ſo that it is not allowed to fiſh either at all Times, or with all ſorts of Nets and Utenſils indifferently: but the Regulations as to the Times, and manner of Fiſhing, are to be obſerved *l*.

l See the Ordinances of 1291. *of* 1326. *Art.* 4, 8, 9. *of* 1402. *Art.* 73, 74. *of* March 1515. *Art.* 90, 91. *of* Auguſt 1545. *Art.* 9.

XI.

11. One cannot change the Courſe of the Water,

Seeing the Uſe of Rivers belongs to the Publick *m*, no body can make any

m Flumina publica ſunt. *l.* 3. *ff. de flum.*

Change

nor divert it another way, nor do any other prejudice to the Rights of the Publick, and of particular Perſons.

Change in them that may be of prejudice to the ſaid Uſe. Thus, one cannot do any thing to make the Current of the Water ſlower, or more rapid, ſhould this Change be any way prejudicial to the Publick, or to particular Perſons *n*. Thus, he who ſhould have an Eſtate divided by the Stream of the Water, or have ſeparate Eſtates lying on the two Banks of the River, could not for his own Conveniency make a Bridge to join his two Eſtates together *o*. Thus altho one may divert the Water of a Brook, or of a River, to water his Meadows or other Grounds, or for Mills and other Uſes; yet every one ought to uſe this Liberty ſo as not to do any Prejudice either to the Navigation of the River, whoſe Waters he ſhould turn aſide, or the Navigation of another River which the ſaid Water ſhould render navigable by diſcharging it ſelf into it, or to any other Publick Uſe, or to Neighbours who ſhould have a like Want, and an equal Right *p*. And if there were not Water enough for them all, or that the Uſe which ſome of them made of it were prejudicial to others, a proper Remedy would be applied according to the Occaſion, by the Officers whoſe buſineſs it is to redreſs ſuch Abuſes.

n Ait prætor in flumine publico inve ripa ejus facere, aut in id flumen ripamve ejus immittere, quo aliter aqua fluat, quam priore æſtate fluxit veto. *l.* 1. *ff. ne quid in flum. publ.*

Quod autem ait, *aliter fluat*, non ad quantitatem aquæ fluentis pertinet, ſed ad modum & ad rigorem curſus aquæ referendum eſt: & generaliter dicendum eſt, ita demum interdicto quem teneri, ſi mutetur aquæ curſus per hoc, quod factum eſt, dum vel depreſſior, vel arctior fiat aqua, ac per hoc rapidior fit cum incommodo accolentium. Et ſi quod aliud, vitii accolæ ex facto ejus qui convenitur, ſentient, interdicto locus erit. *l.* 1. §. 3. *ff. ne quid in flum. publ.*

Oportet enim in hujuſmodi rebus utilitatem & tutelam facientis ſpectari ſine injuria utique accolarum. *d. l.* §. 7. *in f.*

o Quæſitum eſt an is, qui in utraque ripa fluminis publici domus habeat, pontem privati juris facere poteſt? reſpondit non poſſe. *l. ult. ff. de fluminibus.*

See Art. 7. *of Sect.* 1. *and the Remark there made on it.*

p Pleroſque ſcio prorſus flumina avertiſſe, alveoſque mutaſſe, dum prædiis ſuis conſulunt. Oportet enim in hujuſmodi rebus utilitatem & tutelam facientis ſpectari, ſine injuria utique accolarum. *l.* 1. §. 7. *in f. ff. ne quid in fluminibus.*

Quominus ex publico flumine ducatur aqua, nihil impedit: niſi Imperator aut Senatus vetet ſi modo ea aqua in uſu publico non erit. Sed ſi aut navigabile eſt, aut ex eo aliud navigabile fit, non permittitur id facere. *l.* 2. *ff. de fluminibus.*

XII.

12. *The Policy concerning Bridges.*

The Policy in relation to Bridges on Rivers, and on Brooks, reſpects the manner of building them, and the care of keeping them in repair. As to the building of Bridges on navigable Rivers, they ought to be proportioned to the Conveniency of the Paſſage over them, by giving them a ſufficient Breadth, and the other Dimenſions; and to the Uſe of Navigation, by the Width and Height of the Arches, and by diſpoſing them in a proper manner to receive the Stream of the Water that the Current may run in a direct Line thro the Hollow of the Arch. Thus we ſee Bridges whoſe Arches are either too ſtrait, or too low to receive Boats loaded full to the Top, or which receive the Current of the Water on the Flank of the Piles *q*.

q Pontes fiant ubicumque oportet. *l. un. ff. de via publ.*

The Bridges ought to be proportioned to the Uſe of Navigation.

XIII.

13. *Reparations of Bridges.*

As to the Reparations of Bridges, Care is taken therein by the proper Officers appointed to have the Inſpection of them; and the Charges of ſuch Repairs are furniſhed either out of the King's Coffers for ſuch Bridges as he is bound to keep in repair, or by the Contributions of Perſons who may be liable to ſuch Repairs, either on account of Tolls, or other Duties laid upon Bridges *r*.

r See the Ordinance of October 1508. *Art.* 18. *that of* Orleans, *Art.* 107. *and that of* Blois, *Art.* 282.

XIV.

14. *Three ſorts of Ways.*

As to the Policy concerning Ways out of Towns, and other Places, it is neceſſary to diſtinguiſh three different ſorts of Ways. The firſt is of the Highways which are for the publick Uſe, to go from one Place to any other; and theſe ſorts of Ways terminate, either in other Ways, or at the Gates of the Towns, or other Places, or at the Sea, or at Rivers. The ſecond is of the Ways which belong in particular to ſome Perſons, for the Uſe of their Lands; and theſe terminate at one end in the Highways, and at the other end in the remoteſt of the Lands to which they lead *s*. The third is of the

s Viarum quædam publicæ ſunt, quædam privatæ, quædam vicinales. Publicas vias dicimus, quas Græci Βασιλικὰς, id eſt, regias, noſtri prætorias, alii conſulares vias appellant. Privatæ ſunt quas agrarias quidam dicunt. Vicinales ſunt viæ quæ in vicis ſunt, vel quæ in vicos ducunt. *l.* 2. §. 22. *ff. ne quid in loco publ. vel itin. fiat.*

Privatæ viæ dupliciter accipi poſſunt: vel hæ, quæ ſunt in agris, quibus impoſita eſt ſervitus, ut ad agrum alterius ducant; vel hæ quæ ad agros ducunt: per quas omnibus permeare liceat, in quas exitur

the Ways which are as Services between Neighbours, one of which has a right of Paſſage through the Lands of the other *t*.

exitur de via conſulari: & ſic poſt illam excipit via, vel iter, vel actus ad villam ducens: has ergo, quæ poſt conſularem excipiunt in villas, vel in alias colonias ducentes, putem etiam ipſas publicas eſſe. *d. l.* §. 23.

Viæ vicinales, quæ in agris privatorum collatis factæ ſunt, quarum memoria non extat, publicarum viarum numero ſunt: ſed inter eas, & cæteras vias militares hoc intereſt: quod viæ militares exitum ad mare, aut in urbes, aut in flumina publica, aut ad aliam viam militarem habent: harum autem vicinalium viarum diſſimilis conditio eſt, nam pars earum in militares vias exitum habent; pars ſine ullo exitu intermoriuntur. *l. ult.* §. 1. *ff. de loc. & itin. publ.*

t Hæ quæ ſunt in agris quibus impoſita eſt ſervitus, ut ad agrum alterius ducant. *l.* 2. §. 23. *ff. ne quid in loc. pub. vel itin. fiat.*

Ait prætor: *in via publica, itinereve publico facere, immittere quid, quo ea via, idve iter deterius ſit, fiat, veto.* l. 2. §. 20. ne quid in loc. publ.

Deteriorem autem viam fieri, ſic accipiendum eſt, ſi uſus ejus ad commeandum corrumpatur, hoc eſt ad eundum vel agendum, ut cum plana fuerit clivoſa fiat, vel ex molli aſpera, aut anguſtior ex latiore, aut paluſtris ex ſicca. §. 32. *eod.*

Si viæ publicæ exemptus commeatus ſit, vel via coarctata, interveniunt magiſtratus. §. 25. *eod.*

Si quis cloacam in viam publicam immitteret, exque ea re minus habilis via per cloacam fiat: teneri eum Labeo ſcribit, immiſiſſe enim eum videri. §. 26. *eod. V. T. h. T.*

XV.

15. *The Policy concerning the Highways.*

The Policy relating to the Highways conſiſts in keeping them in that good condition they ought to be in for the Conveniency of the Publick. And this takes in three ſorts of Rules, thoſe reſpecting the Breadth and other Conveniences of the Ways, ſuch as the Pavement, if neceſſary; thoſe which forbid the putting or throwing out any thing in the Ways which may incommode the Paſſage; and thoſe which oblige to Reparations. And this Policy regards the Officers appointed to take care of the Highways, and who direct the Expences thereof, which are to be furniſhed either out of the King's Coffers, or by particular Perſons, who upon the account of Tolls, or other Duties, are obliged to be at this Charge *u*. And as to the other Ways which ſerve for the Uſe of particular Perſons, every one of the Parties concerned contributes to their Repair according to their Right and Intereſt, or according to their Titles and Poſſeſſions *x*.

u See the Ordinance of Orleans, *Art.* 107. *and that of* Blois, *Art.* 282, 355.

x The Reparations of the Ways for Services are properly incumbent on him who has the Right of Service. In omnibus ſervitutibus refectio ad eum pertinet qui ſibi ſervitutem aſſerit, non ad eum cujus res ſervit. *l.* 6. §. 2. *ff. ſi ſerv. vindic.*

And as for the other Ways whereof the Uſe is in common to ſome particular Perſons, every one is obliged to pay his proportion according to the Rule explained in this Article.

XVI.

26. *The Policy concerning the Streets and other publick Places.*

The Policy concerning the Streets, the Market-Places, and other Places which are for the publick Uſe, conſiſts in putting and maintaining them in the good Condition they ought to be in, for rendring the Uſe of them free and commodious. Thus for the Streets and Market-Places, it is neceſſary to keep the Pavement in good Order, to take care that nothing obſtruct the Paſſage, or render it inconvenient, to hinder the throwing out or expoſing in them any Filth or other things that may be a Nuſance to the Paſſengers; that care be taken to keep them clean; and that the Magiſtrates, or other Perſons appointed to take care of the Streets, be diligent in ſeeing all theſe Regulations put in execution, making the Inhabitants contribute towards it, according to the Share that every one ought to bear of this Expence *y*.

y Ædiles ſtudeant ut, quæ ſecundum civitates ſunt viæ, adæquentur: effluctiones non noceant domibus: & pontes fiant ubicumque oportet. *l. un. ff. de via publ. & ſi quid in ea fact. eſſe dic.*

Conſtruat autem vias publicas unuſquiſque ſecundum propriam domum &, aquæ ductus purget, qui ſub dio ſunt, id eſt cœlo libero: & conſtruat ita, ut non prohibeatur vehiculum tranſire. *d. l.* §. 3.

Curent autem, ut nullus effodiat vias, neque ſubruat, neque conſtruat in viis aliquid——ædiles autem mulctent ſecundum legem: & quod factum eſt diſſolvant. §. 2. *eod.*

Quicunque autem mercede habitant, ſi non conſtruat dominus, ipſi conſtruentes, computent diſpendium in mercedem. §. 3. *in f. eod.*

Studeant autem, ut ante officinas nihil projectum ſit, vel propoſitum: præterquam ſi fullo veſtimenta ſiccet, aut faber curus exterius ponat. Ponant autem & hi, ut non prohibeant vehiculum ire. *d. l.* §. 4.

Sive ædium vitio, ſive operis, quod vel in ædibus, vel in loco urbano, aut ruſtico, privato, publicove fiat, damni aliquid futurum ſit: curat prætor, ut timenti damnum caveatur. *l.* 19. §. 1. *ff. de dam. infect.*

Non permittant autem rixari in viis, neque ſtercora projicere, neque mortiſſina, neque pelles jacere. *l. un.* §. *ult. ff. de via publ.*

See the Ordinance of 1567. *for the general Policy, Tit.* 17. *Art.* 1, &c.

XVII.

17. *Reparation of the publick places.*

The Reparations neceſſary for publick Places are made, either at the Charge of the Publick, or of thoſe who ought to contribute to them, according to the Quality of the Places, and the Uſages and Regulations: and as to the particular Perſons intereſted in the uſe of the Places to be repaired, none of them is exempted from contributing towards it; but 'tis the common Charge of them all *z*.

z Abſit ut nos inſtructiones viæ publicæ, & pontium

tium ſtratarumque opera, titulis majorum principum dedicata, inter ſordida munera numeremus. Igitur ad inſtructiones reparationeſque itinerum pontiumque nullum genus hominum, nulliuſque dignitatis ac venerationis meritis ceſſare oportet. Domus etiam divinas tam laudabili titulo libenter adſcribimus. *l.* 4. *C. de privil. dom. aug.*

Per Bithyniam cæteraſque provincias poſſeſſores in reparatione publici aggeris, & cæteris hujuſmodi muneribus pro jugerum numero vel capitum quæ poſſidere noſcuntur dare cogantur. *l.* 2. *C. de immun. nem. conced.*

Emphyteuticarii poſſeſſores qui manſuetudinis noſtræ beneficio ad extraordinaria minime devocantur munera; ſicut cæteri provinciales, obſequium ſuum itineribus muniendis impendant. Nulla enim ratione debent ab hoc quod in commune omnibus profuturum eſt, ſejungi. *l.* 1. *C. de collat. fund. patr.*

V. l. 1. §. 3. *ff. de via publ. & ſi quid, quoted on the preceding Article.*

XVIII.

18. *Penalties of Treſpaſſes againſt the Policy concerning publick Places.*

The Treſpaſſes againſt the Policy of Publick Places, are repreſſed by Fines and other Puniſhments, according to the Quality of the Facts, and the Circumſtances. And if any particular Perſons ſhould ſuffer Damage by the ſaid Treſpaſſes, care would be taken to indemnify them, by condemning the Perſons who had cauſed the Damage to make Satisfaction for it *a*.

a See the Ordinance quoted on Art. 16.

V. l. 1. §. 2. *ff. de via publ. & ſi quid, cited on Art.* 16.

XIX.

19. *A Building made in a publick Place.*

If it ſhould happen that ſome Building were made in a publick Place, it might either be demoliſhed, if it ſhould prove any way hurtful or inconvenient, or be ſuffered to ſtand upon condition of its paying a Rent, or making ſome other Amends to the Publick, if found to be more advantageous to let it remain, either becauſe it would be an Ornament to a Market-Place or other publick Place, or becauſe of the Rent it would yield, or other Advantage that might be made of it *b*.

b Si quis, nemine prohibente, in publico ædificaverit; non eſſe eum cogendum tollere, ne ruinis urbs deformetur. Et quia prohibitorium eſt interdictum, non reſtitutorium. Si tamen obſtet id ædificium publico uſui: utique is qui operibus publicis procurat debebit id deponere. Aut ſi non obſtet, ſolarium ei imponere. Vectigal enim hoc ſic appellatur, (ſolarium) ex eo quod pro ſolo pendatur. *l.* 2. §. 17. *ff. de quid in loco publ.*

Sicut is, qui nullo prohibente in loco publico ædificaverat, cogendus non eſt demolire, ne ruinis urbs deformetur: ita qui adverſus edictum prætoris ædificaverit, tollere ædificium debet. Alioquin inane & luſorium prætoris imperium erit. *l.* 7. *ff. eod.*

Si quid in via publica fiat, quia in alieno fit, ſatis dandum eſt. *l.* 15. §. 6. *ff. de dam. infect.*

XX.

20. *The Policy relating to Foreſts.*

Seeing the Publick has a great Intereſt in the Preſervation of the Foreſts, from whence the Wood neceſſary for Fewel is taken, as alſo Timber for building of Houſes, Ships, publick Edifices, Churches, Palaces, Bridges, and all other Works for warlike Engines, Carriages for the Artillery, Waggons for Proviſions and Ammunition, and for other Uſes; the Ordinances in *France* have provided by ſeveral Regulations, for the preſervation of Foreſts, and not only of thoſe belonging to the King, but likewiſe of thoſe belonging to Communities, and eſpecially thoſe appertaining to Churches, and even of ſuch as belong to private Perſons *c*.

c See the Ordinance of Jan. 1518. *Art.* 30. *and the other Articles of the ſame Ordinance on the ſame Subject.*

[In *England* we have many Acts of Parliament providing for the better Regulation of Foreſts, and the Increaſe and Preſervation of the Timber growing therein. See *Charta de Foreſta*, 9 *Hen.* III. and other ſubſequent Statutes to that purpoſe, as alſo the Act 9 & 10 *Gul.* III. *cap.* 36. entituled, *An Act for the Increaſe and Preſervation of Timber in the New Foreſt in the County of* Southampton.]

XXI.

21. *The Policy as to Hunting and Fowling.*

The Publick Intereſt, as to what relates to Hunting and Fowling, has made it neceſſary to eſtabliſh Rules for preventing the Inconveniences happening from the bad uſe that may be made of it, either by Quarrels that would happen, if all Perſons were allowed to hunt in all Places indifferently; or by the Prejudice the Game would receive, if a Liberty were granted to hunt in all Manners, in all Seaſons; or by the Danger of encouraging Idleneſs too much in thoſe whoſe Profeſſion requires they ſhould ſpend their time in other Exerciſes. The Ordinances contain many Regulations touching all theſe Matters *d*.

d See the Ordinance of Aug. 6. 1533. *and the other Ordinances touching this Matter.*

Our Uſage in this Matter is very different from that of the Roman *Law, which allowed to all ſorts of Perſons indifferently the Liberty of Hunting and Fiſhing, as has been remarked in the Preamble to this Section.*

[There are many Laws and Statutes in force in *England* for the better Preſervation of the Game of the Kingdom. By *Stat.* 22 & 23 *Car.* II. *c.* 25. all Perſons not having Lands, or ſome other Eſtate of Inheritance in their own, or in their Wives Right, of 100 *l. per Annum*, or for Life, or Leaſe for ninety nine Years of 150 *l. per Annum*, other than the Son and Heir of an Eſquire, or other Perſons of higher Degree, and Owners and Keepers of Foreſts, Parks, Chaſes, or Warrens, ſtocked with Deer or Conies, in reſpect of the ſaid Foreſts, are declared to be Perſons not allowed to keep any Guns, Bows, Grey-Hounds, Setting-Dogs, *&c.* Several other Acts have been ſince made to explain and amend the Laws relating to the Preſervation of the Game, and for enforcing the due Execution thereof. See the Statutes 5° *Annæ, cap.* 14. 9° *Annæ*, 3°. *Georgii.*]

TI-

TIT. IX.

Of the ſeveral Orders of Perſons who compoſe a State.

AS God in his great Wiſdom has thought fit to render Mankind neceſſary to one another, in order to engage them to the mutual Duties required of them by the ſecond Law, which is the Foundation of their Society, as has been explained in its Place *a*; ſo he has multiplied and diverſified their Wants, and made an infinite number of things neceſſary to them, which they cannot have the uſe of without the aſſiſtance of a great many Arts and Commerce, which require different Profeſſions; the Ties and Relations of which to one another, and the Relation which all of them together have to the common Good of the Society of Mankind, unite them among themſelves. And he has alſo made neceſſary in this Society an Order of Temporal Government, and every thing which reſpects the Exerciſe of Religion; which requires likewiſe the uſe of divers Arts and Sciences, and renders other different ſorts of Conditions and Profeſſions neceſſary. And out of all theſe together he has compoſed a Body, which hath its ſeveral Members for ſeveral Uſes *b*.

It is theſe ſeveral ſorts of Conditions and Profeſſions, which being joined together compoſe the general Order of the Society of Men in a State; and it is by the Exerciſe of their Functions that it is to ſubſiſt, in the ſame manner as in the natural Body, the Union of the Members forms the Symmetry thereof, and the Exerciſe of their Functions gives it Life. And as in the Natural Body each Member hath its Situation proportioned to the Uſe of its Functions; ſo each Perſon hath its Situation and Order in the Society of Men, according to the uſe of the Functions and Duties which his Condition requires of him towards the Publick. Thus we give the Name of Order of Perſons to the different Conditions and Profeſſions, which by placing every one in their proper Station, and giving to them all their Rank, compoſe the general Order.

As the Uſes of the Conditions and Profeſſions of the Members of a Society are different, in the ſame manner as thoſe of the Members of the Body, ſo they have alſo different Characters which diſtinguiſh them, and which it is neceſſary to conſider in every one. Such are thoſe of Uſefulneſs, of Neceſſity, of Authority, and others proportioned to the ſaid Uſes, which conſiſt in the Functions proper to every one, ſuch as thoſe of the Adminiſtration of Juſtice, of Service in the War, of Trade, of ſeveral ſorts of Arts, and others. And it is by theſe different Characters, and by this Variety of Functions, that we diſtinguiſh the ſeveral kinds of Conditions and Profeſſions, and the Ranks of Perſons; which ſhall be the ſubject Matter of the three Sections of this Title. The firſt ſhall be of the ſeveral Natures of Conditions and Profeſſions, and of the Characters peculiar to every one. The ſecond of their different Uſes, which make different kinds of them. And the third of Rank and Precedency, whether it be between Perſons of a different Condition, or of the ſame. But theſe three Sections ſhall contain only the Rules which reſpect preciſely and in general the Nature, the Characters, and the Uſes of the ſeveral kinds of Conditions and Profeſſions, in order to diſtinguiſh them; and the Principles of Rank and Precedency alſo in general; without entring into the detail of the Functions and Duties of each Condition and Profeſſion, or of the particular Combinations which diſtinguiſh the Ranks and Precedencies among Perſons. For as to the ſaid Ranks and Precedencies, it is ſufficient to eſtabliſh the Principles which regulate them all, without entring into a uſeleſs and cumberſome detail of the Particulars, of which there are Collections enough. And as to what reſpects the detail of the Rules peculiar to each Condition and Profeſſion, their Functions and their Duties, we ſhall explain them under the following Titles, unleſs it be ſuch as were to have their Rank in other Places. Thus the Rules which relate to the Prince, to his Counſellors, to thoſe who ſerve in the War, to thoſe employed

a See chap. 2. of the Treatiſe of Laws, numb. 2.

b For the Body is not one Member, but many. 1 Cor. 12. 14.

But now hath God ſet the Members every one of them in the Body, as it hath pleaſed him. And if they were all one Member, where were the Body? But now are they many Members, yet but one Body. 1 Cor. 12. 18, 19, 20.

Every one according to his Service, and according to his Burden. Numb. 4. 49.

employed about the Revenue, have been explained in Tit. 2, 3, 4, 5. Thus the Rules of Officers in general, and particularly of the Officers of Juſtice, and other Perſons who are any ways employed in the Adminiſtration of Juſtice, have their natural Order in the ſecond Book; and one may eaſily ſee by the bare reading of the Table of the Titles, the Place of the Rules of the Functions and Duties of all the kinds of Conditions and Profeſſions.

If any one ſhould be ſurprized, that, in order to diſtinguiſh the Conditions and Profeſſions of Men, we have not in this Title made uſe of the common Diſtinction of all the Conditions into three Orders, which are uſually called the Three Eſtates, *the Clergy, the Nobility, and the Commons*; he is deſired to conſider that this Diſtinction is not of uſe for the Deſign of this Book: For on one hand, one is obliged to give in it more diſtinct Ideas of the Differences of Conditions, than what is given by this general Diſtinction of the three Eſtates; and on the other hand, if we had followed that Diſtinction, we could not have avoided the confounding among the *Commons*, which make the third Eſtate, the firſt Magiſtrates of the Kingdom, many of the Privy Counſellors, and other Perſons who ought to have a diſtinguiſhed Rank. So that without pretending to do any prejudice to the Uſe which this Diſtinction may have, we have thought proper under other Views to diſtinguiſh the Conditions of Men in another manner.

SECT. I.

Of the ſeveral Natures of Conditions and Profeſſions, and of the Characters peculiar to every one of them.

The CONTENTS.

1. *The Foundation of the Diſtinctions of Conditions.*
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3. *Difference between theſe two ſorts of Qualities.*
4. *Remark on the foregoing Article.*
5. *Difference between the State of Perſons, and their Condition or Profeſſion.*
6. *We muſt diſtinguiſh the Condition from the Profeſſion.*
7. *Definition of Profeſſion.*
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9. *Conditions and Profeſſions have divers Characters, which it is neceſſary to diſtinguiſh.*
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18. *Difference between the Characters of Honour and Dignity, and that of Authority.*
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20. *Birth is the firſt Cauſe of Honour and Dignity.*
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23. *Other Cauſes of Honour without Dignity.*
24. *Divers Combinations of all theſe Characters of Conditions and Profeſſions.*
25. *Two Characters proper to Arts: One, of thoſe that are called Liberal. The other, of thoſe which are termed Mechanick.*
26. *Three ſorts of Arts.*
27. *Divers Names of theſe three ſorts of Arts.*

I.

1. The Foundation of the Diſtinctions of Conditions.

ALL the manners of diſtinguiſhing the different Conditions and Profeſſions of Men, have their Foundation in ſome Qualities, which the Laws conſider in Perſons, with reſpect to the Order of Society, and which give to every one his Rank in the Society; as will appear by the Articles which follow *a*.

a The Conditions and Profeſſions diſtinguiſh the Perſons in the Order of the Society according to the relation they have to the ſaid Order, in the ſame manner as the Members are diſtinguiſhed in the Body, according to the relation they have to the Order and Uſe of the Body.

II.

2. Two ſorts of Qualities, which it is neceſſary to diſtinguiſh in each Perſon.

We muſt diſtinguiſh in each Perſon two ſorts of Qualities, which regard the Uſe of Human Society. One is, of thoſe which make up the State of Perſons; ſuch are the Qualities of a Head of a Family, of a Son living under the Paternal Authority, of an Adult, of a Perſon under the Age of Puberty, and other the like Qualities, which have been explained in the Title of Perſons in the Book of the *Civil Law in its Natural Order*. And the other ſort is, of the Qualities which determine each Perſon

ſon to ſome certain kind of Life and Occupation, which ſets him either above or below others in the Order of the Society, according to the Differences of thoſe Qualities, from the very firſt of Prince, Duke and Peer, Count, Marquis, Officers of the Crown, and others, even to the meaneſt of Handicraftſmen, Labourers, and others of the meaneſt of the People *b*.

b See the following Article.

III.

3. *Difference between theſe two ſorts of Qualities.*

There is this Difference between theſe two ſorts of Qualities, That thoſe which make the State of Perſons, are all of them ſuch, as has been obſerved in the Title of Perſons, that each of them hath its Oppoſite which is contrary to it. So that every Perſon has neceſſarily one of the two oppoſite Qualities independently of their Condition; and, for example, there is no body, of what Condition or Profeſſion ſoever, who is not either Head of a Family, or a Son under the Paternal Authority, Adult, or under the Age of Puberty, and the ſame of others. But the Qualities which determine Perſons to a certain kind of Life, and which make the Conditions and Profeſſions of Men, have not a like Oppoſition to one another: And there is no neceſſity of being, for inſtance, either an Officer, or a Merchant, or a Husbandman; for one may have none of theſe Qualities, and be either a common Soldier or a Tradeſman, or of ſome other Condition or Profeſſion *c*.

c See the two following Articles.

IV.

4. *Remark on the foregoing Article.*

It follows from this Difference between theſe two ſorts of Qualities, that it is not from thoſe which make the State of Perſons, that we are to draw the Diſtinctions of Conditions and Profeſſions; ſeeing they are ſuch, that one of the oppoſite Qualities may agree to Perſons of all Conditions and Profeſſions. For tho there be ſome of thoſe Qualities which make the State of Perſons, that make alſo the Condition of ſome, ſuch as the Qualities of Clergyman and of Gentleman; yet the oppoſite Qualities of Layman to that of an Eccleſiaſtick, and of Yeoman to that of Gentleman, do not regulate the Condition of thoſe who are neither Clergymen nor Gentlemen. Thus, it is by another Character of the Qualities of Clergyman and of Gentleman, that they make the Condition of the Perſon different from the Character which regulates the State of Perſons. Which proceeds from this, That theſe Qualities do not only reſpect the Condition of Perſons according to the nature of this Character, which conſiſts in the Capacity or Incapacity of Engagements and Succeſſions, as has been explained in the Preamble of the Title of Perſons; but do moreover determine Perſons to ſome kind of Life, which does not agree to the oppoſite Qualities of Layman and Yeoman, which determine one to no kind of Profeſſion, nor to any Condition *d*.

d Altho the Qualities of Clergyman and of Gentleman which conſtitute the State of Perſons, make alſo their Condition, yet the Rule explained in this Article makes no Exception to that which has been explained in the preceding Article; which reſults from the Reaſon explained in this 4th Article.

V.

5. *Difference between the State of Perſons, and their Condition or Profeſſion.*

It follows from the preceding Articles, that it is neceſſary to diſtinguiſh the Condition and Profeſſion from that which is called in the Language of the Laws the State of Perſons. For the State of Perſons conſiſts, as has been ſaid in the foregoing Article, in thoſe Qualities which make the Capacity or Incapacity of Engagements and Succeſſions; and the Conditions and Profeſſions reſpect the kind of Life of every Perſon. And we muſt alſo diſtinguiſh the Profeſſion from the Condition of Men; for there is a Difference between the one and the other, which it is neceſſary to conſider, and which ſhall be explained in the Articles which follow *e*.

e See the Preamble of the Title of Perſons, and the two Articles preceding this.

VI.

6. *We muſt diſtinguiſh the Condition from the Profeſſion.*

Altho theſe two Words *Condition* and *Profeſſion*, ſeem to be often ſynonymous, and that, for inſtance, the Conditions of an Officer, of an Advocate, of a Merchant, of a Tradeſman, of a Huſbandman, make alſo their Profeſſions; yet there are other Qualities, which without marking their Profeſſions, do nevertheleſs make the Condition of the Perſons. Thus, the Quality of a Gentleman who does not make profeſſion of Arms, and that of a bare Citizen who lives without any Imployment, are Qualities, which without marking the Profeſſion, diſtinguiſh the Condition of the Perſon: So that it is neceſſary to diſtinguiſh the nature of Profeſſion, from that of Condition, according to their Definitions, which ſhall be explained in the two Articles which follow.

VII.

7. Definition of Profeſſion. By Profeſſion is meant, a certain Imployment which engages one in ſome Labour of Mind or of Body, and to Functions annexed to the ſaid Imployment; ſuch as the Profeſſions of divers ſorts of Officers, of Advocates, of Merchants, Tradeſmen, and others; ſome one of which every Perſon embraces voluntarily, according to his Eſtate, his Talents, and his Inclinations, and almoſt conſtantly with a view to ſpend his Life in that Profeſſion: Which makes a Diſtinction between Profeſſions and certain Offices, which tho they oblige to certain Functions and Imployments, are not however reckoned in the Number of Profeſſions, becauſe People may be engaged in them againſt their Will, and becauſe they laſt only a certain Time; ſuch are the Offices of Sheriffs, Conſuls, Aſſeſſors, and Collectors of Taxes, and others, called Municipal Offices; of which notice ſhall be taken in the 16th Title. And as theſe Offices are not conſidered as Profeſſions, ſo they do not regulate the Conditions of Perſons; for Perſons of Conditions altogether different are called to the ſaid Offices *g*.

g It is neceſſary to obſerve theſe Characters of Profeſſions, and that People engage in them willingly, and for what Time they pleaſe.

VIII.

8. Definition of Condition. By Condition is underſtood the Situation of every one in ſome one of the different Orders of Perſons, which compoſe the general Order of the Society, and allot to each Perſon therein a diſtinct ſeparate Rank, which places ſome above or below the others, whether it be that they exerciſe ſome Imployment or Profeſſion, or that they have none at all. Thus, in the Order of the Clergy, there are many of them who have only the bare Engagement in the Eccleſiaſtical State, without having therein either Charge or Imployment. Thus, among the Laity, thoſe who are called bare Citizens, have their Condition regulated by this Quality, altho they are without Imployment or Profeſſion *h*. And there are many other Conditions of a higher degree, which diſtinguiſh Perſons by Qualities, which without being joined to any Imployment, and without the Character of Profeſſions, do nevertheleſs mark the Condition.

h See as to theſe different Orders of Perſons the 2d Section.

IX.

9. Conditions and Profeſſions have divers Characters, which it is neceſſary to diſtinguiſh. Since it is by the Differences of the Conditions and Profeſſions, that we are to diſtinguiſh the Perſons; it is therefore neceſſary to diſtinguiſh in the ſeveral kinds of Conditions and Profeſſions, certain Characters which belong differently to the one and to the other, and which by diverſifying them are the Foundations on which depend the Ranks of Perſons. We ſhall explain theſe Characters in the Articles which follow *i*.

i There is no Condition or Profeſſion but what has ſome one of theſe Characters, and many have them all.

X.

10. What are thoſe Characters. The different Characters, which it is neceſſary to conſider in the ſeveral kinds of Conditions and Profeſſions, are Honour, Dignity, Authority, Neceſſity, and Uſefulneſs. For every Profeſſion that hath not ſome one of theſe Characters, is becauſe of that Want unlawful; and it is a part of the good Order of a Government to prohibit and aboliſh the Uſe of ſuch Profeſſion, as well as that of thoſe Profeſſions which tend to Corruption of Manners, and which the Church condemns and prohibits *l*.

l Good Policy, no more than Religion, cannot ſuffer a Profeſſion which does not carry along with it ſome Advantage.

Wo to them that deviſe Iniquity. *Micah* 2. 1.

XI.

11. Definition of the Honour of a Profeſſion. The Honour of a Profeſſion or Condition, is the great Conſideration that it makes thoſe who exerciſe it to be held in by the Publick. Thus, the Profeſſion of an Advocate, and that of a Phyſician, imply an Honour, but without Dignity or Authority *m*. And even in the Conditions of Trade and Handicraft, as there are ſome of them that are more creditable than others, we may conſider in them a kind of Honour that diſtinguiſhes them, and places ſome of them in a Rank above the others.

m Advocati, qui dirimunt ambigua fata cauſarum, ſuæque defenſionis viribus in rebus ſæpe publicis ac privatis lapſa exigunt, fatigata reparant, non minus provident humano generi, quam ſi præliis atque vulneribus patriam parenteſque ſalvarent. Nec enim ſolos noſtro imperio militare credimus illos, qui gladiis, clypeis, & thoracibus nituntur, ſed etiam Advocatos. Militant namque cauſarum patroni, qui glorioſæ vocis confiſi munimine, laborantium ſpem, vitam, & poſteros defendunt. *l.* 14. *C. de advoc. diverſ. judicior.*

Medicorum quoque eadem cauſa eſt, quæ profeſſorum, niſi quod juſtior: cum hi ſalutis hominum, illi ſtudiorum curam agant. Et ideo his quoque ex-

tra ordinem jus dici debet. *l.* 1. §. 1. *ff. de var. & extr. cogn.*

XII.

12. *Definition of Dignity.*

Dignity adds to bare Honour, and to the Conſideration or Eſteem that it may give, an Elevation which procures likewiſe Reſpect. Thus, the Condition of a Magiſtrate gives him, beſides Honour, the Dignity of his Miniſtry, which ought to be reſpected. And there are many other Conditions, which without being annexed to Offices, give a Dignity greater or leſs, according to their Differences. Thus, the Princes of the Blood, the Knights of the King's Orders, Dukes, and thoſe who have the Titles of Counts and Marquiſſes, have both Honour and Dignity proportionable to the Rank which the ſaid Qualities may give them *n*.

n There is this Difference between bare Honour and Dignity; that Dignity obliges People to pay Reſpect, and bare Honour procures only Eſteem and Conſideration.

Bow thy Head to a great Man, *Eccluſ.* 4. 7.

XIII.

13. *Definition of Authority.*

Authority is a Right to exerciſe ſome publick Function, with a power to enjoin Obedience to thoſe over whom their Authority reaches. So that every Authority implies an Honour and Dignity proportionable to the Miniſtry to which it is annexed. Thus, the Offices of the Crown, the Governors of Provinces, the Mareſchals of *France*, the Officers of War, and thoſe belonging to the Adminiſtration of Juſtice, of the Civil Policy, and of the Revenue, and others who have ſome Juriſdiction, ſuch as Officials, the Mayors and Sheriffs of Towns, the Judges of the Merchants, and all thoſe who exerciſe publick Functions, which ſubject other Perſons unto them; ſuch as thoſe who have ſome Superiority in Chapters, in Univerſities, in Colleges, in Hoſpitals, and who have all of them an Authority proportionable to their Miniſtries. And every one owes to theſe ſeveral ſorts of Power and Authority, the Obedience that is neceſſary for obtaining the End for which the ſaid Powers and Authorities have been ordained *o*.

o Put them in mind to be ſubject to Principalities and Powers. Tit. 3. 1.

Submit your ſelves to every Ordinance of Man, for the Lord's ſake, whether it be to the King as ſupreme, or unto Governors, as unto them that are ſent by him, for the Puniſhment of Evil-doers, and for the Praiſe of them that do well. 1 Pet. 2. 13, 14.

See Rom. 13. 5, 6, 7.

The Lord hath anointed thee to be Captain over his Inheritance. 1 Sam. 10. 1.

See ye him whom the Lord hath choſen, that there is none like him among all the People. 1 Sam. 10. 24.

XIV.

14. *Definition of Neceſſity.*

The Neceſſity of Profeſſions may be underſtood two ways: One of the Profeſſions without which it is impoſſible to live; ſuch as Husbandry, and the Arts neceſſary to it, as alſo the other Arts which ſerve for Nouriſhment, for the Cure of Diſeaſes, for Lodging, and for Clothing; and the Profeſſions, without which the Government would be in Diſorder, ſuch as that of Arms, of the Adminiſtration of Juſtice, of the collecting and managing the publick Revenue, and others. And the other way of underſtanding the Neceſſity of Profeſſions, is of thoſe which not being of an equal Neceſſity with the former, are nevertheleſs neceſſary to many profitable and convenient Uſes. Thus, the Art of Printing is not of this firſt kind of Neceſſity, but it is neceſſary in the ſecond Senſe, for an infinite number of very important Uſes, altho they be not of this abſolute Neceſſity. Thus, Painting and Imbroidery are neceſſary for Ornaments, which are uſeful in Churches and other Places. And it is of the firſt of theſe two ſorts of Neceſſity, that we are to underſtand what is ſaid here of the Neceſſity of Profeſſions, to diſtinguiſh thoſe of this Character from thoſe which, altho they be very uſeful, yet are not of this firſt kind of Neceſſity *p*.

p The word Neceſſity *is underſtood with reſpect to the Uſe for which a Thing may be neceſſary, whether the ſaid Thing be of it ſelf neceſſary or not.*

XV.

15. *Definition of Uſefulneſs.*

The Uſefulneſs of Profeſſions, is the good Uſe that may be made of them for the Publick, whether they be uſeful only without implying an abſolute Neceſſity, or that they be even of the firſt ſort of Neceſſity. Thus, we may diſtinguiſh two kinds of Uſefulneſs of Profeſſions. The firſt is of thoſe which, not being neceſſary in the firſt of the two Senſes explained in the preceding Article, are neceſſary in the ſecond Senſe, being uſeful for many lawful and convenient Purpoſes; ſuch as the Profeſſions of Goldſmiths, Jewellers, Ingravers, and others. And the ſecond is, of thoſe which are of the firſt ſort of Neceſſiſity *q*.

q It is in this manner that the Diſtinction may be made between Neceſſity and Uſefulneſs.

XVI.

16. *The Character of Uſefulneſs is common to all*

Altho this Character of the Uſefulneſs of Profeſſions be common to them all, whereas thoſe of Honour, Dignity,

Profeſſions, but is nevertheleſs diſtinguiſhed.

ty, Authority, Neceſſity are not ſo; yet nevertheleſs it has, as all the others, this Effect, which has been remarked in the Preamble of this Title, to diſtinguiſh Conditions and Profeſſions; not by the preciſe Idea of the Uſefulneſs common to all Profeſſions, but by the different ſorts and degrees of Uſefulneſs, greater or leſſer in ſome than in others. Thus the Uſefulneſs of the Art of Printing, being much greater than that of many other Arts, this Difference of the Uſefulneſs diſtinguiſhes the Profeſſions *r*.

r This Diſtinction is an Effect of the divers Degrees of Uſefulneſs.

XVII.

7. Divers Cauſes of theſe Characters.

We muſt obſerve as to theſe Characters of Conditions and Profeſſions, that they have their ſeveral Cauſes, according as they have relation, either to the Nature of Man, or to the Order of Society. For ſome of them have an eſſential relation to the very Nature of Man, others have relation to the Order of the Society of Mankind, and to Government which maintains the ſaid Order; and there are ſome which reſpect equally, both the Nature of Man, and the Order of Society. Thus the Profeſſions of Husbandry, and of the other Arts and Commerces which are neceſſary to the Life of Man, have relation to our Nature, which ſubjects us to the Neceſſity of the Uſe of theſe Profeſſions. Thus the Profeſſions of thoſe who diſtribute Juſtice, and who are to puniſh Crimes, reſpect the Order of Society, which renders the good Order of Government neceſſary. Thus the Profeſſions of thoſe who teach human Sciences, have relation to our Nature, and to the good Order of the Government. Thus the Profeſſions which have the Characters of Honour, Dignity, and Authority, reſpect the ſame good Order of Government, which demands the uſe of the Profeſſions which have theſe Characters annexed to them *s*.

s Theſe Characters ought to be proportioned to the Uſes of the Profeſſions; as the Profeſſions ought to be ſuited to the Nature of Man, and to the common Good of the Society.

XVIII.

18. Difference between the Characters of Honour and Dignity, and that of Authority.

There is alſo this Difference to be remarked between the Characters of Honour and Dignity and that of Authority, that this hath its Foundation in the Right which the Prince gives to the Perſons, who by their Offices are raiſed above others. For it is from him that all thoſe derive their Authority who have any over others, whether it be that he confers it, by diſpoſing of the Offices himſelf, or that they are filled up by his Order, and under his Direction. But Honour and Dignity may go to Perſons, either by an expreſs Order of the Prince, or by ſome other way, as ſhall be explained in the Articles which follow, and which are to be underſtood, as well as this, of the Profeſſions which relate to Temporal Concerns. For as to thoſe which regard ſpiritual Affairs, their Honour, Dignity and Authority do not proceed from the Temporal Power, but from the Spiritual Miniſtry which eſtabliſhes them; which does not hinder but that this Honour, this Dignity, this Authority may ſtand in need of the Protection of the Prince to ſupport them *t*.

t Honour and Dignity may be acquired either by an expreſs Order of the Prince, as if he makes one a Knight of an Order, or without his expreſs Order, as by the Birth of Princes, and that of other illuſtrious Perſons; but Authority is acquired only by a Title which is held of the Will of the Prince. See the following Articles.

XIX.

19. Three Cauſes of the Honour and Dignity of Conditions and Profeſſions.

We may diſtinguiſh three different Cauſes of the Honour, and of the Dignity of Conditions and Profeſſions, according to three ſeveral Cauſes which confer the ſaid Characters; Birth, Offices and other Imployments, and the bare Will of the Prince independently of Birth, or of a Title of an Office, or other Imployment. We ſhall explain theſe three ſorts of Honour and Dignities in the Articles which follow *u*.

u Theſe three ſorts of Cauſes are ſo many Principles which diſtinguiſh from the vulgar ſort thoſe who have ſome Rank of Honour or Dignity.

XX.

20. Birth is the firſt Cauſe of Honour and Dignity.

Birth makes the Honour and the Dignity, not only of the Princes of the Royal Blood, and of other Princes, but alſo of other Perſons who are deſcended of illuſtrious Families, whoſe Elevation gives them a very diſtinguiſhed Rank, which procures them the Eſteem and Reſpect which ought to be paid to the Merits of their Anceſtors. For it is juſt, and for the publick Good, that the ſaid Merits, which in thoſe Families have been the Effect of Services done to the Publick, ſhould be conſidered in the Perſons of their Deſcendants; that the Conſideration thereof may excite them to imitate the Example of thoſe who

have procured to them the Honour and Dignity which they enjoy *x*.

x The Glory of Children are their Fathers. Prov. 17. 6.

But he began to conſider diſcreetly, and as became his Age, and the Excellency of his antient Years, and the Honour of his grey Head, whereunto he was come, and his moſt honeſt Education from a Child. 2 Maccab. 6. 23.

XXI.

21. *Second Cauſe, Offices.*

Offices give to the Perſons who are provided therewith, a Dignity ſuitable to their Functions, in order to procure to them the Eſteem and Reſpect which ought to accompany the Obedience of the Perſons over whom thoſe Functions are to be exerciſed; and it is for this reaſon, that ſome Offices are called even by the bare Name of Dignities *y*.

y Dignity is annexed to the Qualities which procure Reſpect.

XXII.

22. *Third Cauſe, the Will of the Prince.*

The Will of the Prince gives Dignity, both to Perſons who are in no Office, and to thoſe who have it not by Birth; when he raiſes Perſons to ſome Qualities, or to ſome Imployments which ought to have this Effect, whether it be to recompenſe them for Services already done, or to put them in a condition of doing Services, according as they may be capable thereof. Thus the Quality of Knight of any of the King's Orders, gives Honour and Dignity to thoſe whom he raiſes to that Degree. Thus the Quality of Ambaſſador gives to thoſe who are employed in Embaſſies, and even to thoſe who are named to them, a Rank of Honour and Dignity. Thus thoſe who without any Command in the Army, have by their Bravery and Conduct render'd themſelves worthy of a conſiderable Poſt therein, and are called to it, are thereby raiſed to a Rank of Honour and Dignity proportionable to the Quality of the Function committed to them *z*.

z The Prince having in his Perſon the Sovereign Dignity, to which is due an entire and perfect Reſpect, this Reſpect would be violated, if a proportionable Reſpect were not paid to thoſe whom the Prince doth honour.

What ſhall be done unto the Man whom the King delighteth to honour? Now *Haman* thought in his Heart, to whom would the King delight to do honour, more than to my ſelf? And *Haman* anſwer'd the King; For the Man whom the King delighteth to honour, let the Royal Apparel be brought, which the King uſeth to wear, and the Horſe that the King rideth upon, and the Crown Royal which is ſet upon his Head. And let this Apparel and Horſe be delivered to the hand of one of the King's moſt noble Princes, that they may array the Man withal, whom the King delighteth to honour, and bring him on horſeback through the Street of the City, and proclaim before him, Thus ſhall it be done unto the Man whom the King delighteth to honour. *Eſther* 6. *v.* 6, 7, 8, 9.

Altho this Text of Scripture have not an exact Relation to this Article, yet it may be applied to it.

XXIII.

23. *Other Cauſes of Honour without Dignity.*

Theſe ſeveral Cauſes that have been juſt now explained, which give Honour and Dignity, relate both to the one and the other; but there are others which give barely Honour without Dignity, as has been ſaid in Art. 11. of Sect. 1. of the Profeſſions of Advocates and Phyſicians. And there are likewiſe other Imployments which have the ſame effect, ſuch as thoſe of the Profeſſors of Sciences, and others. And we may place in the Rank of the Conditions which give Honour without Dignity, that of ſimple Gentlemen, who have no Title that gives them any Dignity *a*.

a It is not neceſſary for the bare Character of Honour in a Profeſſion, that it be annexed to it by the Title of an Office, or by the expreſs Will of the Prince. For this Will is not neceſſary except for the Authority and Dignity which oblige even thoſe to pay reſpect who would not do it willingly. But bare Honour requiring no manner of Submiſſion, it may be annexed, and is ſo naturally, to the Qualities which draw Eſteem and Reſpect.

XXIV.

24. *Divers Combinations of all theſe Characters of Conditions and Profeſſions.*

The Diverſity of theſe Characters of Honour, of Dignity, of Authority, of Neceſſity and of Uſefulneſs, hath not this effect, that each Condition or Profeſſion ſhould have only one of the ſaid Characters, for many have them all together; ſuch as thoſe of Prelates, of Magiſtrates, of Commanders in an Army. Others have only the bare Character of Uſefulneſs without Neceſſity, as has been explained in the 14th and 15th Articles; ſome have Honour, Neceſſity and Uſefulneſs, without Authority and without Dignity, as that of Advocates and Phyſicians. Thus theſe Characters are found joined or ſeparated in divers Combinations, according as they agree to the different Natures of Conditions and Profeſſions *b*.

b This is a Conſequence of the preceding Articles.

XXV.

25. *Two Characters proper to Arts, one of thoſe that are called Liberal, the other of thoſe that are termed Mechanick.*

There is this common to theſe ſeveral ſorts of Characters, of which we have ſpoken hitherto, that there is not any one of them but what is to be met with in many different kinds of Conditions and Profeſſions. But there are two others which are to be met with only in Arts, and which diſtinguiſh certain Arts from the others. For we give this Name of Arts to different kinds of Profeſſions, as will appear in the Article which follows. The firſt of theſe two Characters is that

that which diſtinguiſhes among all the Arts thoſe that are called Liberal Arts *c*; and the ſecond is that of Arts to which they add the Quality of Mechanick *d*. We ſhall explain theſe two Characters in the following Article.

c This Expreſſion of Liberal Arts is taken from the Latin *Tongue, where it ſignified the Arts which free Perſons might exerciſe, to diſtinguiſh them from thoſe which were more adapted to Slaves. And altho in our Language this Word Liberal Arts ſeems to be appropriated to certain Sciences, which are taught by the Name of Arts in the Univerſities, yet we often give the Quality of Liberal Arts to other ſorts of Arts, of which notice ſhall be taken in the following Article; as, for example, to Painting, becauſe in effect theſe ſorts of Arts ought to be diſtinguiſhed from the Arts which are commonly called Mechanick; and that the Perſons who excel in them deſerve a ſingular Eſteem from the Publick. Thus we ought not to grudge giving the Quality of Works of a Liberal Art to the Pictures of* Raphael, *and of other famous Painters. And moreover, the Art of Deſigning is not unbecoming Perſons even of the higheſt Quality.*

d Altho this Word Mechanicks, when it is taken as a Subſtantive, ſignifies a Science of great Importance, which is a part of the Mathematicks, and which teaches the Principles of moving Force, and the Uſe of Machines; yet when it is an Adjective, added to the Word Art, this Expreſſion of Mechanick Art is uſed only to denote the meaneſt and moſt laborious Arts, which are diſtinguiſhed from others that are more honourable. Thus we do not call Painting a Mechanick Art; but we give this Name to the Arts or Trades of a Carpenter, Joiner, Ironmonger, Lockſmith, Shoemaker and others.

XXVI.

26. *Three ſorts of Arts.*

We muſt diſtinguiſh in general three ſorts of Profeſſions, which this Word *Art* may ſignify. The firſt is that ſort of Sciences that are taught in the Univerſities by the Name of Arts, that they may be diſtinguiſhed from thoſe which are there properly called Sciences. For in the Univerſities this laſt Name is given only to Divinity, to the Canon Law, to the Civil Law, to Phyſick; and the Name of Arts is there given to Philoſophy, to Rhetorick, to Grammar, and to other human Sciences *e*. Thus the Word *Art* would comprehend Geometry, and the other Parts of Mathematicks, which may be taught in an Univerſity, altho they be a Science, and which of all human Sciences has the moſt certain Demonſtrations. The ſecond ſort of Profeſſions of Arts, which is very different from the former, is that of Handicrafts and Trades, which are called Mechanick Arts; which comprehends all the Trades that are exerciſed by a laborious Handy-work; and to this ſort belong the Trades of thoſe who are called Handy-craftsmen, ſuch as Taylors, Carpenters, Shoemakers, Bakers, Paſtry-Cooks, Lockſmiths, and others. The third is another kind of ſome Arts, which ought not to be confounded with thoſe Mechanick and Laborious Arts; becauſe they are more creditable and of a more refined Uſe, and depend on many Principles and on many Rules that are taken from Geometry, from Aſtronomy, from the Opticks, from Perſpective, and from other Parts of the Mathematicks; which is the reaſon that the Profeſſors of ſome of theſe Arts are called Engineers. And it is in this Rank that we may place Architecture, the Art of Fortification, of Incampments, of the Marching of Troops, the Order of Battle, Maps, and other Plans; and we may likewiſe place in this Rank Muſick, Painting, and ſome other Arts diſtinguiſhed by other different Views.

e Præſes provinciæ, de mercedibus jus dicere ſolet, ſed præceptoribus tantum ſtudiorum liberalium. Liberalia autem ſtudia accipimus, quæ Græci ἐλευθερία appellant. Rhetores continebuntur, Grammatici Geometræ. *l.* 1. *in princip. ff. de extra ord. cogn.*

Si ſalarium alicui decuriones decreverint, decretum id nonnunquam ullius erit momenti: ut puta ſi *ob liberalem artem*, fuerit conſtitutum. *l.* 4. §. *ult. ff. de decr. ab ord. fac.*

Exceptis, qui liberalium ſtudiorum antiſtites ſunt, & qui medendi cura ſunguntur, decurionum decreto immunitas nemini tribui poteſt. *l.* 1. *C. de decr. de cur.*

Angariorum præſtatio, & recipiendi hoſpitis neceſſitas, & militi & liberalium artium profeſſoribus inter cætera remiſſa ſunt. *l.* 10. §. 2. *ff. de vacat. & excuſ. mun.*

XXVII.

27. *Divers Names of theſe three ſorts of Arts.*

It is becauſe of the Diſtinction of theſe three different kinds of Arts that they have different Names given them. For beſides the Name of Liberal Arts which is given to thoſe of the firſt kind, they give them likewiſe the Name of Sciences, becauſe of the Dignity of the things which they treat of; and we give to thoſe of the ſecond Claſs only the Name of Mechanick Arts or Trades; and as for thoſe of the third ſort, many place them in the number of Liberal Arts, on account of the Conſiderations obſerved in the preceding Article, of the Quality of their Uſes, and of their Principles and Rules, which are a part of the ſaid Sciences. To which we may add, that the Merit of thoſe who excel in theſe Arts, places thoſe who arrive at the greateſt Perfection in them, in the Rank of Perſons who do honour to a State, and ſome of them are placed even in the Rank of illuſtrious Men *f*.

f This is a Conſequence of the preceding Articles.

SECT.

SECT. II.

Of the ſeveral Uſes of Conditions and Profeſſions.

ALTHO there be ſome Imployments or Conditions which ſeem to be of no uſe to the Publick, ſuch as, for example, that of Domeſticks of ſeveral ſorts, of both Sexes, who are in the Service of particular Perſons, or of Corporations, for divers Uſes; there is not however any one of them which we ought not to look upon as a part of the Publick Order, and as being ſome way or other uſeful therein by the Functions which reſpect the common Good of the Society of Mankind, and of which it is of importance to the Publick to regulate the Uſe. Thus as to what concerns Servants and Domeſticks; beſides that there are many of them whoſe Services regard the Publick becauſe of the Quality of their Maſters, they have all of them in general their Functions which are uſeful in the Order of Society, and which make a part of the publick Good. For the Order of Society does require, that all Servants be obedient to their Maſters in the things wherein they ought to obey them, that they perform their Duty punctually, that they be faithful, and that thoſe who tranſgreſs theſe Duties, be puniſhed according to the Quality of the Facts and Circumſtances.

We may likewiſe take notice of another ſort of Condition which ſeems to have no manner of relation to the Service of the Publick, which is that of thoſe Perſons who are called bare Citizens, who are without Imployment, unleſs it be that of caring for their own Family; but this Condition hath nevertheleſs its Uſe in the Order of Society. For beſides that the Families, of which they are Heads, make a part of the Society, and that therefore the Care which they ought to take of them, hath its relation to the publick Good; they themſelves are of uſe in the Society, by the Obligation they are under to bear the Offices of which they may be capable; ſuch as that of Mayor, Sheriff, and others; and they bear likewiſe their Share in the Contributions to the publick Taxes. Thus their Condition has by that means its Uſefulneſs. Thus in general the Publick Order takes in not only the Uſe of the Conditions and Profeſſions which have a preciſe relation to the common Good, ſuch as the Conditions of the Officers of Juſtice, of thoſe concerned in the Revenue, of Soldiers, and others; but it comprehends alſo every thing that is in all the other Conditions which ties and unites Men to one another, which forms and maintains their Society, and which may be ſubject to the Laws which regulate the Order thereof. Thus as there is no Member in the Natural Body but what hath its Uſe for the whole Body, ſo likewiſe there is no particular Perſon in the Body Politick but what is engaged to Functions and Duties which reſpect the Society, by the effect of the conjunction of them all into one Body, the Order of which is to be formed by the Functions of every particular Member. And thoſe who, being able to work, live in the Society without any Imployment, and who not only do nothing for the Good of the Publick, but do not ſo much as apply themſelves, either to their own domeſtick Affairs, or to ſome honeſt and lawful Buſineſs, are by this State of Idleneſs, which is the Source of all Vice, as it were rotten Members, and deſerve that the Government ſhould correct and chaſtiſe their diſorderly Life. It was upon theſe Principles that the Laws of the *Romans* were grounded, which among other Functions allotted to that Officer, whom they called Cenſor, gave him that of the Correction of Manners, and particularly that of puniſhing idle Perſons, and even thoſe whoſe Lands were not duly cultivated *a*. And it is upon theſe very Principles that the Ordinances in *France* enjoin the puniſhing of Drunkenneſs, becauſe of Idleneſs and the other Vices which are the Conſequences thereof, and alſo the Correction of Vagrants, in order to prevent the Crimes into which Idleneſs leads them *b*. As to which we may make this Reflection, that it were to be wiſhed, that due care were taken by proper Regulations to prevent the great Diſorders that ſo frequently proceed from Idleneſs.

Seeing it is by the different Uſes which the ſeveral Conditions and Pro-

a Si quis agrum ſuum paſſus fuerat ſordeſcere, eumque indiligenter curabat, ac neque araverat, neque purgaverat; ſive quis arborem ſuam vineamque habuerat derelictui, non id ſine pœna fuit: ſed erat opus cenſorium. *Aulus Gellius, libro* 4. *C.* 12.

As to the Correction of Manners, ſee the ſame Author, Book 18. *Chap.* 3.

b See the Ordinance of Francis I. *of* Auguſt 30. 1536, *and the Ordinances againſt Vagabonds.*

feſſions

ſeſſions are to have in the Society, that we ought to diſtinguiſh their kinds; it follows that every one of them ought to have its relation to ſome Want of the Society: Therefore it ſhall be by the ſeveral ſorts of Wants that we ſhall diſtinguiſh in this Section the Uſes of Conditions and Profeſſions, and their Kinds. But tho the Conditions of Servants and Domeſticks have their Uſe with regard to ſeveral Wants, which may concern the Publick, yet we ſhall not place this Condition among thoſe which ſhall be the ſubject Matter of this Section; and that upon two Conſiderations which induce us not to do it: One is, becauſe Conditions and Profeſſions are properly ſpeaking Imployments which People uſually imbrace with an Intention to ſpend their whole Lifetime in them; whereas thoſe who engage in the Service of other Perſons, do ſubject themſelves to it only for a certain time, and with a view of finding thereby Means or Helps for procuring Settlements that might laſt all their Lifetime. And the other is, becauſe the bare Quality of Servant or Domeſtick does not diſtinguiſh any one Imployment; for there are Servants of ſeveral ſorts for Services that are altogether different, more or leſs laborious, more or leſs creditable, and every one of which is diſtinguiſhed by Functions, which in their nature make Conditions and Profeſſions altogether different.

Thus a Gentleman of the Horſe is a Sword-Man, a Preceptor is a Grammarian, or a Philoſopher; ſo that we cannot form out of the Quality of Domeſtick a kind of Condition or Profeſſion.

Neither ought we to place in the Rank of the Conditions, which we are to explain in this Section, that of mere Citizens. For beſides that it has not of it ſelf a Uſe which may have a preciſe relation to ſome Want of the Society, which requires this ſort of Condition; there are bare Citizens who are of Conditions wholly different, ſome of them having been Officers, others Merchants, ſome Tradeſmen, or of other ſorts of Profeſſions.

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8. *The Neceſſity of the Uſe of Sciences, and of Perſons to teach them.*
9. *The Neceſſity of Commerce.*
10. *The Neceſſity of the ſeveral ſorts of Trades and Handicrafts.*
11. *The Neceſſity of Husbandry, and of the Care of Cattel.*
12. *Several kinds of Profeſſions compriſed under theſe which have been juſt now explained.*

I.

1. Two general kinds of the Uſe of Profeſſions, which are the Eccleſiaſtical and the Secular.

All the Uſes of all ſorts of Conditions and Profeſſions ought to be proportioned to the Wants of the Society, of which they compoſe the Order. And as it is neceſſary to diſtinguiſh two primary general Kinds which comprehend all theſe Wants; one of thoſe which concern the ſpiritual Good of Religion, and the other of thoſe which relate to the temporal Good of the Government of a State; ſo we may diſtinguiſh two primary general kinds of Conditions and Profeſſions which comprehend them all; one is, of thoſe which reſpect the ſpiritual Miniſtry of Religion, and the other of thoſe which relate to the temporal Order of the Society. The firſt of theſe two kinds comprehends the Conditions and Profeſſions of Perſons who are in the Eccleſiaſtical Order, who are called by the Name of the Clergy, and which ſhall be the ſubject Matter of the enſuing Title. And the ſecond takes in all the Conditions and Profeſſions that are Secular *a*.

'*a* Every Miniſtry reſpects either the Spiritual 'Affairs of the Church, or the Temporal Concerns 'of the State.'

Duo ſunt genera Chriſtianorum. Eſt autem unum genus quod mancipatum divino officio & debitum contemplationi & orationi ab omni ſtrepitu temporalium ceſſare convenit, ut ſunt clerici——— Aliud vero genus eſt Chriſtianorum, ut ſunt laici. *Can. duo ſunt.* 12. *q.* 1.

And it ſhall be unto them for an Inheritance; I am their Inheritance: And ye ſhall give them no Poſſeſſion in Iſrael; *I am their Poſſeſſion.* Ezek. 44. 28.

II.

2. The ſeveral Wants of the Society, make the ſeveral Uſes of Profeſſions.

The Uſes of the Secular Profeſſions are different, according to the Differences of the ſeveral Wants of the Society in Temporal Concerns; and as theſe Wants may be reduced to ſome general kinds, ſo we may reduce to the ſame kinds the Conditions and Profeſſions,

ſions, as ſhall be explained in the Articles which follow *b*.

b As Conditions and Profeſſions are eſtabliſhed for compoſing the general Order, and for ſupplying all the Functions neceſſary for that Order, ſo they are diſtinguiſhed by their Uſes for the Wants which the ſaid Functions demand.'

III.

3. The firſt Want of a State, the publick Tranquility.

The firſt general Want of the Society of Perſons who compoſe a State, is that of maintaining it in Peace, and of defending it againſt Enemies or rebellious Subjects, who might diſturb its Tranquillity, whether in the ſpiritual Affairs of Religion, or in the temporal Concerns of the State. And this Want makes the Profeſſion of Arms neceſſary to repel, reſtrain, and revenge the Attempts or other Injuſtices which require the making of War, and to prevent or appeaſe the Storms of ſeditious or rebellious Subjects, and to contain them within the Duty of Obedience. And this demands the Uſe of a ſovereign Power, which may have the Right of making War, and that of reducing to Obedience, and of puniſhing rebellious Subjects; and that under this ſovereign Power, which makes the Condition of the Head infinitely greater than that of all the others by reaſon of his Elevation, and of the Extent of his Authority, there be Perſons whoſe Profeſſions engage them to ſerve in the Wars; ſuch as the Princes of the Blood, the Officers of the Crown who wear a Sword, the Governors of Provinces, the Dukes, Counts, Marquiſſes, and other Vaſſals, Gentlemen, the Officers and Soldiers of the Army *c*.

c That we may lead a quiet and peaceable Life. 1 Tim. 2. 2.
See the 4th Title.

VI.

4. The ſecond Want, the good Order of the Government.

The ſecond general Want of a State, is that of the good Order of the Government, for regulating every thing which relates to the publick Good in Peace and in War; and this makes the Uſe of the ſame Power of the Sovereign neceſſary, to whom all may pay Obedience who may have the Rights which have been explained in their place *d*, and who in the vaſt Extent of a Miniſtry that is ſo difficult, and of which he by himſelf is not able to exerciſe all the different Functions, may be aſſiſted by a wiſe Council, and by Officers, or other Perſons capable of theſe Functions, that is to ſay, who have ſufficient Abilities, who are diſintereſted, faithful to the Sovereign, and zealous for the publick Good, whether they ſerve near the Perſon of the Prince in his Council *e*, or out of his Preſence, as the Governors of Provinces.

d See the 1ſt and 2d Titles.
e See the 3d Title.

V.

5. Third Want, Adminiſtration of Juſtice.

It is a Conſequence of the good Order of the Government of a State, that every thing in it be under the Power and Dominion of Juſtice, that thoſe who demand Juſtice may have its Protection; and that thoſe who violate it may be puniſhed. Which renders the Uſe of the ſame Power of the Sovereign neceſſary, that he may render Juſtice on the Occaſions worthy of his Cognizance, and eſtabliſh the neceſſary Order for having it adminiſter'd on all the particular Occaſions where he cannot render it himſelf, taking care to fill up the Profeſſions of the ſeveral ſorts of Judges, and the others, with Perſons capable of their Functions, and to be more eſpecially careful in the Choice of good Judges, who, beſides a Capacity ſuited to their Miniſtry, ought to have a Principle of Religion, to be Men of Stedfaſtneſs, of Courage, and of an Integrity proof againſt all Corruption, Lovers of Truth and of Juſtice *f*.

f Moreover thou ſhalt provide out of all the People, able Men, ſuch as fear God, Men of Truth, hating Covetouſneſs, and place ſuch over them, to be Rulers of Thouſands, and Rulers of Hundreds, Rulers of Fifties, and Rulers of Tens. And let them judge the People at all Seaſons: And it ſhall be that every great Matter they ſhall bring unto thee, but every ſmall Matter they ſhall judge. Exod. 18. 21, 22.
See Deut. 17.

'If theſe Qualities are neceſſary for the inferior 'Judges, it is much more neceſſary that thoſe who 'are in the more important Offices ſhould be furniſhed therewith.

Ye ſhall do no Unrighteouſneſs in Judgment: Thou ſhalt not reſpect the Perſon of the Poor, nor honour the Perſon of the Mighty; but in Righteouſneſs ſhalt thou judge thy Neighbour. ——— Ye ſhall do no Unrighteouſneſs in Judgment, in Meteyard, in Weight, or in Meaſure, &c. Levit. 19. 15, & 35.

Thou ſhalt not raiſe a falſe Report: Put not thine Hand with the Wicked to be an unrighteous Witneſs. Thou ſhalt not follow a Multitude to do Evil: Neither ſhalt thou ſpeak in a Cauſe, to decline after many, to wreſt Judgment. Neither ſhalt thou countenance a poor Man in his Cauſe. Exod. 23. 1, 2, 3.
See the 4th Title of the 2d Book.
See Pſal. 57. 1. Deut. 1. 16.

VI.

6. Another Want, Regulations for the Things that are of publick Uſe.

It is likewiſe a Conſequence of the good Order of Government, that all Things which are for the publick Uſe may be in ſuch a Condition, that every one may have the free and commodious Uſe

Uſe of them. Which demands a general Policy for theſe ſorts of Things and Profeſſions, and Officers to look after the due Execution of the ſaid Policy. Thus, in *France* there are divers Officers who have the Direction of what relates to the good Condition of Rivers for Navigation, of Bridges, of Sea-Ports, of Highways, of Foreſts, of the Game, of the Fiſhery, and other Things which belong to the publick Uſe, and have been treated of under the 8th Title *g*.

g See the 8th Title.

VII.

7. The Neceſſity of a publick Revenue.

It is alſo a Conſequence of the Order of Government, and one of the greateſt Wants of a State, that there be a publick Revenue for ſupplying all the Expences which the common Good of the State may render neceſſary. And this Want demands the Uſe of Officers, and of other Perſons, who may exerciſe the Functions on which depends the good Order and Direction of the Revenue, and who may take care of the Method of impoſing and levying Taxes, may inſpect the Accounts of thoſe who have had the Management of them, and in general may give Order about every thing that relates to the ſaid Direction and Management *h*.

h See the 5th Title.

VIII.

8. The Neceſſity of the Uſe of Sciences, and of Perſons to teach them.

The good Order of Religion, and that of the Temporal Government, render the Uſe of Sciences neceſſary, ſuch as Divinity, the Canon Law, the Civil Law, Phyſick, and the other Sciences taught in the Univerſities by the Name of Arts, as has been ſaid in Sect. 1. Art. 26. which makes it neceſſary there ſhould be Perſons capable of teaching in theſe ſeveral Faculties of Arts and Sciences, ſuch as the Profeſſors in Univerſities ought to be *i*; and that there ſhould be alſo Perſons who actually exerciſe in publick ſome of the ſaid Sciences, the Uſe of which is neceſſary in the Society, as the Science of Law for ſeveral Officers of Juſtice, and for Advocates, and that of Phyſick, for thoſe who engage in that Profeſſion.

i See Tit. 17. of Univerſities.

IX.

9. The Neceſſity of Commerce.

One of the greateſt Wants of a State is to have conveyed into all Parts of the Kingdom the ſeveral kinds of Things neceſſary for all the different Uſes of the Publick and of particular Perſons, whether it be of ſuch Things as grow within the Kingdom it ſelf, or of ſuch as muſt be fetched from other Countries. Which demands the Uſe of many different Commerces, and of Perſons to carry them on, whether it be with Strangers, according to the Liberty that Princes give for ſuch mutual Intercourſe between their reſpective Subjects, or between the Subjects of one and the ſame Prince. And theſe are of two ſorts: One is of Wholeſale Merchants, who lay in great Stores of Goods, in order to ſell them out by the Great to other Merchants. And the other is of thoſe who ſell to particular Perſons in a leſs quantity, and who are called Merchants by Retail *l*.

l See the 12th Title of Commerce.

X.

10. The Neceſſity of the ſeveral ſorts of Trades and Handicrafts.

In order to fit for uſe all the Things neceſſary for the Wants of Men, and even thoſe which cannot poſſibly be wanted for Food, Lodging, and Diet, there is neceſſary an infinite number of Arts, which demand ſo many different Profeſſions of Perſons to exerciſe them *m*. And this kind of Profeſſion alone imploys more than all the others put together, that have been mentioned in the preceding Articles.

m See Tit. 13. of Trades and Handicrafts.

XI.

11. The Neceſſity of Husbandry, and of the Care of Cattle.

Of all the temporal Wants of Mankind, the greateſt, moſt natural, and moſt general, is, that of drawing from the Earth the Grain, the Fruits, the Wood, and other Things which it may produce for Food, Clothing, and Lodging, and for all the other different Neceſſities and Conveniences of Life; and alſo for the Nouriſhment and Care of the Cattle neceſſary for tilling the Ground, and for other Uſes. So that Husbandry, and the other Labours about the Earth, are as it were the Foundation of the moſt neceſſary Supplies for all our Wants *n*. And as it is from the whole Surface of the Earth, that the Tillage and other Labours of Men draw theſe ſeveral Supplies, ſo the vaſt Extent of this Surface, which demands this Tillage and theſe other Cares, demands likewiſe the Labour of the greateſt part of Mankind; ſo that the Number of thoſe belonging to this Profeſſion, ſurpaſſes very far the Number of all the other ſorts of Profeſſions put together.

n See Tit. 14. of Husbandry, and of the Care of Cattle.

Husbandmen, and they that go forth with Flocks. Jer. 31. 24.

See Jer. 51. 23. & 52. 16.

XII.

12. *Several kinds of Profeſſions comprized under theſe which have been juſt now explained.*

The Diſtinctions of Conditions and Profeſſions, which have been juſt now explained in the preceding Articles, make general Kinds of them, under which are comprized many other Diſtinctions, which make particular Kinds, the Detail of which it was not proper to explain here, ſeeing they have all their Rank in their proper Place. Thus, for example, the general kind of Conditions and Profeſſions neceſſary for the Adminiſtration of Juſtice, comprehends a great number of ſeveral particular Kinds, ſuch as Judges of different Juriſdictions, Advocates, Proctors, Regiſters, and others, as will appear in the ſecond Book *o*.

o This is a Conſequence of the preceding Articles. See Book 2. Tit. 1.

SECT. III.

Of Rank and Precedency.

IT is not only to prevent or terminate the Differences which ariſe from the Ambition and Vanity of thoſe who affect to ſet themſelves above others, that it has been thought neceſſary to have Rules touching Rank and Precedency: But altho there were no Diſpute of this kind, and that on the contrary every one made it his buſineſs to give way to others, and to place himſelf below thoſe whoſe Rank is inferior to his; yet it would be neceſſary to have Rules for pointing out to every one his Rank, whether it be among Perſons of different Conditions or Profeſſions, or among thoſe who are of the ſame. For the publick Order of the Society requires that nothing in it ſhould be in diſorder; and it would be a Diſorder attended with a great many Inconveniences, if the Members of the Society had not their Places ſettled, and that on every occaſion where many Perſons meet together either to ſit in an Aſſembly, or to march in a Proceſſion, or otherwiſe, it ſhould be neceſſary either to confound the Ranks, or to make thoſe whoſe buſineſs it is to marſhal the Company in their proper Ranks, to ſpend their time in regulating that which is uncertain.

It is not proper to explain here the ſeveral different Regulations about Rank and Precedency. Such an infinite Detail would be inconvenient and diſagreeable, and would not have the advantage of giving a clear and perfect Knowledge of the Principles of this Matter, nor even that of eſtabliſhing Deciſions that are certain; ſeeing it happens every day that different Circumſtances of Times, of Places, of the Qualities of the Perſons, and others of the like nature, hinder the effect of drawing Conſequences from one Caſe to another, which may ſeem to be alike. Therefore we ſhall confine our ſelves, as we have ſaid in the Preamble of this Title, to the explaining of the Principles and eſſential Rules, on which may depend the Deciſion of the Queſtions relating to Rank and Precedency in all the Caſes where there may ariſe Difficulties.

But tho we are not to enter here upon the Diſcuſſion of all the particular Queſtions relating to Rank and Precedency, yet the Deſign of explaining the Principles of this Matter leads us to make ſeveral Reflections upon the moſt important and moſt difficult of all the Queſtions of this kind, which is that concerning the Rank and Precedency between the Profeſſion of Arms and that of Juſtice, which we commonly expreſs in theſe two words, *the Gown and the Sword*. For tho this Queſtion be ſufficiently decided, as will appear hereafter, yet ſince this Deciſion has been rather the effect of Uſage, than of a ſolemn Judgment given after hearing the Reaſons alledged on both ſides, many do not agree as to the Equity of the ſaid Uſage, which is as it were a tacit Judgment, which the Publick has pronounced between theſe two Orders. So that we have thought it neceſſary to dive into the bottom of this Queſtion, and to examine the Principle on which it depends; in order to ſet the Truth of this Matter in a clear Light, not for ſatisfying a bare Curioſity, but to eſtabliſh the Foundations of the Eſteem and Reſpect that is due to theſe two Orders, and to juſtify the Diſtinction which places one of them above the other.

They who are of opinion, that the Profeſſion of Juſtice ought to have Precedency before that of Arms, judge rightly that Arms ought only to ſerve for the defence of Juſtice, and that any other Uſe that ſhould be made of it would be Violence and Tyranny; and that therefore Arms having their Advantage and Uſefulneſs only from the Service they render to Juſtice, ought to give place to it. Among thoſe who are of a contrary Opinion, that the Profeſ-

ſion of Juſtice ought to give way to that of Arms, and who are by far the greateſt Number, moſt of them think of no other Foundation than that of the Advantage which Force gives, which renders it ſelf every where ſuperior, and makes every thing give way to that which is predominant.

If this Queſtion were to be decided by either of theſe Principles, it would be unjuſt to imagine that the Profeſſion of Arms ought to have the firſt Rank for this reaſon, becauſe it is neceſſary to yield to Force. For Princes, and others who poſſeſs the ſupreme Government, whether in Monarchies, or in Commonwealths, and who are to decide this Queſtion, having equally in their hands both the ſovereign Adminiſtration of Juſtice, and the ſovereign Exerciſe of Arms, they could not ſay that the Dignity of Juſtice muſt neceſſarily yield to the Force of Arms, ſeeing they themſelves are Maſters of the Exerciſe of this Force, and in a condition to judge of this Precedency by the Principles of Truth and Equity. So that if it is truly juſt that the Gown ſhould give place to the Sword, it ought to be upon other Principles, which give ſuch a Dignity to Arms, that the ſame being put into the Ballance with the Dignity of Juſtice, this ſhould yield to that.

In order therefore to diſcover the true Reaſons, upon which to ground the Precedency between theſe two Orders of the Profeſſion of Juſtice, and of that of Arms; it is neceſſary to conſider the Dignity of the one, and of the other, and to put them into the Ballance one againſt another; which it is eaſy to do, ſeeing the Dignity of Juſtice, and that of Arms, are placed in the greateſt Elevation, and have their Source in one and the ſame Place, which is the Perſon of the Sovereign, in whom God has placed the ſovereign Diſpenſation of Juſtice, which he has from the hand of God *a*, and which God himſelf hath armed with the Sword *b*, which our Kings for this reaſon take from off the Altar on the Day of their Coronation. Thus, it is from God that Princes derive immediately both the Diſpenſation of Juſtice, and the Uſe of Arms; and their Habits of Ceremony denote in their Perſons the Affinity and Union that is between the one and the other of theſe Miniſtries. And as in God, who is both infinitely juſt and infinitely powerful, the Works of his Power are thoſe of his Juſtice *c*; ſo he gives to Princes the Exerciſe of Power, and that of Arms which he puts into their hands, only that they may maintain and ſupport Juſtice *d*: from whence it follows that Arms are the Inſtrument of Juſtice, and conſequently cannot have any Glory or Elevation, except in ſo far as they are imployed in the defence of Juſtice. Thus, we revere in the Perſon of the Prince the Majeſty of Juſtice, whereof God makes him the Diſpenſer, and the Glory of the Power with which he arms him for the Maintenance and Support of Juſtice *e*.

It would ſeem, by this firſt View, that the Order of the Profeſſion of Arms ought to yield to that of the Profeſſion of Juſtice, of which Arms are the Inſtrument; but we muſt under another View diſtinguiſh in the Perſon of the Prince two different Rights of exerciſing Juſtice, or, to ſpeak more diſtinctly, two ſeveral ſorts of Juſtice, and two different Uſes of Arms for the one and for the other.

We have ſeen in the Preface to this Book, that there are, as it were, two Parts of the univerſal Order of the Society of Mankind. One, which conſiſts in what paſſes between Nations ſubject to different Governments, and which has for its Laws thoſe called by the Name of the Law of Nations. And the other, which comprehends that which paſſes in every State ſubject to one and the ſame Government, and which has for its Laws the Law of Nature, and the municipal Laws there in force.

Both the one and the other of theſe two Parts of the Order of the World, cannot ſubſiſt without the Exerciſe of Juſtice, which may make the Laws peculiar to each of them to be obſerved; and this Exerciſe of Juſtice in each of

a Prov. 8. 15.

b 2 Maccab. 15. 16, 17.

c The Works of his Hands are Verity and Judgment. Pſal. 111. 7.

d Bleſſed be the Lord thy God, which delighted in thee, to ſet thee on his Throne, to be King for the Lord thy God: becauſe thy God loved Iſrael, *to eſtabliſh them for ever, therefore made he thee King over them, to do Judgment and Juſtice.* 2 Chron. 9. 8.

Thus ſaith the Lord God, Let it ſuffice you, O Princes of Iſrael, *remove Violence and Spoil, and execute Judgment and Juſtice, take away your Exactions from my People, ſaith the Lord God.* Ezek. 45. 9.

See Deut. 1. 15, 16, 17.

e If your Delight be then in Thrones and Scepters, O ye Kings of the People, honour Wiſdom, that ye may reign for evermore..... A wiſe King is the upholding of the People. Wiſd. of Sol. 6. 21, 24.

Therefore made he thee King, to do Judgment and Juſtice. 1 Kings 10. 9.

the two Parts is different from that of the other. As to the ſecond Part of this Order, which is limited to every State in particular, the Exerciſe of Juſtice is in the hands of thoſe who have the Government of it; and they have the Authority and Power neceſſary for enforcing a due Obſervance of the Laws, and for puniſhing thoſe who tranſgreſs them. But as for the firſt Part, when one Nation violates the Law of Nations with reſpect to another, there is no common Power on Earth, which can interpoſe and do juſtice between them. And ſeeing it is from God alone that each Prince derives his Power, he alone is the common Lord and Maſter who reigns over all, and who may ſet himſelf up for their Judge; and this he does by the means of War, which he permits Princes to have recourſe to, when the Injuſtices of others give occaſion for it. And it is for this reaſon that he takes to himſelf the Name of the Lord of Hoſts *f*; becauſe he exerciſes his Juſtice between Princes by the Succeſs he is pleaſed to give to Wars. So that Wars are as it were a Tribunal on which God himſelf ſits as Judge *g*; and it is his Juſtice which Victory makes to triumph therein. And tho he often ſuffers, as has been remarked in another place, the righteous Party to be oppreſſed by Force of Arms, in the ſame manner as he permits likewiſe that Princes and their Officers do not always render Juſtice in their Dominions; yet ſtill it is the Juſtice of God, inſeparable from every thing which he wills, that reigns by the Events he is pleaſed to give to Arms. And even when he ſuffers the righteous Party to ſink under Violence and under Injuſtice, he turns the Events of his Providence to the Support of his Juſtice. For this Juſtice of his not being confined, as that whereof he grants the Diſpenſation to Men, to the reſtraining of ſome Injuſtices, according as the Occaſions do happen, but having its Extent to the univerſal Government of all that paſſes among Mankind; as God finds always in all Men juſt Occaſions for chaſtiſing both Princes and People, without doing injuſtice to any body; ſo it is by the different Judgments of his infinite Wiſdom, that he does not give to all juſt Wars a ſucceſsful Event. And this very Juſtice of his, which ſuffers Injuſtice and Oppreſſion to triumph, chaſtiſing by this Event the Princes and People who bear the Weight of the Victory of unjuſt Arms, reſerves to a proper time the Puniſhment of thoſe, who by theſe Victories of theirs have been only the Inſtruments of his Juſtice, and they ſhall feel in their turn the Weight of his Hand.

Since therefore it is the Juſtice of God which Princes exerciſe, when the Injuſtices of their Enemies oblige them to make War; ſince it is by Arms that this Juſtice is to be render'd, and that the Victory which God gives to the Courage and Forces of the victorious Party *h*, decides in favour of Juſtice, and makes it to triumph, in order to impoſe its Yoke on thoſe whom God would have ſubjected to it; this Function gives to the Arms imployed for the War a Dignity of Juſtice; and of a Juſtice very different from that which Princes adminiſter to their Subjects. For whereas the Juſtice which Princes render to their Subjects commands the Arms, and regulates the Uſe of them; and whereas they are only the Inſtrument of Juſtice, with which the Prince, and under him the Officers of Juſtice, arm the Miniſters who execute their Orders; and ſo this Juſtice has of it ſelf its Authority and Dignity, and it is from it that the Arms it puts into the hands of its Miniſters derive their legal Authority; the Juſtice which is exerciſed by War, has no Dignity, no Authority but what it derives from the Force of Arms. So that whereas the Miniſters, who are armed by Juſtice in a State, that they may make it to reign over the Subjects, are below the Dignity of thoſe whoſe Orders they execute, becauſe theſe have the Adminiſtration of this Juſtice, and give to thoſe

f I come to thee in the Name of the Lord of Hoſts. 1 Sam. 17. 45.

For the Battel is the Lord's. 1 Sam. 17. 47.

God himſelf is with us for our Captain. 2 Chron. 13. 12.

g For God breaketh the Battels; for amongſt the Camps in the midſt of the People he hath delivered me out of the hands of them that perſecuted me. Aſſur came out of the Mountains from the North, he came with ten thouſands of his Army, the multitude whereof ſtopped the Torrents, and their Horſemen have covered the Hills. He bragged that he would burn up my Borders, and kill my young Men with the Sword, and daſh the ſucking Children againſt the Ground, and make mine Infants as a Prey, and my Virgins as a Spoil. But the Almighty Lord hath diſappointed them by the Hand of a Woman. Judith 16. 3, 4, 5, 6.

See 1 *Chron.* 11. 14 & 21.

h They determined not to pitch Camp, but courageouſly to ſet upon them, and manfully to try the Matter by Conflict. 2 Maccab. 15. 17.

' See this Paſſage quoted entire hereafter in this ' Preamble.'

Mi-

Miniſters the Uſe of Arms; in War it is the Prince himſelf who is armed by the Hand of God, and who with his own hand imploys the Force of Arms, even to expoſe his own Life upon occaſion, that he may exerciſe that Juſtice, which God has reſerved to himſelf to render to Princes. Thus the Dignity of this Juſtice is in the Arms themſelves which are to render it; and herein conſiſts the Glory of Arms. And tho all Princes cannot, and even ought not always to fight themſelves, and command their Armies in Perſon, and are obliged to intruſt the Command of them to Generals, and to commit the Direction of the Arms to other Perſons; thoſe who are raiſed to this Honour, exerciſe the divine Function of the Juſtice of God between Princes, and it is by their Arms that they are to render it, and to impoſe its Yoke on their Enemies.

Thus it is by their Hands that God diſpenſes his Juſtice, as he diſpenſes it by the Hands of the Prince, to whom he has given a Right to make War. So that the Uſe of Arms in juſt Wars, gives to Princes, and to thoſe who command their Armies under them, this double Glory, of being armed by the Hand of God for the Support of Juſtice, and of being at the ſame time the Defenders and Protectors of the State, by preſerving the Goods and the Lives of all the Subjects at the hazard of their own.

If we conſider in the Perſon of the Prince the Uſe of Authority for diſpenſing Juſtice among his Subjects, and that of Arms for the War, according to the Views we may have of this Parallel from the Reflections juſt now made upon it; we ſhall find therein the Foundations of the Glory of Arms, and of the Equity of the Judgment that Uſage has made upon it; which has been only the natural Sentiment of the Multitude, and the general Bent of Mankind, who were perſuaded, that the Uſe of Arms in War had a Rank of Honour and of Dignity above that which the Adminiſtration of Juſtice within a State can give, whether they knew, or whether they were ignorant of the Principles of the Dignity both of the one and the other of theſe two Orders.

All that has been ſaid hitherto of the Dignity which the Profeſſion of Arms receives from the Divine Providence, which commits the Uſe of them to Princes, that they may make War, ought to be underſtood only according to the Relation which the Conduct of the Princes, who take up Arms, has to the ſaid Divine Providence. For tho all the contending Parties propoſe to themſelves to have God for their Judge, and that the People of the two different Parties give the ſame Honour to the Profeſſion of Arms; yet the Princes who engage in unjuſt Wars, draw upon themſelves, notwithſtanding that Appearance of Glory in the eyes of Men, a terrible Vengeance for daring to ſet up God for a Protector of Violence, and for employing the Power he has entruſted to them, as an Inſtrument of their Paſſions. Thus there is nothing of greater importance in the Conduct of Princes, than the care of not propoſing to themſelves any other Glory, any other Good, than that of maintaining the Power and Dominion of Juſtice. So that, as it is by Juſtice they ought to exerciſe their Power over their Subjects, it is only in behalf of Juſtice that they imploy the uſe of Arms againſt their Enemies, and that they engage in no War, except for Cauſes which they may juſtly hope that God will undertake the Defence and Protection of, and where they may be able to join to all they may expect from their Forces and from their Courage, a Confidence in his Help, and Succeſs to the Arms which he puts into their hands. It was with this View alone, that the Princes who were animated by the Spirit of God, undertook and carried on their Wars, they engaging in no War but for Cauſes worthy to have God for their Judge and Defender. *Take this holy Sword a Gift from God, with the which thou ſhalt wound the Adverſaries. Thus being well comforted by the Words of* Judas, *which were very good, and able to ſtir them up to Valour, and to encourage the Hearts of the young Men, they determined not to pitch Camp, but courageouſly to ſet upon them, and manfully to try the Matter by Conflict, becauſe the City, and the Sanctuary, and the Temple were in danger.* 2 Macc. 15. 16, 17.

Tho it may ſeem reaſonable to gather from all theſe Reflections on the Parallel of Arms and of Juſtice, of the Gown and of the Sword, that the Order of Arms has the firſt Rank; yet no body will pretend to infer from thence, that all who are of the Profeſſion of Arms, ought to take place of all thoſe who belong to the Order of the Adminiſtration of Juſtice. And we do not make this Remark here, to prevent

vent a Doubt which can never enter into any one's Mind; but only to inform the Reader, that, as ſhall be ſaid in this Section, it is neceſſary to diſtinguiſh between the Precedency of one Order before another, and that of the Perſons of one Order before the Perſons of another. For as there are in each Order divers Degrees of Honour, of Dignity, and Authority; the Effect of the Dignity of one Order above another is only that we ought to compare the Perſons of the reſpective Orders, according to the Rank which every one may have in his own Order. So that he who occupies in his Order the ſame Rank which another holds in his, provided both the one and the other are equally advanced in their reſpective Orders; he who is of the Order which has the greateſt Dignity, will take place of the other. Thus, when there was in *France* a Conſtable; as he had among the Sword-Men, or in the Order of Arms, the ſame Rank which the Chancellor has in the Order of Juſtice, he took place of the Chancellor. But as thoſe of each Order are unequally ſituated, every one in his own Order, and that there is on one ſide and the other more or leſs in every Perſon of the Dignity of his Order; the Ranks are regulated by the Proportion of the Rank that every one has in his own Order, and by the Quality of his Functions, and the other Circumſtances which may come under conſideration for regulating between them the Precedency of the one before the other. So that many Perſons of an Order leſs honourable, have much more Dignity than others who are of a ſuperior Order, and of whom they take place. All theſe things make up a large Detail, which it is not our buſineſs to enter into here; where we intend to confine our ſelves to the general Principles of the Matter of Precedency, as has been remarked in the Preamble of this Title.

It follows from this laſt Remark, that in the Queſtions touching Rank and Precedency, it is neceſſary to diſtinguiſh two ſorts of Ranks or Precedencies, that of the Orders, which ſets one Order above the other; and that of the Perſons, whether they be of one and the ſame Order, or of divers Orders, which places them differently either by the bare View of their Order, or by other Views. It is theſe two ways of conſidering Ranks and Precedencies, which ſhall be the ſubject Matter of this Section.

Altho, beſides the Profeſſions mentioned in the foregoing Sections, there be other Profeſſions peculiar to Women, yet we have made no Diſtinction of them. For beſides that theſe Profeſſions are compriſed under ſome of the kinds that have been diſtinguiſhed, when any Queſtion ariſes about the Condition, Profeſſion, and Rank of married Women, it is the Condition and Rank of the Husband which ought to regulate that of the Wife; unleſs it be in the Caſe of Princeſſes who marry below their Quality. And as Wives follow the Condition of their Huſbands *i*, ſo it is with Widows who follow the Condition of their laſt Huſband *l*; and as to young Women who are not married, they are of the ſame Order and Rank to which their Fathers belong *m*.

i Mulieres honore maritorum erigimus, & genere nobilitamus. *l. ult. C. de incol.*

Quoniam uxores coruſcant radiis maritorum, hoc lege dante. *Nov.* 105. *cap.* 2. *in pri.*

Fœminæ nuptæ clariſſimis perſonis, clariſſimarum perſonarum appellatione continentur. —— Tamdiu igitur clariſſima fœmina erit, quamdiu ſenatori nupta eſt, vel clariſſimo, aut ſeparata ab eo, alii inferioris dignitatis non nupſit. *l.* 8. *ff. de Senat.*

Cum te non ex Senatore patre procreatam ſed ob matrimonium cum Senatore contractum, clariſſimæ fœminæ nomen adeptam dices: claritas, quæ beneficio mariti tibi parata eſt, ſi ſecundi ordinis virum poſtea ſortita es, redacta ad prioris dignitatis ſtatum depoſita eſt. *l.* 10. *C. de nupt.*

l Si autem minoris ordinis virum poſtea ſortitæ fuerint, priore dignitate privatæ poſterioris mariti ſequentur conditionem. *d. l. in f.*

Non tamen permittimus mulieribus ad ſecundas venientibus nuptias, adhuc velle priorum maritorum dignitatibus aut privilegiis uti: ſed ad quale poſt priorem venerint matrimonium, illius amplectantur fortunam; quæ enim priorum oblita eſt, non rurſus ex prioribus adjuvabitur. *Nov.* 22. *cap.* 36.

m Clariſſimarum fœminarum nomine, Senatorum filiæ, niſi quæ viros clariſſimos ſortitæ ſunt, non habentur, fœminis dignitatem clariſſimam mariti tribuunt, parentes vero donec plebeii nuptiis fuerint copulatæ. *l.* 8. *ff. de Senator.*

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I.

1. It is neceſſary to examine the Ranks of the Orders before thoſe of the Perſons.

Before we explain the Rules of Rank and Precedency among Perſons, whether they be of the ſame or of different Orders, it is neceſſary to conſider firſt the Ranks of the Orders among themſelves. For tho it often happens that ſome of an inferior Order take place of others who are of a higher Order, as has been ſaid in the Preamble; yet that is upon particular Conſiderations which ſhall be explained hereafter, and do not hinder but that in the Caſes where Perſons are diſtinguiſhed barely and preciſely by their Orders, thoſe of the moſt honourable Order precede thoſe of the leſs honourable. So that it is neceſſary to begin with the Ranks of the Orders: and as in the foregoing Section we have diſtinguiſhed the different kinds of Profeſſions, according to their Uſes for the Wants and Neceſſities of the Society, and have given to all thoſe different Wants, the Order which ſeemed to be moſt natural; ſo we ſhall purſue the ſame Method, as to the Ranks of the Orders *a*.

' *a* The firſt view in relation to the Ranks of ' Perſons is that of the Rank of their Orders, ' which regulates that of their Perſons, if there be ' no other reaſon of Diſtinction.'

See the 22d and following Articles.

II.

II.

2. *The first Order is that of the Clergy.*

Of all the Orders, the first in Honour, Dignity, and Neceſſity, is the Order of Eccleſiaſticks, who are Miniſters of Jeſus Chriſt, Diſpenſers of the Myſteries of Religion, and who receive from him the Holy Ghoſt, for the Edification and Government of his Church. It is this Importance, and this Elevation of ſo auguſt a Miniſtry, that gives to this Order preferably before all others, employed only about Temporal Concerns, a diſtinguiſhed Rank, in proportion to their Differences. It is this Order which we call the Clergy; and tho all who belong to this Body, are not advanced to the ſacred Miniſtry of thoſe primary Functions, yet all the Functions which the ſeveral Orders of the Clergy exerciſe, having a relation to the Government of the Church, the Order of the Clergy hath its Dignity preferably to all other Orders whatſoever *b*.

b The Order of the Clergy is called the firſt Order of the Kingdom, in the Edict of the Month of April, 1695. *concerning the Eccleſiaſtical Juriſdiction.*

And thou ſhalt come unto the Prieſts the *Levites*, and unto the Judge that ſhall be in thoſe Days, and enquire; and they ſhall ſhew thee the Sentence of Judgment. And thou ſhalt do according to the Sentence which they of that Place (which the Lord ſhall chuſe) ſhall ſhew thee, and thou ſhalt obſerve to do according to all that they inform thee. *Deut.* 17. 9, 10.

III.

3. *The firſt of the Lay Orders is that of the Profeſſion of Arms.*

Of all the Lay Orders, the firſt is that of the Profeſſion of Arms, in the Exerciſe of which conſiſts the Glory of the Prince, and which makes a Body whereof the Sovereign is the Head, and which hath for its Members the Princes of the Blood, the Officers of the Crown who are Sword-Men, the Governours of Provinces, and all the moſt illuſtrious Perſons whoſe Birth and Qualities give them their Rank in this Order *c*.

c See the Preamble of this Section, and Sect. 2. *Art.* 3.

See the Remark on the following Article.

IV.

4. *The ſecond Order, the Council of the Prince.*

The ſecond Order of Laymen is that of the Miniſters and other Perſons whom the Prince honours with a Place in his Privy Council, where are debated the Affairs of State, thoſe relating to the Order of the Government, and other Matters, which the Intereſt of the Church and the publick Good may occaſion to be brought before them. And tho there may be in this Order Eccleſiaſticks and Perſons belonging to the Profeſſion of Arms, Princes of the Blood and others; yet the Nature and Functions of this Order, not having the Character of Eccleſiaſtical Functions, nor of the Functions belonging to the Profeſſion of Arms, it ought to be ranked among the Lay Orders, and in the next place to that of the Sword *d*.

d See Sect. 2. *Art.* 4.

¶ We muſt diſtinguiſh the Council mentioned in this Article, from that wherein are decided the Law-Suits between contending Parties, of which we ſhall ſpeak in the following Article.

It is to be remarked on this Article, that tho it be true that the Prince is not only the Head in his Council, but that he alone, without the concurrence of his Counſellors, may make Orders and Decrees therein, except it be in the States where the Prince is obliged to conform himſelf to the Deliberations of his Council; yet we have not ſaid in the Article, that the Council of the Prince makes a Body of which he is the Head, as has been ſaid in the foregoing Article, that he is the Head of the Body which is compoſed of Perſons whom their Birth and other Qualities engage to ſerve him in the Army. For there is this difference between this Body and that compoſed of the Prince's Council, that the Prince himſelf is not a Member of his Council, whereas he is armed with a Sword; and it is for this reaſon that in the foregoing Article we have aſſigned the firſt Rank to the Profeſſion of Arms, becauſe the Prince himſelf uſes them, and the Princes of the Royal Blood take it as an honour to wear them, for the Service of the Prince, and under his Command. Thus of what Quality ſoever the Perſons may be who are of the Prince's Council, there is no wrong done them by placing before their Order another wherein the Prince himſelf and Perſons of ſo auguſt and elevated Rank are comprehended.

See the Preamble of this Section.

V.

5. *Third Order, of the Adminiſtration of Juſtice.*

The third of theſe Orders is that of the Perſons who exerciſe the Functions of the Adminiſtration of Juſtice, whether it be in the King's Council for Affairs which are cognizable there, or in that which is termed in *France* the Council for deciding Law-Suits between Parties, or in the ſeveral Courts of Juſtice, which it is not our buſineſs to enumerate

enumerate here. This Order comprehends alſo the Officers who are ſole Judges in Matters belonging to their Cognizance, and likewiſe the other Perſons, who without being Judges, exerciſe the Functions neceſſary in the Adminiſtration of Juſtice, ſuch as Advocates, Proctors, Regiſters, and others *e*. And ſeeing the Adminiſtration of Juſtice implies the Miniſtry of the Civil Policy, which is a part thereof, and that the greater part of the Officers of Juſtice, and the chief among them, exerciſe many Functions of the Civil Policy; and that alſo all others who have any Direction in the Civil Policy, have likewiſe Functions of adminiſtring Juſtice which the Civil Policy renders neceſſary; we ought not to ſeparate the Civil Policy from Juſtice, and they may be both comprehended under one and the ſame Order, ſeeing their Functions are united to the greateſt part of Offices, and to thoſe in the firſt Rank of Juſtice, and are exerciſed by the ſame Perſons *f*.

e See Sect. 2. Art. 5.

f See Sect. 2. Art. 6.

‘ The Reader ought not to be ſurprized that we ‘ have ranked in one and the ſame Order the Privy Council, the chief Courts of Judicature, the ‘ other inferior Judges, and alſo thoſe who exerciſe ‘ other Functions beſides thoſe of a Judge, and ‘ which are neceſſary in the Order of the Adminiſtration of Juſtice. For it is certain that all the ‘ Functions of theſe ſeveral ſorts of Officers, and ‘ other Perſons, are of the ſame Order which relates to this Adminiſtration. And the great Difference there is between thoſe who are the firſt of ‘ this Order, and thoſe who have the laſt Rank ‘ in it, does not hinder them from being all in the ‘ ſame Order, when this Word is taken in the ‘ Senſe it ought to have here, for the general Diſtinction of Conditions; no more than the Difference that is between a common Soldier and a ‘ Prince of the Blood, or a Mareſchal of *France*, ‘ hinders the common Soldier from being of the ‘ Order of thoſe who wear the Sword.

VI.

6. Fourth Order, the Profeſſion belonging to the Revenue.

We may put down in the fourth Rank the Order of Officers and others whoſe Profeſſions and Imployments are about the Revenue, who have the Management and Direction of it, thoſe who ſettle and adjuſt the Aſſeſſments in the Publick Taxes, thoſe who collect them, and in general all who exerciſe any Functions, which have relation to the Management and good Order of the Publick Revenue *g*.

g See the Title of the Revenue.

¶ There are Officers who have an Adminiſtration of Juſtice, and who by reaſon of that Function may be placed in the Order which has been ſpoke of in the foregoing Article; ſuch as the Officers of the Chamber of Accounts, whoſe Functions relate to Matters of Accounts, and who have other Functions of a different nature, and of much greater importance; the Officers of the Court of Aids, who render Juſtice to Parties who have Law-Suits with one another, not only in Matters belonging to the Revenue, but in all other Matters of what kind ſoever they be, when they come in as Incidents to the Matters of the Revenue, and likewiſe determine Claims to the Title of Nobility, when the ſame is conteſted, to thoſe who pretend on that ſcore an Exemption from the Taxes; the Treaſurers of *France*, who beſides their Functions in and about the Revenue, have the Direction of the Policy relating to the Highways, which is allotted to them by the Ordinances, for viſiting and repairing the Highways, Cauſeys, Bridges, Pavements, Sea-Ports and Paſſages of the Kingdom. But altho all the ſaid Officers, and others, ſuch as thoſe belonging to the Elections or Diſtricts of the Kingdom, exerciſe Functions of Juſtice; yet they are properly ſpeaking Officers belonging to the Revenue; and the Ordinances give that Quality to the Chambers of Accounts, and to the Treaſurers of *France a*, and the Courts of Aids have it even by their Name.

a See the Ordinance of the Month of *Auguſt* 1598. Art. 2.

VII.

7. Fifth Order, the Profeſſion of Sciences and Liberal Arts.

After theſe ſeveral ſorts of Officers, the fifth Order of Profeſſions, according to that of the Wants and Neceſſities of the Society, is the Order of Perſons who profeſs the Sciences and Liberal Arts that are taught in the Univerſities and Schools *h*. Which is to be underſtood of the Profeſſors of the Canon Law, of the Civil Law, of Phyſick, and of ſuch ſorts of Liberal Arts. For as to the Profeſſors of Divinity, they belong to the Order of Eccleſiaſticks; which makes the Univerſities mixed Bodies, compoſed of Churchmen and Laymen, as has been obſerved in another place *i*. It is under this Order that we ought to include thoſe who having taken Degrees in the Faculty of Phyſick in an Univerſity, make Profeſſion of practiſing it.

h See Sect. 2. Art. 8.

i See Tit. 17. of Univerſities, Sect. 1. Art. 1.

VIII.

8. *Sixth Order, the Profeſſion of Merchandize.*

Purſuant to the ſame Order, of the Wants of the Society, the Profeſſion of Merchandize makes a ſixth Order, which conſiſts of the Perſons who exerciſe the ſeveral Commerces neceſſary in a State; whether they be carried on only between Subjects of one and the ſame Prince, and be things which are the Growth and Manufacture of his Dominions, or be carried on with Strangers, for things which do not grow, or at leaſt do not ſufficiently abound, in the Territories of that Prince *l*.

l See Sect. 2. Art. 9.

IX.

9. *Seventh Order, of Trades and Handicrafts.*

The Uſe of Trades and Handicrafts makes a ſeventh Order of Profeſſions, which are neceſſary to prepare and fit for uſe to the ſeveral Wants of the Publick, all the ſeveral Matters which the ſaid Wants may demand *m*.

m See Sect. 2. Art. 9.

'It is by the help of Trades and Handicrafts 'that we apply to uſe all things that are either ne'ceſſary, uſeful, or convenient for all ſorts of Wants. See *Heb.* 3. 4. 1 *Theſſ.* 4. 11.

Moreover there are Workmen with thee in abundance; Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver, and the Braſs, and the Iron, there is no number. 1 Chron. 22. 15, 16.

For he, peradventure willing to pleaſe one in Authority, forced all his Skill to make the reſemblance of the beſt Faſhion. Wiſdom of Solomon 14. 19.

X.

10. *Eighth and laſt Order, Husbandry and the Care of Cattle.*

The laſt Order of Profeſſions, tho the firſt in neceſſity for the Life of Man, is that of Perſons employ'd in Husbandry, and looking after Cattle *n*. Theſe are likewiſe the moſt natural Profeſſions, and which for this reaſon were in the firſt times the Employment of Perſons even of the firſt Rank, among thoſe whom God called to his Knowledge and Worſhip *o*: and it was Husbandry that was to be the Labour and Work of Man, even before his Fall; and ſeeing as a Puniſhment for his Fall, God has enjoined him a painful and laborious Life, to earn his Bread with the Sweat of his Brow, no body fulfils this divine Order in the literal Senſe, more than Shepherds and Labourers *p*: but as this Calling is very laborious, and imploys the greateſt part of Mankind, and removes them more than any other Profeſſion from the Uſe of Rank and Precedency, we have therefore placed thoſe who follow this Imployment in the laſt Rank.

n See Sect. 2. Art. 11.

o *And* Noah *began to be an Husbandman.* Gen. 9. 20.

And Jacob *ſaid, I will again feed and keep thy Flock.* Gen. 30. 31.

Thy Servants Trade hath been about Cattle from our Youth even until now, both we and alſo our Father. Gen. 46. 34. ch. 47. 3.

Moſes *kept the Flock of* Jethro *his Father-in-Law.* Exod. 3. 1.

But David *went and returned from* Saul, *to feed his Father's Sheep at* Bethlehem. 1 Sam. 17. 15.

And David *ſaid unto* Saul, *Thy Servant kept his Father's Sheep, and there came a Lion and a Bear, and took a Lamb out of the Flock; and I went out after him, and ſmote him, and delivered it out of his Mouth.* 1 Sam. 17. 34, 35.

'It is remarkable in relation to this Subject, that 'after *Saul* had been choſen King of *Iſrael*, he 'conducted the Cattle home out of the Field.

p *In the Sweat of thy Face ſhalt thou eat Bread, till thou return unto the Ground; for out of it waſt thou taken.* Gen. 3. 19.

In Sorrow ſhalt thou eat of it all the Days of thy Life. Gen. 3. 17.

Therefore the Lord God ſent him forth from the Garden of Eden *to till the Ground, from whence he was taken.* Gen. 3. 23.

See the Treatiſe of Laws, chap. 2. numb. 2. and the Preamble of Tit. 15.

XI.

11. *Divers kinds of Conditions and Profeſſions under every one of theſe Orders.*

Theſe different Orders, juſt now explained, are ſo many general Kinds, which compriſe all the ſeveral Conditions and Profeſſions; for there is not any one of them but what belongs to ſome one of the ſaid Orders. But all the Orders have this in common, that there are in every one of them other Kinds leſs general, which diſtinguiſh the Perſons of each Order as it were into divers Claſſes, which have different Ranks among themſelves, as will appear by the following Articles. And tho the Differences of the ſaid Claſſes be ſuch, that they make ſeveral kinds of Conditions and Profeſſions; yet ſeeing all the Conditions and Profeſſions which are of one and the ſame Order, tho in different Claſſes, have a common Character belonging to them which ranges them under the Order diſtinguiſhed by the ſaid Character, it was not proper to make as many Orders as there are Claſſes; but to reduce all the Conditions and Profeſſions to the leaſt number of general Kinds poſſible *q*, obſerving between theſe kinds of Diſtinctions, that they be ſuch, as that one may perceive in every one of them a Character which may agree to the ſeveral Claſſes comprized under it. And

'*q* It is agreeable to Method and Order to be'gin with the moſt general Diſtinctions.

'See in the Articles which follow what are the 'Characters that diſtinguiſh the Orders, and are 'common to the ſeveral Claſſes of every one.

as

as for the Detail of theſe Claſſes which it would be too tedious to enumerate at length, and which could not well be done without Confuſion, it will be ſufficient to give, in theſe following Articles, general Ideas, and ſome Examples which may make it eaſy to find out what any one deſires to know of all this Detail.

XII.

12. *The Character which diſtinguiſhes the Order of the Clergy.*

In the firſt Order, which is that of the Clergy, the Character common to all who are of this Order, is their Deſtination to ſome Eccleſiaſtical Miniſtry or Function *r*. But under this Character it is neceſſary to diſtinguiſh, as it were into ſeveral Claſſes, the Biſhops, Prieſts, and others in holy Orders, the Canons of Cathedral and Collegiate Churches, and others belonging to this Order, as ſhall be explained in the following Title.

r See the Preamble of the following Title.

XIII.

13. *Character of the firſt Lay Order, the Profeſſion of Arms.*

In the ſecond Order, to wit, that of the Profeſſion of Arms, which is the firſt among the Lay Orders, the Character common to all the Perſons of this Order, is their Engagement to ſerve in the Wars. But under this Character we muſt diſtinguiſh the Generals of an Army, the Mareſchals of *France*, the Colonels, Captains, and other Officers, the Soldiers, and alſo the Perſons whoſe Qualities engage them to this Service, as will appear in the 11th Title *s*.

s See Tit. 4. and Tit. 11.

XIV.

14. *Character of the ſecond Lay Order, the Prince's Privy Council.*

In the ſecond of the Lay Orders, under which are comprehended the Perſons who compoſe the Privy Council of the Prince, the Character common to all who are of this Order is to have ſome of the Functions, which relate to the Order of Government, and to the common Good of the Church, and of the State. But ſeeing theſe Functions are different, it is neceſſary to diſtinguiſh under this Character the Miniſters of State, the Secretaries of State, and others to whom the Prince diſtributes theſe Functions, either by the Title of Offices, or under other Titles *t*.

t See Art. 4. See 2 *Chron.* ch. 10, 11.

XV.

15. *Character of the third, the Adminiſtration of Juſtice.*

In the third Order, in which are the Perſons who exerciſe the Functions of the Adminiſtration of Juſtice, the Character common to them, is that of being employed in ſome one of the ſaid Functions; but it is neceſſary to diſtinguiſh in this Order Perſons of Qualities very different, according to the Qualities of theſe Functions. For the firſt of this Order is the Chancellor, who is the Head of it, and of all the Courts of Judicature, whoſe Rank diſtinguiſhes him in a ſingular manner by his Elevation above all others of the ſame Order: and next to him come the Officers who are Members of the Council which has the Deciſion of Appeals from inferiour Courts of Juſtice; the Judges of the ſeveral Courts of Juſtice, both ſuperior and inferior, the Stewards and other Officers belonging to Courts of the Royal Juriſdiction, thoſe belonging to the Courts of Lords of Mannors, and others. And the ſame Character agrees likewiſe with Regiſters and other Officers who exerciſe Functions which have a relation to this Adminiſtration; which is the reaſon why they are comprehended under this Order: and the ſame reaſon holds for taking in likewiſe Advocates and Proctors *u*.

u See Art. 5. and the Remark there made on it.

XVI.

16. *Character of the fourth, the Revenue.*

In the fourth Order, of Perſons who by their Offices or Imployments exerciſe Functions relating to the Revenue, the Character common to them, is their Engagement in theſe Functions; but it is neceſſary to diſtinguiſh in this Order Imployments that are widely different from one another. For it comprehends by this Character the chief Officers who have the Direction of the Revenue, the general and particular Receivers, and all others, even thoſe who exerciſe the loweſt of theſe Functions. And we may likewiſe take in under this Order other Officers, who, as has been remarked on Art. 6. may be placed in this Order *x*.

x *And over the King's Treaſures was* Azmaveth *the Son of* Adiel; *and over the Storehouſes in the Fields, in the Cities, and in the Villages, and in the Caſtles was* Jehonathan *the Son of* Uzziah. 1 Chron. 27. 25.

See Tit. 5. as alſo Art. 6. of this Section.

XVII.

17. *Character of the fifth, Profeſſion of Sciences and Liberal Arts.*

In the fifth Order, of Perſons who make Profeſſion of Sciences and Liberal Arts, of which mention has been made in Art. 7. the Character common to them is the Study, the Knowledge, and publick Profeſſion of ſome one of theſe Sciences or Liberal Arts. But we muſt diſtinguiſh in this Order thoſe who profeſs the Civil and Canon Law, thoſe who profeſs Phyſick, thoſe who practiſe it,

and those who teach and profess the Liberal Arts *y*.

y See Tit. 17. Art. 7.

XVIII.

18. *Character of the sixth, of Merchandize.*

In the sixth Order, of Persons who exercise some Commerce, the Character common to them, is to lay up Stores, either by buying, by trucking, or otherwise, of Wares and Merchandize, in order to sell them; but it is necessary to distinguish in this Order different sorts of Merchants. Thus, the Merchants who trade into Foreign Countries are different from those who drive a Trade only within the Kingdom of which they are Subjects. Thus Wholesale Merchants differ from those who sell by Retail. Thus, we must distinguish under another View, the different Companies of Merchants by the different kinds of Merchandize in which they deal, Bookfellers, Drapers, Grocers, Corn-Merchants, Wine-Merchants, Graziers, Woodmongers, and those of all the other kinds, of whom we may be able to judge by the few that have been reckoned up here *z*; without pretending, that the Order in which they are here named should be of any consequence for determining their Precedency, which may be different in divers Places *a*.

z See Tit. 13. Art. 8.

a See Art. 42. of this Section.

' The Rank or Precedency of Companies of ' Merchants, may be different in divers Places, ' according to the time of their Establishment, or ' by other Views.

XIX.

19. *Character of the seventh, of Trades and Handicrafts.*

In the seventh Order, which is that of Persons who exercise the different sorts of Trades and Handicrafts for the several Uses both of particular Persons and of the Publick, the Character common to them, is the Knowledge of the Rules of the Trade or Handicraft they profess, and the Industry and Experience necessary for practising them. But we must distinguish in this Order an infinite number of different Trades and Arts for several Uses. Thus, Pharmacy and Surgery are Arts that are exercised on the human Body, for the Cure of Diseases, of Wounds, and other Distempers. Thus, Printing is used, to give to the Publick the Use of Books of all sorts, and of other Things of which it is necessary to have a great many Copies, or to render them more authentick, or more commodious, by printing them. Thus Architecture and the Carpenter's Art are necessary for Buildings: and the infinite multitude of the other different Wants makes the Use of several other sorts of Arts necessary, as Taylors, Hatters, Shoemakers, Joiners, Locksmiths, Bakers and others; which distinguishes them, and according to their Uses, makes them more or less necessary, more or less useful, more or less reputable *b*.

b And Hiram *King of* Tyre *sent Messengers to* David, *and Cedar-Trees, and Carpenters, and Masons; and they built* David *a House.* 2 Sam. 5. 11.

And he made Staves of Shittim *Wood, and overlaid them with Gold.* Exod. 37. 4.

And they wrought Onyx *Stones inclosed in Ouches of Gold, graven as Signets are graven, with the Names of the Children of* Israel. Exod. 39. 6.

And he hath filled him with the Spirit of God, in Wisdom, in Understanding, and in Knowledge, and in all manner of Workmanship: And to devise curious Works, to work in Gold, and in Silver, and in Brass; and in the cutting of Stones to set them, and in carving of Wood to make any manner of cunning Work. Exod. 35. 31, 32, 33.

And it was covered with Cedar above upon the Beams, that lay on forty five Pillars, fifteen in a row. 1 Kings 7. 3.

Moreover, there are Workmen with thee in abundance, Hewers, and Workers of Stone and Timber, and all manner of cunning Men for every manner of Work. Of the Gold, the Silver, and the Brass, and the Iron there is no Number. 1 Chron. 22. 15, 16.

Send me now therefore a Man, cunning to work in Gold, and in Silver, and in Brass, and in Iron, and in Purple, and Crimson, and Blue, and that can skill to grave with the cunning Men that are with me in Judah *and in* Jerusalem, *whom* David *my Father did provide.* 2 Chron. 2. 7.

See the same Chapter, *ver.* 3, 4. See *Exod.* 36. and 38. *ver.* 21.

And in the uppermost Basket there was of all manner of Bake-meats for Pharaoh. Gen. 40. 17.

See Art. 9. Tit. 13.

XX.

20. *Character of the last Order, Husbandry and the Care of Cattle.*

In the last Order, of Husbandry, and the Care of Cattle, the Character common to them, is the Relation which their Functions have to the Tillage of the Ground. But it is necessary to distinguish in this Order Gardeners, Ploughmen, Vine-Dressers, Shepherds, and others; and among all those we must distinguish between such as work for themselves, whether in their own Lands, or in those of others, and hired Labourers who spend their time, and get their Livelihood by working for others *c*.

c See Art. 10. of this Section, the 14th Title, and the Texts cited on the Preamble of this Title.

See 1 *Chron.* 27. ver. 26, *&c.*

He digged many Wells, for he had much Cattle, both in the Low-Country, and in the Plains; Husbandmen also and Vine-Dressers in the Mountains, and in Carmel, *for he loved Husbandry.* 2 Chron. 26. 10.

XXI.

21. *Ranks of Perſons are not all regulated according to the Ranks of the Order.*

It apppears by theſe Diſtinctions of different Orders, and by the different Claſſes which each Order contains, that the Ranks of the Claſſes are not all regulated by the Ranks of the Order; ſeeing in many Orders there are Claſſes which have a Rank above others, who are of a much higher Order. Thus, the Rank of the firſt Officers who have the Direction of the Revenue, is above the Rank of many of the Officers of Juſtice. But the Effect of the Diſtinction of Orders, as to what relates to Rank and Precedency, is that the chief Perſons of an Order, ſuperior to another Order, have their Rank above thoſe that are the firſt of the inferior Order. Thus, the firſt Officers of Juſtice have their Rank before the firſt Officers of the Revenue; and it is the ſame thing between the ſeveral Claſſes of one and the ſame Order. But as we deſcend from the firſt of every Order, or of every Claſs, to thoſe who are inferior, the Ranks are not regulated between Perſons of divers Orders, or of divers Claſſes, by the exact Conſideration of the Rank of their Orders, or of their Claſſes, as has been remarked in the Preamble of this Title; but we ought to join to that Conſideration that of the Honour, of the Dignity, and of the other Characters of the Functions of each Perſon, and weigh in the Ballance the Advantages on one ſide and the other, in order to regulate their Ranks by theſe Views *d*.

d See the Preamble of this Title.

XXII.

22. *Caſes where the Ranks of the Orders, or Claſſes, regulate thoſe of the Perſons.*

It follows from the Rule explained in the preceding Article, that when there is any Conteſt about Rank and Precedency, between Perſons of divers Orders, or of divers Claſſes in one and the ſame Order; it is neceſſary to begin by comparing the Order or Claſs of every one, with the Order or Claſs of the other, and to conſider in each Order and in each Claſs what it has in it of Honour, of Dignity, of Authority, Neceſſity or Uſefulneſs; and more eſpecially what may make in it a Diſtinction of Honour. For as has been ſaid in Sect. 1. Art. 11. there is even in the Profeſſion of Merchandize, and that of Trades, a kind of Honour which places ſome of them above the others. And it is by this firſt View of the Ranks of Conditions and Profeſſions that we ought to regulate that of Perſons. So that if between thoſe whoſe Ranks are to be adjuſted, there were no other Diſtinction beſides that of the Ranks of their Orders, or of their Claſſes, he who ſhould be found in an Order, or in a Claſs, whereof the Rank ought to precede the other, would have the Precedency. Thus between Perſons of the firſt Orders, and of the laſt, to wit that of Husbandry, thoſe who are in the very laſt Degree of any of the other Orders will take place of thoſe who are in the firſt Degree of this laſt Order. Thus in the Order of the Adminiſtration of Juſtice, a Counſellor of a Preſidial Court in *France* will take place of a Counſellor of a Court belonging to a Bailywick, or Seneſchal's Juriſdiction which has no Preſidial Court, by the bare Diſtinction of the Ranks of their Claſſes *e*.

e This is a Conſequence of the preceding Articles.

XXIII.

23. *Caſes where the Ranks of the Perſons are not ſo regulated.*

If in two Orders, or two Claſſes of one and the ſame Order, there be Perſons, who by the Differences of their Functions, and other Advantages that every one has in his way, are diſtinguiſhed; ſo that the Rank between them ought not to be regulated by that of their Order or Claſs; we ought to judge of it by a compariſon of the Rank of every one in his own Order or Claſs, and by the Differences of their Functions, and of their other Advantages: For they may be ſuch in the Perſon of him who is in the inferior Order, or in the loweſt Claſs, that he ought to have the Precedency above him who has his Rank in the ſuperior Order, or Claſs. Thus, for example, as touching the Orders, if we compare a Receiver of the Taxes, who is in the Order of the Revenue, to a Regiſter, who belongs to the Order of the Adminiſtration of Juſtice in a Preſidial Court, the Advantages of the Office and Functions of a Receiver, and his Rank in his Order, will give him the Precedency before Regiſters. Thus, for Claſſes of one and the ſame Order, if in that of the Profeſſion of Arms, and in the Claſſes of Cavalry and Infantry, we compare a Captain of Infantry to a Trooper; the Captain will take place of him by the Quality of his Function, and by the Advantage of his Rank in his Claſs, above that which the Trooper ought to have in his Claſs *f*.

f This is alſo a Conſequence of the foregoing Articles.

XXIV.

XXIV.

24. *The Will of the Prince regulates the Rank between Persons of different Orders or Classes.*

We must add for another Rule of Rank and Precedency, the Will of the Prince, who may determine the Matter, either when he erects new Offices, or on other Occasions when he settles the Ranks of Persons. Thus many enjoy their Ranks by virtue of the Regulation which the Prince himself has made; and it is always this Will of the Prince, which is the primary Rule in this Matter, in the Cases where he has settled the Precedency. For as it is in him that the supreme Dignity resides, that he is vested with the Sovereign Authority, and with the Right to regulate every thing relating to the Publick Order; that of the Rank and Precedency of Persons cannot have any Rules more natural than those which he prescribes *g*.

g In albo decurionum in municipio, nomina ante scribi oportet eorum, qui dignitates, Principis judicio, consecuti sunt. *l.* 2. *ff. de albo scribendo.*

'The Prince has two Titles which give him 'this Right; one, as having in his Person the 'Sovereign Dignity and Authority, together with 'the Right of dispensing them to whomsoever he 'pleases; and the other is his Right to give a final 'Decision to every thing without Appeal.

XXV.

25. *Distinction between the Use of the preceding Rules and that of the following.*

One may see by the Rules explained in the four preceding Articles, that they contain the general Principles of this Matter of the Rank and Precedency between Persons of different Orders, or of different Classes in one and the same Order. And without entring into the detail of the several Combinations, which diversify these Precedencies according to the Differences of the particular Advantages peculiar to the Persons; the Rules we have just now explained, and these few Instances, will be sufficient for making an application of them to all the Questions of this nature. But since these Rules relate only to the Precedency between Persons of different Orders, or of distinct Classes, and that there arise also frequent Questions concerning Precedency between Persons of the same Order, or of the same Class; it remains that we should explain the Principles and Rules which ought to serve for deciding them; and this shall be the subject Matter of the Articles which follow *h*.

h This Article results from the preceding Articles.

XXVI.

26. *Will of the Prince regulates the Precedency between Persons of the same Order or Class.*

As it has been already remarked, that in Disputes touching the Rank and Precedency between Persons of distinct Orders, or different Classes, the Will of the Sovereign is the primary Rule; so it is likewise, for the same Reasons, the first and chief Rule in Cases of Precedency between Persons of the same Order, or of the same Class *i*.

i See Art. 24.

XXVII.

27. *The Ranks in one and the same Order, or Class, distinguished by the Differences of the Functions of every Person.*

As the Characters of Honour, Dignity, Authority, Necessity, and of Usefulness, distinguish Conditions and Professions of Men, and that it is by these Characters we assign to every one of them a Rank among the whole, which is proportioned to the Share which the said Condition or Profession has of these Characters to distinguish it from what the other Conditions and Professions have of them; so it is likewise by the Differences of what those who are of the same Order, or the same Class, may have more or less of the said Characters, that we ought to regulate their Ranks among them. And it is by this Rule, next to that of the Will of the Prince, that we should judge of their Precedency. Thus, for example, among Persons belonging to the Order of the Administration of Justice, seeing the Dignity and Authority of the Chancellor are much greater than the Authority and Dignity of all the Heads or Chiefs in the several Classes of the same Order, he holds the first Rank, distinguished in proportion to the Grandure and Extent of his Ministry. Thus, in the same Order, the Officers of the Parliaments in *France* have their Rank before the Officers of the inferior Courts of Justice. Thus among Persons of the same Class in the same Order, the Presidents of a Court of Justice, having more Dignity and Authority than the Judges, they have the first Rank; and in the other Courts of Justice, where there are Officers distinguished by other Names of Dignity, such as in Bailywicks and Seneschals Jurisdictions, the Lieutenants General, the Lieutenants Criminal, the particular Lieutenants, the Assessors and others who are called Chiefs, have their Rank above the Judges of the same Courts.

l See Art. 22.

XXVIII.

28. *Among Equals of the same Class, their Rank is regulated by the*

If in one and the same Class there be Persons not distinguished by their Functions, such as the Judges of the same Court of Justice, the Advocates of the same Parliament, or other Jurisdictions, the Proctors, Notaries, and other

Order of their Reception.

ther Officers of the like kind, their Ranks are regulated by the Order of their Admiſſion. For there being no other Cauſes of Diſtinction between them, it is juſt that they who enter into thoſe Bodies and Societies, ſhould not alter the Ranks of thoſe whom they find in them; and that therefore thoſe admitted in the laſt Place, ſhould have the laſt Rank: otherwiſe it would be neceſſary that at the admiſſion of every new Member, it be determined what his Rank ſhould be with reſpect to every one of thoſe admitted before him, and that all whom he were take place of, ſhould loſe their Rank *m*.

m Decuriones in albo ita ſcriptos eſſe oportet, ut lege municipali præcipitur. Sed ſi lex ceſſat, tunc dignitates erunt ſpectandæ ut ſcribantur eo ordine quo quiſque eorum maximo honore in municipio functus eſt, puta qui duumviratum geſſerunt, ſi hic honor præcellat & inter duumvirales antiquiſſimus quiſque prioris: deinde hi qui ſecundo poſt duumviratum honore in republica functi ſunt, poſt eos qui tertio & deinceps: mox hi qui nullo honore functi ſunt, prout quiſque eorum in ordinem venit. *l.* 1. *ff. de albo ſcrib.*

See upon this Law Art. 35. of the ſame Sect.

XXIX.

29. Perſonal Qualities make no Alteration in the Rule that ſettles Precedency according to the time of Admiſſion.

The Rule explained in the preceding Article reſpects only the Caſes where thoſe who are of one and the ſame Claſs, and have the ſame Functions, are admitted therein ſucceſſively one after another, and at different times. For in that caſe, it is by the Dates of their Admiſſion, that their Rank is regulated, without any regard to their former Condition, and the other Qualities which may diſtinguiſh them; as if one of them were older than the others; if he had exerciſed ſome Office, when the others never had been in any; if he were a Gentleman, or of a nobler Extraction than the others. For no regard is had to theſe Qualities, and others which ſhall be mentioned hereafter, except when the Queſtion is about the Rank and Precedency between Perſons admitted at the ſame time into ſome Society, where the Functions, the Honour, the Dignity and Authority of all ought to be the ſame; as if the Queſtion were about ſettling the Rank between Perſons called by one and the ſame Nomination to the Offices of Sheriffs, Conſuls, Aldermen, Aſſeſſors, or others. For in that caſe it would be neceſſary to ſettle their Rank according to the Difference in their Conditions, and their other perſonal Qualities; as ſhall be explained in the Sequel of this Section *n*.

n See in relation to Municipal Offices the following Article.

¶ We muſt obſerve on this Article, in relation to Municipal Offices, ſuch as Sheriffs, Conſuls, Aldermen, that there are ſome Places where the ſaid Offices are annual, and where a new Nomination is made every Year of Perſons to fill them; and that in others the Aldermen ſerve longer than one Year, and that every Year they name only ſo many new ones as to ſupply the Vacancies of thoſe who go out of the Office. But both in the one and the other of theſe two Uſages, ſome of the ſaid Officers may be continued; and in theſe two laſt Caſes where there is only a Nomination of ſome part of them, or a Continuation of ſome of the old Officers, the Uſages with reſpect to their Ranks between them are different. For in ſome Places the old ones take place of thoſe who are newly named, without regard to the Differences of their Qualities; and in other Places the new ones may take place of the old ones, if their Qualities give them a Rank above the others. Thus a Judge of a Court of Juſtice will take place of an Advocate, or of a Merchant who had been named to the ſaid Municipal Office before him.

XXX.

30. Why mention is made here of Rank and Precedency in relation to Municipal Offices.

Altho it may ſeem that the Matter of Rank and Precedency is handled here only with reſpect to the Conditions and Profeſſions of Perſons; and that the Qualities of Sheriffs, Conſuls, Aldermen, Aſſeſſors, and others of the like kind, whom we have mentioned in the preceding Article, are not kinds of Conditions and Profeſſions, as has been ſaid in Sect. 1. Art. 7. yet we ought not to exclude out of this Title what relates to Rank and Precedency among Perſons called to the ſaid Municipal Offices: for there is no reaſon, while we are ſpeaking of the Ranks of Conditions and Profeſſions, why we ſhould not explain the general Rules of all ſorts of Rank and Precedency. And ſince, in the Queſtion about Rank and Precedency among Perſons called to thoſe Municipal Offices, we firſt conſider the Differences of their Conditions and Profeſſions; and if they appear to be equal, we next proceed to the other perſonal Qualities; it is natural alſo, when the Queſtion is about the Rank between Per-

Perſons called at the ſame time to other ſorts of Offices, ranked in the ſame Claſs, and having the ſame Functions, that we ſhould diſtinguiſh them likewiſe by their perſonal Qualities. Thus in the Caſe of the Erection of a new Court of Judicature, conſiſting of ſeveral Judges, to be received at the ſame time, and whoſe Ranks it ſhould be neceſſary to regulate; it might be reaſonable, if ſeveral preſented themſelves to be admitted at the ſame time, to admit firſt thoſe who ſhould appear to be diſtinguiſhed by their perſonal Qualities. And ſeeing this Concurrence of many Perſons to the ſame Offices happens yearly in Cities and Corporations for the Municipal Offices, the Queſtions about Precedency do ariſe more frequently there; and in order to decide them, recourſe muſt be had to the Diſtinctions that are made by the perſonal Qualities, as has been ſaid in the preceding Article; it would be reaſonable to apply the ſame Rules to the like Caſes of Offices of another nature *o*.

‘ *o* The ſame Principles and Rules agree to the ‘ ſeveral Caſes of Precedency mentioned in this ‘ Article.

See the following Article.

XXXI.

31. Remark on the Rule for deciding of Ranks by perſonal Qualities.

Since it reſults from the preceding Articles, that in the Caſes where there is a Concurrence of many Perſons called to the ſame Offices, their Ranks ought to be regulated by their perſonal Qualities; it is neceſſary to obſerve, that this Rule ought not to be underſtood indifferently of all ſorts of Qualities, but only of ſuch as ſhall be explained in the Articles which follow: and tho the greateſt part of the Rules relating to theſe Qualities be taken out of the Texts of the *Roman* Law which reſpect Municipal Offices; yet we muſt extend the Application of them to all the Caſes to which they may agree, as has been obſerved in the preceding Article *p*.

p De honoribus ſive muneribus gerendis cum quæritur, imprimis conſideranda perſona eſt ejus cui defertur honor, ſive muneris adminiſtratio: item origo natalium, facultates quoque an ſufficere injuncto muneri poſſint. *l.* 14. §. 3. *ff. de muner. & hon.*

‘ Altho this Text does not conſider the perſonal ‘ Qualities mentioned in it with reſpect to Rank and ‘ Precedency, but only with reſpect to the Capa- ‘ city of the Perſons for the Offices; yet ſeeing ‘ theſe Qualities have their relation to the Exerciſe ‘ of the ſaid Offices, it is natural, that ſince they ‘ are to be conſidered in the Perſons called to thoſe ‘ Offices, they be likewiſe conſidered in them as ‘ Advantages which may entitle thoſe who are endowed with them to a Preference before thoſe ‘ who want them; as ſhall be explained in the ‘ Articles which follow.

XXXII.

32. Two ſorts of Qualities neceſſary to be diſtinguiſhed.

In order to underſtand rightly what is the Nature of the perſonal Qualities which may be conſidered for ſettling the Ranks of Perſons, it is neceſſary to diſtinguiſh in every Perſon two ſorts of Qualities: One, of thoſe which are internal, reſiding in the Mind and in the Heart, and which diſtinguiſh the Perſons as they have more or leſs Underſtanding, Courage, Vertue or Probity; and the other, of thoſe which are external, and reſide neither in the Mind nor Heart, ſuch as Age, Birth, Number of Children, and other like Qualities. There is this difference between theſe two ſorts of Qualities, that thoſe of the firſt ſort are ſuch as it is eaſy to be deceived in them, to take one for a Man of Senſe and Judgment who has only ſome occaſional Flaſhes of Wit; to take a learned Man without Judgment, whoſe Learning is nothing but Confuſion, for an able skilful Perſon; a Hypocrite for a Man of Probity: but no body can be miſtaken either as to Age, or as to Birth, or other Qualities of the like nature, of which mention ſhall be made hereafter. And there is alſo this difference between theſe two ſorts of Qualities, that a Preference given to the Mind, or to Vertue, would occaſion Jealouſies, Enmities, and other bad Conſequences; whereas there can be no Jealouſy or Enmity between Perſons, when one is preferred to the other, either upon the account of his great Age, or becauſe he has a greater number of Children, or becauſe his Extraction is evidently more noble, or if the Condition of the one is ſuperior to that of the other; as if of the two one were an Officer of Juſtice, and the other a Merchant *q*.

‘ *q* One may be able to judge by the Reaſons ‘ explained in this Article, of the Diſtinction to ‘ be made between the different Qualities of ‘ Perſons, in order to ſettle their Ranks.

See on the ſame Subject the 41ſt Article.

XXXIII.

33. Preference on account of the Difference of Conditions.

Among theſe external Qualities that are to be conſidered in the concurrence of many Perſons, called at the ſame time to Offices whoſe Functions are the ſame; as for inſtance, Aldermen of a City; if there be no Uſage to the contrary, they conſider firſt the Difference of Conditions and Profeſſions: Thus, an Advocate would

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would be preferred before a Proctor *r*.

r In primis conſideranda perſona. *l.* 14. §. 3. *ff. de muner. & hon.*

Lege municipali cavetur, ut præferentur in honoribus certæ conditionis homines. *l.* 11. §. 1. *ff. de muner. & honor.*

Amplioris honoris inferiori——Et ingenuum libertino præferemus. *l. ult. ff. de fide inſtr.*

' See this Text as it is quoted on Art. 31. and ' the Remark there made upon it.

' The other Circumſtances being equal, the Diſ- ' ference of the Conditions ought to decide the ' Precedency.

XXXIV.

34. *Preference because of Age.*

If there were no other Cauſes of Diſtinction between the Perſons, one might conſider their Ages, and place the Eldeſt before the Youngeſt. And it was likewiſe by the Age that the Policy which was eſtabliſhed by the Divine Law advanced the Elders to the firſt Poſts in the Miniſtry of the Government, next unto him who was eſtabliſhed the Chief or Head thereof *s*.

s Go and gather the Elders of Iſrael *together.* Exod. 3. 16.

Thou ſhalt riſe up before the hoary Head, and honour the Face of the old Man. Levit. 19. 32.

And the Lord ſaid unto Moſes, *Gather unto me ſeventy Men of the Elders of* Iſrael, *whom thou knoweſt to be the Elders of the People, and Officers over them.* Numb. 11. 16.

See *Deuter.* 22. 15.

Honour me now I pray thee before the Elders of my People. 1 Sam. 15. 30.

The Beauty of old Men is the grey Head. Prov. 20. 29.

Semper in civitate noſtra ſenectus venerabilis fuit; namque majores noſtri pene eumdem honorem ſenibus quam magiſtratibus tribuebant. Circa munera quoque municipalia ſubeunda, idem honor ſenectuti tributus eſt. *l.* 5. *ff. de jure immun.*

Semper ſeniorem juniore, & amplioris honoris inferiori, & marem fœminæ, & ingenuum libertino præferemus. *l. alt. ff. de fide inſtr.*

' Beſides the Conſideration of the Reſpect due to ' old Age, it gives moreover this Advantage, which ' has relation to the publick Good, that it is attend- ' ed with more Experience.

XXXV.

35. *Preference for having ſerved in other Offices.*

We conſider likewiſe as another Quality, which gives Preference, the Honour of having ſerved in other Offices, which ought to entitle thoſe to a Preference before others who have had the Advantage to bear Offices, the others never having had any; or if they have all been in Office, the Advantage of having been imployed in Offices of greater Importance, or of having ſerved in like Offices for a much longer time, or in a greater number *t*.

t Decuriones in albo ita ſcriptos eſſe oportet, ut lege municipali præcipitur. Sed ſi lex ceſſat, tunc dignitates erunt ſpectandæ, ut ſcribantur eo ordine, quo quiſque eorum maximo honore in municipio functus eſt: puta qui duumviratum geſſerunt, ſi hic honor præcellat: & inter duumvirales antiquiſſimus quiſque prior is: deinde hi, qui ſecundo poſt duumviratum honore in republica functi ſunt. Poſt eos, qui tertio, & deinceps. Mox hi qui nullo honore functi ſunt, prout quiſque eorum in ordinem venit. *l.* 1. *ff. de albo ſcrib.*

' This Preference is founded on the Services ren- ' der'd to the Publick in the Exerciſe of Offices.

XXXVI.

36. *Preference because of the Number of Children.*

We ought alſo to conſider in theſe Caſes, the Difference between thoſe who have Children, and thoſe who have none, or who have fewer, in order to give the Preference to thoſe who have Children before thoſe who have none, or to thoſe who have the greateſt number; and this Preference hath its Equity founded on this Conſideration, that Children are a Burden, the Weight whereof turns to the common Good; the Multiplication of Mankind being of great Importance to the Publick *u*.

u In albo decurionum præſcriptis patrem non habenti filios anteferri conſtat. *l.* 9. *C. de decur.*

Qui plures liberos habet in ſuo collegio, primus ſententiam rogatur, cæteroſque honoris ordine præcellit. *l.* 6. *in f. ff. de decur. & fil. eor.*

XXXVII.

37. *On account of greater Riches.*

The ſame Conſideration of the Qualities of which the Uſe may turn to the Publick Good, may likewiſe be a Motive for giving the Preference in the ſame Caſes to thoſe, who having greater Riches, may be more uſeful in the Society, by imploying their Wealth for divers Services, and for that among others, of bearing greater Burdens, and of paying larger Taxes *x*.

x De honoribus ſive muneribus gerendis cum quæritur; in primis conſideranda perſona eſt ejus cui debetur honor ſive muneris adminiſtratio, item origo natalium: *facultates quoque*, an ſufficere injuncto munere poſſint: item lex, ſecundum quam muneribus quiſque fungi debeat. *l.* 14. §. 3. *ff. de mun. & honor.*

Paucitas eorum qui muneribus publicis fungi debeant neceſſaria etiam ad dignitatem municipalem, ſi facultates habeant, invitat. *l.* 12. *in f. ff. de decur.*

' We may apply theſe two Laws to divers o- ' ther Cauſes of Precedency.

See the Remark quoted on Art. 31.

XXXVIII.

38. *On account of the greateſt number of Voices in Elections.*

It is likewiſe a Conſideration in the *Roman* Law, which is uſed in ſome Places, that in the Election of many Perſons to Offices of a like nature by one and the ſame Nomination, if there be no other reaſons for deciding the Preference, it is given to him who had moſt Voices in the Election *y*.

y Privilegiis ceſſantibus cæteris, eorum cauſa potior

tior habetur, in ſententiis ferendis, qui pluribus eodem tempore ſuffragiis jure decurionis decorati ſunt. *l. 6. §. 5. ff. de decur. & fil. eor.*

XXXIX.

39. *Preference of a Scholar to an illiterate Perſon.*

The Diſtinction which Learning and want of Learning makes among Perſons, may alſo be conſidered in theſe Caſes, if other Qualities do not regulate the Preference in favour of an illiterate Perſon. For beſides the advantage which the literate Perſon has over the other, he may be much more ſerviceable to the publick Good *z*.

z 'The other Circumſtances being equal, the 'Scholar has the advantage of being capable of 'doing greater Service.

XL.

40. *Preference on account of Birth.*

The Conſideration of Birth makes likewiſe a Diſtinction which may be the Foundation of Preference in the ſame Caſes; either becauſe of the Juſtice that may be due to the Merit of the Anceſtors of him who is deſcended of the nobleſt Extraction, or becauſe his Birth may put him in a condition of rendring himſelf more uſeful to the Publick by following the Footſteps of his Anceſtors *a*.

a Item origo natalium. *l.* 14. §. 3. *ff. de muner. & hon.*

Ingenuum libertino præferemus. *l. ult. ff. de fide inſtr.*

See Art. 31. and the Remark there made on it.

XLI.

41. *Caſes where regard ſhould be had to to the Parts and Vertue of the Perſons.*

Altho Brightneſs of Parts and a vertuous Diſpoſition be not Qualities to be inſiſted on judicially as Arguments for Precedency, becauſe of the Reaſons explained in Art. 3. yet it does not from thence follow that they may not be conſidered by the Judges who are to determine the Precedency, and that they may not ſerve as a Motive for giving the preference to him who is judged to excel the others in Parts and Probity, in the Caſes where recourſe muſt be had to the perſonal Qualities, and where the other Qualities leave the Matter in ſuſpence *b*.

b 'Altho it is not proper to alledge in a Court 'of Juſtice the Advantages of Parts and Vertue, 'yet there is no reaſon why upright Judges ſhould 'not take them into conſideration, if the other 'Qualities decide not the Matter.

XLII.

42. *Preference according to the Uſage of Places.*

We may add as a laſt Rule in this matter of Precedency, the Uſages of Places, if there be any ſuch without Abuſe *c*: And that even altho the ſaid Uſage ſhould derogate from ſome of the Rules which have been juſt now explained; for Uſages and Cuſtoms are in the place of Laws *d*.

c Decuriones in albo ita ſcriptos eſſe oportet ut lege municipali præcipitur. *l.* 1. *ff. de albo ſcrib.*

Legem quoque reſpici cujuſque loci oportet. *l.* 5. §. 1. *ff. de jure imm.*

Herennius Modeſtinus reſpondit, ſola albi proſcriptione minime decurionem factum, qui ſecundum legem decurio creatus non ſit. *l.* 10. *ff. de decur.*

Nonnunquam etiam longa conſuetudo in ea re obſervata, reſpicienda erit. Quod etiam cuſtodiendum principes noſtri conſulti reſcripſerunt. *l.* 11. *in f. ff. de decur.*

d See Art. 10, 11. of Sect. 1. of the Rules of Law.

Inveterata conſuetudo pro lege non immerito cuſtoditur, & hoc eſt jus quod dicitur moribus conſtitutum. Nam cum ipſæ leges nulla alia ex cauſa nos teneant, quam quod judicio populi receptæ ſunt: merito & ea quæ ſine ullo ſcripto populus probavit, tenebunt omnes, nam quid intereſt, ſuffragio populus voluntatem ſuam declaret, an rebus ipſis & factis? quare rectiſſime etiam illud receptum eſt ut leges non ſolum ſuffragio legiſlatoris, ſed etiam tacito conſenſu omnium per deſuetudinem abrogentur. *l.* 32. *ff. de leg. & ſenat. cenſ.*

XLIII.

43. *The Regard that ought to be had to the ſeveral Combinations of perſonal Qualities.*

It is neceſſary to underſtand all that has been ſaid hitherto of the different Conſiderations of the Qualities which may be weighed, in order to the ſettling of Ranks and Precedencies in ſuch a manner as to examine in the ſeveral Caſes the Combinations of the ſaid Qualities, according as the ſame Perſon may either have only one of theſe Qualities without the other, or have many of them together; according as one of theſe Qualities may be more uſeful to the Publick than another, or even than two of the others; and according as the Advantages may be diſtinguiſhed by the Circumſtances. For as it is natural that the Differences of theſe Combinations, and of the Circumſtances, ſhould diverſify the Advantages of one Perſon over another; ſo it is prudent for thoſe who have Queſtions of this nature to decide, to examine the ſeveral Effects of theſe Combinations and of the Circumſtances, in order to aſſign to every one his Rank in proportion to his Advantages *e*.

e 'Since it may happen that one Perſon may have 'ſeveral of theſe Qualities, when another has on-'ly one of them, and that theſe Qualities may be 'ſuch as that one of them ſingly may be of more 'advantage than two of the others; it is by having 'regard to the ſeveral Combinations, and to the 'Circumſtances, that we ought to judge of the Pre-'cedency founded on theſe Qualities.

XLIV.

44. *Of Precedency with regard to the Clergy.*

All the Rules which have been juſt now explained touching the Matter of Rank and Precedency, reſpect Lay Conditions and Profeſſions, according to the relation they have to the publick Order of the Society; and ſeeing the Profeſſions of Clergymen have alſo their relation to the ſame Order, and that the

Rules

Rules concerning them differ from the Rules of the Lay Profeſſions, it remains that we ſhould add them here, and they may be reduced to the following Rules *f*.

f See the following Articles.

XLV.

45. *Two Caſes where it is neceſſary to ſettle the Ranks of Clergymen.*

As to the Rank of Clergymen, we muſt diſtinguiſh two ſorts of Caſes in general, where it is neceſſary that theſe Ranks ſhould have their Rules. The firſt Rule concerns the Caſes where the Queſtion is about the Rank and Precedency of Clergymen among themſelves. And the ſecond is of the Caſes where the Queſtion is touching Rank and Precedency between Clergymen and Laymen. And both the one and the other have their different Rules, which ſhall be explained in the following Articles *g*.

g ‘ This is a natural Conſequence of the Diverſity of Eccleſiaſtical Functions, and of that of Lay Profeſſions. For the different Degrees of Honour and Dignity in the Perſons belonging to theſe two Orders, make it neceſſary to diſtinguiſh the Precedencies in the two Caſes mention'd in this Article.

XLVI.

46. *The Rule of the Rank of Clergymen among themſelves.*

The Clergy have their Rank among themſelves according to their Characters, and the Dignity of their Functions, of Cardinals, Patriarchs, Primates, Archbiſhops, Biſhops, and other Prelates, or according to their Holy Orders, of Prieſt, Deacon, Subdeacon, and the other Orders; or according to their Miniſtry, of Paſtors, Archdeacons, Rural Deans, Curates; or according to the reſpective Qualities of their Benefices, whether they be of the Secular Clergy, as Canons and Prebendaries of Cathedral and Collegiate Churches; or of the Regular Clergy, ſuch as Abbots, Chiefs of the ſeveral Orders, Abbots of Convents, Priors and others, and ſome Chapters; or that they hold their Benefices *in Commendam*, ſuch as Abbots or Priors who hold their Abbies and Priories ſo. And in general every one has his Rank according to that of his Miniſtry, of his Order, of his Benefice, without any regard to perſonal Qualities. For ſeeing all the Places of Eccleſiaſticks, and the Honours annexed to them, have their ſole and preciſe relation to ſpiritual Functions; it is by the Differences of their Miniſtry and Functions, that they are diſtinguiſhed in a ſeparate Order, of which it is not proper to explain the Detail here; it being ſufficient barely to obſerve, that among Eccleſiaſticks who compoſe a Body in which they exerciſe the ſame Functions, ſuch as in a Chapter thoſe who are in the firſt Places, which are called Dignities, are there the firſt in Rank; and the others, ſuch as the Canons or Prebendaries, have their Rank from the Day of their Inſtalment or Admiſſion *h*.

h ‘ It is by the Differences of the Functions and ‘ Miniſtry that Clergymen have their Ranks.

XLVII.

47. *Two Caſes of the Rank between Clergymen and Laymen.*

As to the Rank between Clergymen and Laymen, it is neceſſary to diſtinguiſh the Occaſions in which Clergymen exerciſe the Functions of their Miniſtry, from thoſe where the ſaid Functions are not exerciſed: for theſe two Caſes have their different Rules, which ſhall be explained in the three Articles that follow *i*.

i See the following Articles.

XLVIII.

48. *All Clergymen take place of Laymen in the Caſes relating to their ſpiritual Functions.*

In all the Caſes where the Clergy exerciſe the ſpiritual Functions of their Miniſtry, ſuch as the Performance of Divine Service in the Churches, the Adminiſtration of the Sacraments, whether it be in the Church or other Places, at Proceſſions, and on other Occaſions of the like nature, all Clergymen without diſtinction of the loweſt degree, have their Rank before all the Laity, the Chief of whom owe to the leaſt ſpiritual Functions a very great Reſpect *l*. And altho we ſee in ſome Cathedral and Collegiate Churches, and likewiſe in others, that during the Divine Service, certain Places among the Canons, or other Eccleſiaſticks, are aſſigned to Lay-Officers, or to other Perſons, ſuch as Founders; yet they occupy thoſe Places without performing any Function in the Divine Service, or having any more ſhare in it than what all the common People have. But thoſe Places are granted them as a Favour, for Conſiderations which the publick Order of the Society and the Intereſt of the Church render favourable, and in ſuch a manner as does not give to Laymen any Rank in the Spiritual Order, nor any Precedency above thoſe of that Order; neither does it make any manner of Change in their Dignity *m*.

l ‘ This is a natural Effect of the Quality of the ‘ Functions of Clergymen.

m ‘ Since it is by Favour that thoſe Places are ‘ granted to Laymen, and that without their having any ſhare in the ſpiritual Functions of the ‘ Divine Service; they do no manner of prejudice ‘ to the Precedency of the Clergy.

XLIX.

49. *Caſes where Clergymen and Laymen meet*

In the Caſes where the buſineſs is not to perform Divine Service, or any Spiritual Functions; and where it happens to

together in the same Body.

to be neceſſary to ſettle the Rank between Clergymen and Laymen; it is likewiſe neceſſary to diſtinguiſh the occaſions where Clergymen and Laymen happen to meet in one and the ſame Body in order to perform therein the ſame Functions, and thoſe occaſions where they have nothing to do in common together. Thus, for example: The Clergymen who are of the number of Judges in the Temporal Courts of Juſtice in *France*, ſuch as the Parliaments and Preſidial Courts of that Kingdom, and who are diſtinguiſhed by the name of Eccleſiaſtical Counſellors or Judges, ſeeing they exerciſe the ſame Functions with the Lay Counſellors or Judges who ſit on the ſame Bench, they have their Rank there only as the other Judges, according to the time of their admiſſion; becauſe they have all of them in thoſe Tribunals the ſame Functions, and the ſame Dignity and Authority *n*. But on other occaſions, where there are no Functions common to Clergymen and to Laymen, and where the buſineſs is not to exerciſe any Function of the Eccleſiaſtical Miniſtry, the Ranks are different according to the Rule which ſhall be explained in the following Article.

n 'Seeing it is by favour, and as a privilege 'granted to the Church, that the Kings of *France* 'have erected Offices of Eccleſiaſtical Counſellors 'or Judges in the Temporal Courts of Juſtice, 'and that their Functions are the ſame with thoſe 'of the Lay Judges of the ſame Bench, there is no 'reaſon which gives the Precedency to the Eccle'ſiaſtical Judges before the others.

L.

50. Caſes where Clergymen and Laymen have Precedency differently, according to their qualities.

When it happens that Clergymen and Laymen are in company together, whether it be caſually, as in accidental Meetings at going in or out of a Room, or other rencounters of the like nature; or that they are called to ſome Aſſembly of Ceremony, in which the Eccleſiaſtical Miniſtry has nothing to do; the Clergymen have their Rank differently according to their own qualities, and the qualities of the Laymen with whom they chance to meet. For ſeeing in theſe Caſes the Dignity of the Spiritual Functions is no way concerned, and that on all occaſions, the Dignity which gives a Rank in the Publick, ought to be regulated by the qualities to which the publick Order of the Society requires the greateſt reſpect ſhould be paid, there are many qualities in Laymen which demand a much greater reſpect than what is due to many Clergymen, abſtracting from their Miniſtry: and becauſe the Combinations of this meeting of Clergymen and Laymen together are infinite, according to the differences of the qualities of the one and the other, the Rules of their Ranks on theſe ſorts of occaſions are diverſified, which makes a detail that would be uſeleſs and inconvenient to explain in this place *o*.

o 'Setting aſide the firſt Dignity of the Head of 'the Church, which gives him a Rank even above 'all the Temporal Princes whatſoever, all the o'ther Eccleſiaſtical Dignities may happen to meet 'with Temporal Powers which take place of them; 'and according to the different qualities of the 'Eccleſiaſtical and Lay Perſons, the Order of their 'Ranks is different: ſo that many Laymen of 'the firſt Rank, the Princes of the Blood, the 'chief Officers belonging to the Sword and the 'Gown, have their Rank before the chief of the 'Clergy.

[According to the Rules of Precedency eſtabliſhed in *England* among the Clergy, the great Officers, Nobility, and others of the Kingdom, the two Archbiſhops of *Canterbury* and *York* have place above all the great Officers and Nobility in Parliament, Council and Commiſſions, ſaving in ſome particular Caſes where the Precedency is reſerved to the Lord Chancellor or Lord Keeper; all the other Biſhops have place above all the Barons of the Realm, but they give place to Viſcounts, Earls, Marquiſſes and Dukes. If a Biſhop of this Realm had in former days been made a Cardinal, he did not take any place of Precedency in Parliament as Cardinal, but took his place in right of his Biſhoprick, in reſpect whereof he ſat in Parliament, 31 *Hen. VIII.* c. 10. *Coke* 4. *Inſt. p.* 361.]

Remark on the following Titles.

HAving explained in the foregoing Title the ſeveral Orders of Perſons who compoſe a State, and made as it were a Plan of the general kinds of Conditions and Profeſſions; our propoſed Method requires that we ſhould now proceed to a particular Examination of each of the ſaid Kinds, to conſider in them the diſtinctions of their Claſſes, which are as it were particular Kinds, and to explain the Functions and Duties peculiar to every one of them: and this is what we ſhall treat of under the following Titles. But having been obliged by other Views of the Method we propoſed, to treat of ſome of thoſe general Kinds, and of their Claſſes, in other Places, and to explain the Functions and Duties of the Perſons who compoſe them; it was not proper to repeat here what we have found neceſſary to place elſewhere. Therefore ſince it was neceſſary to explain what concerns the Privy Council of the Sovereign in the third Title; what

what belongs to the Revenue in the fifth; what relates to the Order of the Adminiſtration of Juſtice and of the Civil Policy in the ſecond Book; and the Profeſſions of Sciences and Liberal Arts in the 17th Title, which is of Univerſities; the Reader ought not to be ſurprized that he does not find in the ſequel proper Titles for theſe four Orders according to the Rank they are placed in among the others, ſeeing he may find them every one in their place. Neither ought he to be ſurprized that he does not find in every one of the other Orders, a detail of all their Claſſes; as for example, in that of Trades and Handicrafts, a particular enumeration of all the kinds of them; for ſuch a detail would be equally tedious and uſeleſs: but we ſhall confine the diſtinctions of the Claſſes, according as their differences diverſify the Functions and Duties of the Profeſſions.

TIT. X.

Of the Clergy.

BY Clergy is meant the Eccleſiaſtical State, and this name is taken from a word of the *Greek* Language, which ſignifies Lot, or Portion *a*; and it is given to Eccleſiaſtical Perſons, as well becauſe they ought to be the Portion of God, as that God ought to be theirs *b*. Clergymen are the Portion of God, becauſe he conſecrates them to himſelf by their vocation to a Divine Miniſtry, the Functions whereof being altogether Holy and Spiritual, have no relation but to his Worſhip, and to his Service, and require a diſengagement from all worldly care and anxiety; ſo that their whole Conduct conſiſts in devoting themſelves wholly to God, and in bringing over to his Worſhip and Service all thoſe to whom their Miniſtry may give them any relation *c*. And God is alſo reciprocally the Lot and Inheritance of the Clergy, to be to them inſtead of all the things from which the Purity and Holineſs of this Miniſtry ought to wean their Affections. It was to foretel, and to repreſent this Duty of the Holineſs of the Miniſters of the Church of the New Covenant, that in the Old Covenant God having made choice of the *Levites* for the Prieſthood, would not let them have any ſhare in the Partition of the Land which was promiſed to the People of the *Jews*; telling them that he himſelf would be their Part, and their Inheritance *d*; and leaving them only Places to dwell in *e*, and the Tenths for their Subſiſtence *f*.

a Κλῆρος.

b Clericus qui Chriſti ſervit Eccleſiæ interpretetur primo vocabulum ſuum, & nominis definitione prolata, nitatur eſſe quod dicitur. Si enim Κλῆρος Græce, Sors Latine appellatur, propterea vocantur Clerici, vel quia de ſorte ſunt Domini, vel quia Dominus ſors, id eſt, pars Clericorum eſt. Qui autem vel ipſe pars Domini eſt, vel Dominum partem habet, talem ſe exhibere debet, ut ipſe poſſideat Dominum, & poſſideatur a Domino. Qui Dominum poſſidet, & cum Propheta dicit, *pars mea Dominus*, nihil extra Dominum habere poteſt. Quod ſi quidpiam aliud habuerit præter Dominum, pars ejus non erit Dominus. Verbi gratia, ſi aurum, argentum, ſi poſſeſſiones, ſi variam ſupellectilem, cum iſtis partibus Dominus fieri pars ejus non dignatur. 12. *q.* 1. *c.* 5.

c Duo ſunt genera Chriſtianorum: eſt autem unum genus quod mancipatum divino officio, & debitum contemplationi, & orationi, ab omni ſtrepitu temporalium ceſſare convenit, ut ſunt Clerici & Deo devoti, ut videlicet converſi Κλῆρος enim Græce, Latine Sors. Inde hujuſmodi homines vocantur Clerici, id eſt, ſorte electi. Omnes enim Deus in ſuos elegit. Hi namque ſunt reges, id eſt, ſe & alios in virtutibus regentes, & ita in Deo regnum habent. 12. *q.* 1. *c.* 7.

De quibus probabilis conjectura non ſit, eos ſæcularis judicii fugiendi fraude, ſed ut Deo fidelem cultum præſtent, hoc vitæ genus elegiſſe. *Conc. Trid. Seſſ.* 23. *cap.* 4. *de reform.*

d *And the Lord ſpake unto* Aaron, *Thou ſhalt have no Inheritance in their Land, neither ſhalt thou have any part among them:* I am thy Part, and thine Inheritance *among the Children of* Iſrael. Numb. 18. 20.

The Prieſts the Levites, *and all the Tribe of* Levi, *ſhall have no part nor inheritance with* Iſrael: *they ſhall eat the Offerings of the Lord made by Fire, and his Inheritance. Therefore ſhall they have no Inheritance among their Brethren: the Lord is their Inheritance, as he hath ſaid unto them.* Deuter. 18. 1, 2.

Cui portio Deus eſt, nihil debet curare, niſi Deum: ne alterius impediatur neceſſitatis munere: quod enim ad alia officia confertur, hoc religionis cultui, atque huic noſtro officio decerpitur. Hæc enim vera eſt ſacerdotis fuga, abdicatio domeſticorum, & quædam alienatio chariſſimorum: ut ſuis ſe abneget, qui ſervire Deo elegerit. 12. *q.* 1. *c.* 6.

Hujuſmodi homines vocantur Clerici, id eſt, ſorte electi. Omnes enim Deus in ſuos elegit. 12. *q.* 1. *c.* 7.

e *Command the Children of* Iſrael, *that they give unto the* Levites *of the Inheritance of their Poſſeſſion, Cities to dwell in: and ye ſhall give alſo unto the* Levites *Suburbs for the Cities round about them.* Numb. 35. 2.

The Cities of the Levites, *and the Houſes of the Cities of their poſſeſſion, may the* Levites *redeem at any time.* Levit. 25. 32.

f *And behold I have given the Children of* Levi *all the tenth in* Iſrael, *for an Inheritance, for their ſervice which they ſerve, even the ſervice of the Tabernacle of the Congregation.* Numb. 18. 21.

Under

Under this Name of Clergy are comprehended all ſorts of Eccleſiaſticks; and by the appellation of Eccleſiaſticks is underſtood all Perſons ſeparated from the State of ſimple Laymen, by an expreſs deſtination to the Worſhip of God, whether it be in ſome of the Holy Orders, or in ſome inferior Order, or by the Tonſure and the Eccleſiaſtical Habit *g*, whether they have ſome Benefice, or have none at all. For by the bare Tonſure, the Biſhop has given them an entrance into the Church, and placed them in the Eccleſiaſtical State, telling them that the Lord ſhould be their Portion: which preſuppoſes that they ſhall perſevere therein. For many, after the Tonſure, quit this firſt Engagement, and return to the Rank of Laymen. Thus we give the Rank and Name of Eccleſiaſticks, only to thoſe, who being admitted into the Church by the Tonſure, do imbrace that Profeſſion, and retain and carry the Marks of it.

There is this in common to the Clergy and to the Laity in every Catholick Country, that they compoſe all of them together two different Bodies, of which every one is a Member; The Body Spiritual of the Church, and the Body Politick of the State: for all the Laymen of a State are, as well as the Clergy, Members of the Church; and all the Clergy, as well as the Laity, are Members of the Body Politick, and Subjects of the Prince. But there is this difference between theſe two Bodies, that the Spiritual Body, which is made up of the Clergy and Laity in a Kingdom, makes a part of the Body of the univerſal Church, which reaches to the whole Univerſe, and which being only one, comprehends all the Catholicks of all Countries, whether Clergymen or Laymen; whereas the Politick Body of a State has its Limits within its own Territories, under the Government of its Prince, and independent of all others in matters Temporal: ſo that the Clergy and Laity who are under the Government of one Prince, are Members of no other Body Politick; but all the Clergymen and Laymen of all the Kingdoms and Churches in the World, are united and linked together as to Spirituals, in ſuch a manner as that they compoſe all of 'em together only one Church, the Unity of which conſiſts in this, that all the Nations have been called to one and the ſame Faith, to one and the ſame Law of one only God in one only Religion, which he has eſtabliſhed and taught unto Men by his only Son, which is preached in all places, and is perpetuated throughout all Ages, by the bare Miſſion of his Apoſtles and their Succeſſors, under one ſole Head of the ſaid Church, Succeſſor of St. *Peter*, upon whom Jeſus Chriſt hath founded it, and which he has always governed, and will govern to after Ages, by a Series of Succeſſors of that firſt viſible Head, and by the channel of the ſaid Miſſion, which nothing can ever interrupt, and to which nothing ſtrange or foreign can be united.

It may not be amiſs to remark on the diſtinction of Clergymen and Laymen, this difference between theſe two Bodies of the Church and the State; That with reſpect to the Church, no Layman is capable of exerciſing in it any Spiritual Miniſtry, whereas many Clergymen exerciſe in the State Functions that are merely Temporal; as, for inſtance, the Eccleſiaſtical Judges in the Temporal Courts of Juſtice in *France*, and the Officials, in reſpect of the Juriſdiction which the Princes have granted to the Church in relation to Temporal concerns among Clergymen.

Since it is no part of the deſign of this Book, to explain in particular all the diſtinctions of Eccleſiaſticks according to the difference of their Dignities, of their Miniſtry, of their Functions; but only to give a general Idea of them with reſpect to the Laws made by Chriſtian Princes in relation to Eccleſiaſtical matters; we ſhall therefore limit according to this view the diſtinctions of Eccleſiaſticks, which we ſhall make here.

We muſt in the laſt place obſerve on the word *Clergy*, that altho it agrees to the Univerſal Church, according to the Etymology of the word, as it has been explained in the beginning of this Preamble, and according to the Canons there cited; yet in *France* the word Clergy is commonly made uſe of, only to ſignify either the whole Clergy of the Kingdom, or the Clergy of each Dioceſs.

[‘ In this Title of the Clergy, there are many ‘ things not applicable to the Clergy of the Church ‘ of *England*. For our Reformation from Popery ‘ has freed us from all manner of Subjection or ‘ Subordination to the See of *Rome*; and has laid ‘ aſide ſeveral Eccleſiaſtical Dignities, ſuch as Ab-
‘ bots

g Generaliter Clerici nuncupantur omnes, qui in Eccleſia Chriſti deſerviunt, quorum gradus & nomina ſunt hæc, Oſtiarius, Pſalmiſta, Lector, Exorciſta, Acolytus, Subdiaconus, Diaconus, Presbyter, Epiſcopus. 21. *d.* c. 1.

' bots and Priors; as alſo the inferior Orders of ' Eccleſiaſticks, and many uſeleſs Ceremonies ' which are ſtill retained in the Church of *Rome*: ' However, we have not thought proper to leave ' out, or to alter any thing in the Articles which ' explain theſe matters; it being our Intention in ' this Tranſlation not to deviate from the Original; ' and altho ſome of theſe things may be thought of ' no preſent uſe or ſervice in our Reformed ' Church, yet the knowledge of them muſt be ' entertaining to ſuch as are curious to know the ' Hierarchy and Diſcipline of other Churches, as ' well as that of our own.]

SECT. I.

The Diſtinction of Clergymen.

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I.

1. The Pope, Head of the Univerſal Church, is no Member of the Clergy of any of the States ſubject to Temporal Princes.

WE are not to comprehend as a Member of the Body of the Clergy of any of the States ſubject to Temporal Princes, the Sovereign Pontiff, the Succeſſor of St. *Peter*. For beſides that the height of a Dignity ſo diſtinguiſhed renders him Head of the Univerſal Church, the common Father of all the Faithful, and even of all the Princes in the whole Univerſe; he himſelf is the Temporal Prince of the State wherein he has his See, that Temporal Dominion having been united by the Divine Providence, and the Bounty of Princes, to the Spiritual Power he holds from God *a*.

a In patrimonio beati Petri Apoſtolica ſedes, & ſummi Pontificis auctoritatem, & ſummi Principis exequitur poteſtatem. *c.* 13. *Qui filii ſint legitimi.*

II.

2. A Cardinal may be of another Clergy beſides that of Rome.

Altho the Cardinals who compoſe the Sacred College be by virtue of that quality in a Rank which ties them to the Church of *Rome*; yet ſuch of them as are Biſhops, are likewiſe of the Body of the Clergy of the State in which their Biſhoprick is ſituated *b*.

b ' A Cardinal Biſhop has his Rank, both in ' the Sacred College, and among the Clergy of his ' Biſhoprick.

III.

3. Patriarchs, Archbiſhops, and Biſhops have each their Sees in divers places.

The Patriarchs, the Archbiſhops and Biſhops, have every one of them their Sees in divers places, where they exerciſe the Apoſtolical Functions of their Dignities. And they are in their reſpective Sees the firſt of all the Clergy according to their Order among themſelves *c*.

c ' It is neceſſary to diſtinguiſh the ſeveral ' Senſes of the word Clergy, which have been re- ' marked at the end of the Preamble of this Title. *V. cap.* 4. *Seſſ.* 23. *Concil. Trid.*

IV.

4. Paſtoral Functions.

The Paſtoral Functions are diſpenſed by the Patriarchs, the Archbiſhops and Biſhops, whoſe principal Miniſtry is to confer the Holy Ghoſt by the impoſition of hands, to ordain Prieſts, Deacons, Subdeacons by Holy Orders, and other inferior Miniſters of the Church, by the leſſer Orders, and to receive all of them into the Church by the Tonſure, to adminiſter all the Sacraments, and to bear the weight of the Paſtoral Care of Souls. Theſe are the ſeveral Functions of Epiſcopacy which conſtitute the Order of the Church, in which it is neceſſary to diſtinguiſh thoſe who under the Biſhops, and together with them, partake in the Functions of the Paſtors of Souls *d*.

d Jeſus ſaith unto him, Feed my Sheep. Joh. 21. 17. *Wo be to the Shepherds of* Iſrael *that do feed themſelves: ſhould not the Shepherds feed the Flocks?——And they were ſcattered becauſe there is no Shepherd: and they became meat to all the Beaſts of the Field, when they were ſcattered. My Sheep wandred throout all the Mountains, and upon every high Hill: yea, my Flock was ſcattered upon all the face of the Earth, and none did ſearch or ſeek after them. Therefore ye Shepherds, hear the word of the Lord; As I live, ſaith the Lord God, ſurely becauſe my Flock became a Prey, and my Flock became Meat to every Beaſt of the Field, becauſe there was no Shepherd, neither did my Shepherds ſearch for my Flock, but the Shepherds fed themſelves, and fed not my Flock.* Ezek. 34. 2, 5, 6, 7, 8.

Now

Now therefore, O Brethren, let us ſhew an Example to our Brethren, becauſe their Hearts depend upon us, and the Sanctuary, and the Houſe, and the Altar reſt upon us. Judith 8. 24.

All ye Beaſts of the Field, come to devour, yea all ye Beaſts in the Foreſt. His Watchmen are blind; they are all ignorant, they are all dumb Dogs, they cannot bark; ſleeping, lying down, loving to ſlumber. Yea, they are greedy Dogs which can never have enough, and they are Shepherds that cannot underſtand; they all look to their own Way, every one for his Gain, from his Quarter. Iſaiah 56. 9, 10, 11.

Preach the Word, be inſtant in ſeaſon, out of ſeaſon, reprove, rebuke, exhort with all Long-ſuffering and Doctrine.——But watch thou in all things, endure Afflictions, do the Work of an Evangeliſt, make full Proof of thy Miniſtry. 2 Tim. 4. 2, 5.

See *Rom.* ch. 10.

Howl ye Shepherds, and cry. Jer. 25. 34.

Moreover in Jeruſalem *did* Jehoſhaphat *ſet of the* Levites, *and of the Prieſts, and of the Chief of the Fathers of* Iſrael, *for the Judgment of the Lord, and for Controverſies, when they returned to* Jeruſalem. 2 Chron. 19. 8.

V.

5. *Canons and Prebendaries of Cathedral Churches.*

The Dignity of Epiſcopacy has occaſioned the Diſtinction of Cathedral Churches, that is to ſay, the Churches where the Biſhops have their See, and where the Cathedral Churches are, which are compoſed of Canons or Prebendaries, the chief of whom have Names of Dignity, ſuch as that of Dean, Abbot, Provoſt, or others, according to the Uſage of Places. And theſe Canons or Prebendaries compoſe Bodies, every one whereof has always the Biſhop for its Head, and which are deſtined for two principal Uſes: one of which is to exerciſe during the Vacancy of the Epiſcopal See, the Functions of the voluntary Juriſdiction, which the Biſhops may commit to their Vicars General; and that of the contentious Juriſdiction which is exerciſed in the Officialities. And the other Uſe of Cathedral Churches is to celebrate Divine Service; and they had formerly the Right, which many Chapters of the Cathedral Churches ſtill retain, which is that of chuſing the Biſhop *e*: But in *France* the Right of Nomination to the Biſhopricks has been granted to the Kings by the Church. And this Right may be conſidered in the King's Perſon, as agreeing to his Quality of Head of the People of all the Churches within his Dominions, becauſe of the Share which the People of every Church formerly had in the Election of a Biſhop in the Caſe of a Vacancy *f*.

e Mandamus, quatenus cum conſtet, electionem de præpoſito memorato a majori & ſaniori parte capituli celebratam fuiſſe, publicatam etiam & ſubſcriptam, ſi dictus præpoſitus eidem electioni conſenſerit, ut per mutuum conſenſum eligentium & electi, quaſi conjugale vinculum ſpiritualiter ſit contractum. C. 21. *v. ſeq. de elect. & el. poteſt.*

f Nulla ratio ſinit ut inter Epiſcopos habeantur, qui nec a Clericis ſunt electi, nec a plebibus expetiti, nec a Provincialibus Epiſcopis cum Metropolitani judicio conſecrati. Unde cum ſæpe quæſtio de male accepto honore naſcatur; quis ambigat nequaquam iſtis eſſe tribuendum. *Diſt.* 62. *C.* 1.

Noſſe tuam fraternitatem volumus ad noſtras aures fore perventum; Immolenſem Epiſcopum ab hac luce migraſſe, in cujus ſucceſſoris electione populi diviſionem proveniſſe audivimus, quod quia ſæpe contingere ſolet (quærentibus ſingulis quæ ſua ſunt, non quæ Jeſu Chriſti) non adeo miramur, veruntamen in hoc tuam plurimum oportet adhiberi ſolicitudinem, ut convocato clero & populo, talis ibi, eligatur per Dei miſericordiam, cui ſacri non obvient Canones. Sacerdotum quippe eſt electio, & fidelis populi conſenſus adhibendus eſt, quia docendus eſt populus, non ſequendus. *Diſt.* 63. *C.* 12.

'The Chapters of the Cathedral Churches have 'had a quite different Origin from the State in 'which they are at preſent. But it is not the De'ſign of this Book to enter into this Detail, which 'is a part of the Eccleſiaſtical Hiſtory.

[In *England* the manner of electing Biſhops is at preſent thus: Upon the Avoidance of any Biſhoprick, the King grants to the Dean and Chapter of the Cathedral Church belonging to the ſaid Biſhoprick, a Licence under the Great Seal to proceed to the Election of a Biſhop, and therewith ſends a Letter Miſſive, containing the Name of the Perſon whom they ſhall chuſe. By virtue of which Licence the ſaid Dean and Chapter muſt with all ſpeed in due form elect the ſaid Perſon named in the Letter Miſſive, and no other. And if they defer their Election above twelve Days after ſuch Licence, then the King may nominate and preſent by his Letters Patent under the Great Seal, ſuch Perſon to the ſaid Biſhoprick as he ſhall think fit. *Stat.* 25 *Hen.* VIII. *cap.* 5.]

VI.

6. *Divines and Preceptors.*

We may diſtinguiſh among the Canons of Cathedral Churches, thoſe who are called Theologues or Divines, to whom the Ordinances in *France* have appropriated the Income of a Canonſhip, that they may preach on Sundays and the great Feaſts, and give three times every Week publick Lectures on the Holy Scripture. And the ſame Ordinances have likewiſe appropriated the Revenue of another Canonſhip for the Maintenance of a Preceptor, who may inſtruct *gratis* the young Children; and they have alſo directed the like Eſtabliſhments to be in the Collegiate Churches where there are more than ten Canons *g*.

g For Eſdras *had very great Skill, ſo that he omitted nothing of the Law and Commandments of the Lord, but taught all* Iſrael *the Ordinances and Judgments. Now the Copy of the Commiſſion which was written from* Artaxerxes *the King, and came to* Eſdras *the Prieſt and Reader of the Law of the Lord, is this that followeth.* 1 Eſdras 8. 7, 8.

'In every Cathedral or Collegiate Church there 'ſhall be reſerved a Prebend for a Doctor in Divi'nity,

' nity, which ſhall be conferred upon him by the Archbiſhop, Biſhop or Chapter; on condition that he ' ſhall preach and teach the Word of God on every ' Sunday and the great Feſtivals, and on the other ' Days he ſhall three times in the Week read a ' publick Lecture on the Holy Scripture: And all ' the Canons ſhall be obliged and compelled to attend ſuch Sermons and Lectures on pain of forfeiting their Shares in the Diſtribution. *Ordinance of* Orleance, *Art.* 8. See the following Article of the ſame Ordinance. See the 33d and 34th Articles of that of *Blois*.

De quibuſdam locis ad nos refertur, neque Magiſtros neque curam inveniri pro ſtudio literarum, idcirco in univerſis Epiſcopis ſubjectiſque plebibus, & aliis locis, in quibus neceſſitas occurrerit; omnino cura & diligentia adhibeatur, ut Magiſtri & Doctores conſtituantur, qui ſtudia litterarum, liberaliumque artium dogmata aſſidue doceant: quia in his maxime divina manifeſtantur atque declarantur mandata. *Diſt.* 37. *C.* 12.

Quoniam Eccleſia Dei ſicut pia mater providere tenetur, ne pauperibus qui parentum opibus juvari non poſſunt, legendi & proficiendi opportunitas ſubtrahatur, per unamquamque Cathedralem Eccleſiam, Magiſtro, qui Clericos ejuſdem & ſcholares pauperes gratis doceat, competens aliquod beneficium præbeatur. *C.* 1. *de Magiſtris & ne aliquid.*

Quia nonnullis propter inopiam, & legendi ſtudium & opportunitas proficiendi ſubtrahitur, in Lateranenſi Concilio pia fuit conſtitutione proviſum, ut per unamquamque Cathedralem Eccleſiam, Magiſtro, qui ejuſdem Eccleſiæ Clericos, alioſque ſcholares pauperes gratis inſtrueret, aliquod competens beneficium præberetur: quo & docentis relevaretur neceſſitas, & via pateret diſcentibus ad doctrinam. Verum quoniam in multis Eccleſiis id minime obſervatur, nos prædictum roborantes ſtatutum, adjicimus, ut non ſolum in qualibet Cathedrali Eccleſia, ſed etiam in aliis, quarum ſufficere poterunt facultates, conſtituatur Magiſter idoneus, a Prælato cum Capitulo ſeu majore & ſaniori parte Capituli eligendus, qui Clericos Eccleſiarum ipſarum gratis in Grammatica facultate ac alios inſtruat juxta poſſe. Sane Metropolis Eccleſia Theologum nihilominus habeat, qui Sacerdotes & alios in ſacra pagina doceat: & in his præſertim informet, quæ ad curam animarum ſpectare noſcuntur. Aſſignetur autem cuilibet Magiſtrorum a Capitulo unius præbendæ proventus: & pro Theologo Metropolitano tantundem. *C.* 4. *eod.*

V. T. h. T.

Sacroſancta Synodus——ſtatuit, & decrevit; quod in Eccleſiis in quibus præbenda, aut præſtimonium, ſeu aliud quovis nomine nuncupatum ſtipendium pro Lectoribus ſacræ Theologiæ deputatum reperitur, Epiſcopi, Archiepiſcopi, Primates, & alii locorum Ordinarii, eos qui præbendam, aut præſtimonium, ſeu ſtipendium hujuſmodi obtinent ad ipſius ſacræ Scripturæ expoſitionem & interpretationem per ſeipſos, ſi idonei fuerint, alioquin per idoneum ſubſtitutum, ab ipſis Epiſcopis, Archiepiſcopis, Primatibus, & aliis locorum Ordinariis eligendum, etiam per ſubtractionem fructuum, cogant & compellant——Et quatenus in ipſis Eccleſiis nulla, vel non ſufficiens præbenda foret, Metropolitanus, vel Epiſcopus ipſe per aſſignationem fructuum alicujus ſimplicis beneficii ejuſdem tamen debitis ſupportatis oneribus, vel per contributionem beneficiatorum ſuæ civitatis & Diœceſis, vel alios prout commodius fieri poterit, de Capituli Concilio ita provideat, ut ipſa ſacræ Scripturæ lectio habeatur——Eccleſiæ vero quarum annui proventus tenues fuerint, & ubi tam exigua eſt Cleri & populi multitudo, ut Theologiæ lectio in eis commode haberi non poſſit; ſaltem Magiſtrum habeant, ab Epiſcopo cum Concilio Capituli eligendum, qui Clericos, alioſque ſcholares pauperes Grammaticam gratis doceat; ut deinceps ad ipſa ſacræ Scripturæ ſtudia, annuente Deo tranſire poſſint, &c. *Conc. Trid. Seſſ.* 5. *cap.* 1.

VII.

Seeing the Holy Orders, and the Functions which are the Conſequences thereof, and more eſpecially thoſe which belong to Paſtors who have the Cure of Souls, who ought to be the Light of the World by their Doctrine, and the Salt of the Earth by the Holineſs of their Lives, demand Qualifications ſuitable to this Miniſtry, and which cannot be acquired but by an Education and Study proper to prepare the Youth for that holy Miniſtry; the Biſhops are obliged to have in their Dioceſſes Seminaries for that purpoſe, purſuant to the Direction of the Council of *Trent*, and of the Ordinances *h*. And the Conſequence

7. *Seminaries of Biſhops.*

h Cum adoleſcentium ætas, niſi recte inſtituatur, prona ſit ad mundi voluptates ſequendas; niſi a teneris annis ad pietatem & religionem informetur, antequam vitiorum habitus totos homines poſſideat, nunquam perfecte, ac ſine maximo ac ſingulari propemodum Dei omnipotentis auxilio in diſciplina Eccleſiaſtica perſeveret, ſancta Synodus ſtatuit ut ſingulæ Cathedrales, Metropolitanæ, atque his majores Eccleſiæ, pro modo facultatum, & Diœceſis amplitudine certum puerorum ipſius civitatis & Diœceſis, vel ejus provinciæ, ſi ibi non reperiantur, numerum in Collegio ad hoc prope ipſas Eccleſias vel alio in loco convenienti, ab Epiſcopo eligendo, alere, ac religioſe educare, & Eccleſiaſticis diſciplinis inſtituere teneantur. *Conc. Trid. ſeſſ.* 23. *c.* 18. *de reform.*

' The Archbiſhops and Biſhops in their Dioceſſes ' ſhall be careful and diligent to erect Seminaries, ' purſuant to the firſt Article of the Edict of *Me*' *lun*; and in order to facilitate the Execution ' thereof in this Particular, all Benefices of more ' than ſix hundred Livres of yearly Revenue, ſhall ' be obliged to contribute thereto. *Ordinance of* ' Lewis XIII. *made at* Paris *in* 1614. *See that of* ' Blois, *Art.* 24.

Cum non deceat eos, qui divino miniſterio adſcripti ſunt, cum ordinis dedecore mendicare, aut ſordidum aliquem quæſtum exercere; compertumque ſit complures pleriſque in locis ad ſacros Ordines nullo fere delectu admitti; qui variis artibus ac fallaciis confingunt ſe beneficium Eccleſiaſticum, aut etiam idoneas facultates obtinere: ſtatuit ſancta Synodus, ne quis deinceps Clericus ſæcularis, quamvis alias ſit idoneus moribus, ſcientia & ætate, ad ſacros Ordines promoveatur: niſi prius legitime conſtet, eum beneficium Eccleſiaſticum quod ſibi ad victum honeſte ſufficiat pacifice poſſidere——patrii monium vero, vel penſionem obtinentes ordinar- poſthac non poſſint, niſi illi quos Epiſcopus judicaverit aſſumendos pro neceſſitate vel commoditate Eccleſiarum ſuarum, eoque prius perſpecto patrimonium illud, vel penſionem vere ab eis obtineri, taliaque eſſe quæ eis ad vitam ſuſtentandam ſatis ſint, &c. *Conc. Trid. ſeſſ.* 21. *c.* 2.

Si quis neque ſanctis pollens moribus, vel neque a Clero populoque vocatus, vel pulſatione coactus, impudenter Chriſti Sacerdotium jam quolibet facinore pollutus, injuſto cordis amore, vel ſordidis

quence of the Functions of thoſe who have the Direction and Government of the ſaid Seminaries, deſerve that they ſhould be here diſtinguiſhed.

precibus oris, ſive comitatu, ſive manuali ſervitio, ſive fraudulento munuſculo Epiſcopalem ſeu Sacerdotalem, non lucro animarum, ſed inanis gloriæ avaritia ſultus dignitatem acceperit, & in vita ſua non ſponte reliquerit, eumque inſperata mors pœnitentem non invenerit, proculdubio in æternum peribit. 1. *q.* 1. *c.* 115.

Cum nullus debeat ordinari qui judicio ſui Epiſcopi non ſit utilis aut neceſſarius ſuis Eccleſiis, ſancta Synodus, veſtigiis ſexti Canonis Concilii Chalcedonenſis inhærendo, ſtatuit ut nullus in poſterum ordinetur, qui illi Eccleſiæ aut pio loco pro cujus neceſſitate aut utilitate aſſumitur nonadſcribatur. *Ibidem ſeſſ.* 23. *de reform. cap.* 16.

'It appears by theſe Regulations of the Council 'of *Trent*, and of the Ordinance, that the uſe of 'Seminaries is for the Education and Inſtruction of 'the Youth *a teneris annis*, and to fit and qualify 'ſome of them for Holy Orders, the Choice of 'whom ought to depend on the Qualities neceſſary 'for the faithful Diſcharge of ſo holy a Miniſtry. 'It is much to be wiſhed that theſe Regulations of 'the Council of *Trent* were obſerved with the 'greateſt Strictneſs poſſible; in which Caſe we 'ſhould not ſee ſo many Miniſters that are uſeleſs 'to the Church, and even a Burden to the Publick.

VIII.

8. *Their Vicars General.*

The Biſhops not being able to exerciſe perſonally all the Functions of their Miniſtry, they name Vicars-General, or Grand-Vicars, to whom they commit ſuch of their Functions as are capable of being diſcharged by others than themſelves; and theſe Vicars-General, or Grand-Vicars, have alſo a diſtinct Rank in the Church *i*.

i V. Tit. de Offic. Vic. in 6.

IX.

9. *Their Officials.*

Seeing the Vicars General or Grand Vicars of Biſhops exerciſe the Functions of their voluntary Juriſdiction in what relates to ſpiritual Matters, and that the Biſhops have another Juriſdiction, called a contentious Juriſdiction, and which is between all ſorts of Perſons, both Eccleſiaſticks and Laymen, in ſpiritual Affairs, ſuch as the Celebration of Marriage, and other Matters; and that they have likewiſe a Juriſdiction in Temporal Matters, that Princes have granted them in favour of Eccleſiaſticks: And ſeeing this double contentious Juriſdiction cannot, as indeed it ought not, be exerciſed by the Biſhops in Perſon, who ought to employ their Time in other Functions of much greater Importance, they appoint for the Exerciſe of the ſaid Juriſdiction Officials, who are the Judges thereof, and Surrogates or Vicegerents, who officiate as Judges in the abſence of the Officials; and likewiſe Promoters, who perform within the ſaid Juriſdiction the ſame Function which the King's Proctors, or thoſe of Lords of Mannors, do in Temporal Courts *l*.

l Licet in Officialem Epiſcopi per commiſſionem officii generaliter tibi factam cauſarum cognitio transferatur; poteſtatem tamen inquirendi, corrigendi aut puniendi aliquorum exceſſus, ſeu aliquos a ſuis beneficiis officiis vel adminiſtrationibus, amovendi, transferri nolumus in eundem: niſi ſibi ſpecialiter hæc committantur. *C.* 2. *de Offic. vic. in* 6.

X.

10. *Eccleſiaſticks who are Judges in the Temporal Courts.*

The ſame Conſideration which induced Princes to grant to the Church a Temporal Juriſdiction over all Eccleſiaſtical Perſons, has induced the Kings of *France* to eſtabliſh in the Parliaments and Preſidial Courts, ſome Eccleſiaſtical Judges, Perſons who are in Holy Orders, and who are called Eccleſiaſtical Counſellors or Judges, or Counſellors for the Church, that they may take care of the Intereſt of the Church in the Affairs wherein it may be any way concerned. And thoſe who are put into the ſaid Offices, exerciſe the ſame Functions with the other Judges, except in Criminal Cauſes, in which they do not aſſiſt, if the Crimes are puniſhable with corporal Puniſhments *m*.

m See Art. 213, 235. of the Ordinance of *Blois*.

By the Ordinance of *Lewis* XIII. made at *Paris*, it is ordained, 'That the Offices of the Eccleſiaſti-'cal Judges in the Temporal Courts cannot be re-'ſigned but to Eccleſiaſtical Perſons; and in caſe 'of the Vacancy of the ſaid Offices by Death, 'that the ſame, as likewiſe thoſe Places which ſhall 'happen to be filled by Lay Perſons, by Diſpenſa-'tion or otherwiſe, ſhall be appropriated to the 'ſaid Eccleſiaſticks, until the Number of the Ec-'cleſiaſtical Judges appointed by the Eſtabliſhment 'of the ſaid Courts ſhall be filled up.

XI.

11. *Collegiate Churches.*

The Celebration of Divine Service in the Churches being no leſs neceſſary in all other Places than in thoſe where the Biſhops have their Sees, whether it be for the publick Prayers, or for the Conſolation of the Faithful, the ſaid Service is celebrated in the Pariſh-Churches where the Number of Eccleſiaſticks is ſufficient to perform it, at leaſt on the Feſtival Days. And there are likewiſe other Churches which are called Collegiate Churches, and are founded for celebrating every day Divine Service at the proper Hours *n*.

n Statutum felicis recordationis Gregorii Papæ decimi, prædeceſſoris noſtri, de his, qui ad parochialium Eccleſiarum regimen aſſumuntur, promovendis ad ſacerdotium intra annum, alioquin eiſdem Eccleſiis ſint privati: quod cum ſit pœnale, reſtringi potius convenit, quam laxari, declaramus ad Collegiatas

legiatas Eccleſias, etiamſi aliàs parochiales extiterint, & aſſumptos ad earum regimen non extendi: ſed antiqua jura ſervari debere potius in eiſdem. *C.* 22. *de elect. & el. pot. in* 6.

XII.

12. *Eccleſiaſtical Communities.*

Beſides the Diſtinctions of Eccleſiaſticks which have been explained in the foregoing Articles; there is in the Church an infinite number of Communities of ſeveral Monaſtical Orders, and others, ſome of which have Temporal Poſſeſſions, and others are Mendicants, who are called Regulars, becauſe every one of them have their proper Rule, eſtabliſhed by their Founder; and the greateſt part of them are profeſs'd Monks, who are tied by Vows to the Obſervance of their Rule. There are likewiſe ſome Orders of Eccleſiaſtical Communities, who without taking upon them any Vow, and without the Name of Monk, have alſo their proper Rules and Habits, diſtinct from thoſe of the Religious, and from thoſe of other Eccleſiaſticks; and all the ſaid Orders and Communities have their Superiors General, and their different Functions *o*.

o 'Beſides the antient Orders of the Rules of 'St. *Benedict*, St. *Baſil*, St. *Auguſtin*, there are many others which have been eſtabliſhed in theſe 'latter days under other Rules. *V.* 18. *q.* 2. *c.* 25.

XIII.

13. *Canons Regular.*

Among the ſaid Regular Orders, there are ſome of them which are called Canons Regular, who in ſome Biſhopricks compoſe the Chapters of the Cathedral Churches *p*.

p In omnibus igitur (quantum humana permittit fragilitas) decrevimus ut Canonici Clerici canonice vivant, obſervantes divinæ Scripturæ doctrinam, & documenta Sanctorum Patrum: & nihil ſine licentia Epiſcopi ſui, vel Magiſtri eorum incompoſite agere præſumant, in unoquoque Epiſcopatu ut ſimul manducent & dormiant ut ubi his facultas id faciendi ſuppetit: vel qui de rebus Eccleſiaſticis ſtipendia accipiunt, in ſuo Clauſtro maneant, & ſingulis diebus mane primo ad lectionem veniant, & audiant, quid eis imperetur. Ad menſam vero ſimiliter lectionem audiant, & obedientiam ſecundum Canones ſuis miniſtris exhibeant. *C.* 34. *de conſecr. diſt.* 5.

XIV.

14. *Benefices held in Commendam.*

Among the ſaid Regular Orders, ſome of them have given to their Superiors the Titles of Abbots, Priors, and others, according to the Differences of their Houſes, and the different Functions of thoſe who are in the higheſt Place and Station among them; and the ſaid Titles in many of the ſaid Houſes, have paſt, without the Functions belonging to them, to thoſe who are called Abbots, or Priors, *in Commendam*, that is to ſay, who without being profeſſed Monks, have and poſſeſs, by a kind of Depoſit called *Commendam*, theſe Titles, together with a part of the Revenues of the ſaid Houſes which has been appropriated thereto. It is by reaſon of theſe Titles to which the ſaid Revenues are annexed, that we ſee in the Church that multitude of Benefices held *in Commendam* under the Names of Abbots, Priors, and other Titles; but many Regular Houſes of ſeveral Orders, have kept their Abbies, Priories, and other Titles, and they fill the ſaid Places with the Monks of their own Order; and all the Orders who have an Abbot for the Chief and General of their Order, obſerve it as a ſtanding Rule among them, to retain the ſaid firſt Place for one of their own Order, and which cannot be filled but by one who is either a profeſſed Monk or a Cardinal *q*.

q 'We only take notice here in general of that 'kind of Benefices which are *in Commendam*, 'and do not think fit to enter into the detail of the 'ſeveral ſorts of theſe *Commendams*, or to explain their Origin and Progreſs, the ſame being a 'Matter purely Hiſtorical, and foreign to the Deſign of this Book. Neither is it our buſineſs to 'explain here in what manner the Titles of Cures 'and their Revenues have paſt to others than the 'Curates, and from whence proceed the Prior-'Curates, the Primitive-Curates, whether they be 'Monks of ſeveral Orders, or Chapters, or other 'Houſes to which the Cures have been annexed, 'reſerving only a ſmall Portion of the Revenue to 'thoſe who ſerve the Cure under the Name which 'is given them of perpetual Vicars.

'We ſhall not take up time to explain here the 'Diſtinction of the ſeveral Benefices which are 'called Regular, becauſe they are poſſeſſed by 'Monks who have them as a Title, and enjoy 'them during their Lifetime. All theſe Matters 'take up a vaſt Detail, which it is not our buſineſs to explain here.

XV.

15. *Knights of* Malta, *and other Knights of the like kind.*

We may reckon in the number of Religious Orders the Military Order of the Knights of *Malta*, and other Orders of the like kind; for the ſaid Knights are bound by Vows: upon which account the Church gives them the Name of Religious; which diſtinguiſhing them from Laymen, in the ſame manner as other Religious Perſons are, gives them a Rank in the Eccleſiaſtical State *r*.

r Cum & plantare ſacram Religionem, & plantatam fovere modis omnibus debeamus, nuſquam hoc melius exequimur, quam ſi nutrire ea, quæ recta ſunt, & corrigere, quæ profectum virtutis impediunt, commiſſa nobis auctoritate curemus. Fratrum autem, & Coepiſcoporum noſtrorum conqueſtione comperimus, quod fratres Templi, & Hoſpitalis, & alii Religioſi, &c. *C.* 3. *de privilegiis.*

XVI.

16. *Nuns.* We may place in fine in the Eccleſiaſtical State the Nuns of ſeveral Orders, who are ſeparated from the World, and conſecrated to God by ſolemn Vows *s*, which engage them to a Regular Life, and to the Celebration of Divine Service, whereof ſome of them make particular profeſſion under the name of Canoneſſes: ſo that as it is by the Profeſſion which Eccleſiaſticks make to take God for their Portion, that they are particularly ſet apart for the Worſhip of God, and diſtinguiſhed from Laymen; the ſame Profeſſion made by Nuns ought to have with regard to them the like Effect *t*, in proportion to the Functions proper to their Sex.

s 'The ſacred Canons give the name of Con-'ſecration to the Ceremony of giving the Veil to 'Nuns.

Placuit ut ante 25. annos ætatis ne Diaconi ordinentur, nec virgines conſecrentur. 20. *q.* 1. *c.* 14. *V. diſt.* 77. *c.* 5.

t Quæcumque tamen a nobis in omnibus quæ prius & quæ nunc prolata ſunt, ſacris noſtris conſtitutionibus ſunt ſancita, de Clericis, aut Monachis, aut Monaſteriis, hæc communia ponimus & in maſculis & in fœminis, & monaſteriis & aſceteriis: non diſcernentes quantum ad iſtos maſculum aut fœminam: eo quod ſicut prædiximus, unum omnia in Chriſto conſiſtant. *Nov.* 5. *c.* 13. §. 1.

XVII.

17. *Eccleſiaſtical Profeſſors in the Univerſities.* Seeing the Univerſities are Bodies compoſed partly of Eccleſiaſticks and partly of Laymen, as has been remarked in another place *u*; the Profeſſors who teach there Divinity, or Church-Hiſtory, are of the Order of the Clergy, not only becauſe of their Profeſſion, but becauſe they are really and truly Clergymen.

u See Tit. 17. Sect. 1. Art. 1.
See the laſt Article of the following Section.

SECT. II.

Of the Duties of Clergymen, with reſpect to the publick Order.

The CONTENTS.

1. *The Foundation of theſe Duties, the Holineſs of the Eccleſiaſtical Miniſtry.*
2. *The Duty of Princes, to ſee that Clergymen perform their Duties which relate to the Publick.*
3. *The Right and Duty of Princes to maintain the Diſcipline of the Church.*
4. *The chief Duties of Paſtors of Souls, are Learning, and a good Life.*
5. *Modeſty in their Apparel and Furniture.*
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8. *The Duty of Reſidence.*
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11. *Diſintereſtedneſs in Clergymen.*
12. *Plurality of Benefices is unlawful.*
13. *The adminiſtration of the Sacraments ought to be gratuitous.*
14. *A good uſe of the Eccleſiaſtical Revenues.*
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I.

1. *The Foundation of theſe Duties, the Holineſs of the Eccleſiaſtical Miniſtry.*

THE Duties to be explained here are thoſe which have relation to the publick Order of the Society. But altho this Idea ſeems not to take in the general Duty of Clergymen, which obliges them to ſuch a Purity in Life and Converſation as may be ſuitable to the Holineſs of their Miniſtry; yet we ought to preſuppoſe this primary Duty as the Foundation of thoſe which are the ſubject matter of this Section; and it hath alſo its relation to the Publick, it being the Duty of Clergymen to edify others by their good Example *a*.

a *Be ye Holy, for I am Holy.* 1 Pet. 1. 16. *I am the Lord your God: ye ſhall therefore ſanctify your ſelves, and ye ſhall be Holy, for I am Holy: neither ſhall ye defile your ſelves with any manner of creeping thing that creepeth upon the Earth.* Levit. 11. 44. Ibid. 19. 2. & 20. 7. 1 Cor. 3. 9.

'If Holineſs be enjoined to all the faithful in 'general, much more is it to Clergymen, whoſe 'Duty it is to inſtruct others by their Life and 'Converſation, as well as by their Doctrine.

Scire Prælati debent, qui ſi perverſa unquam perpetrant, tot mortibus digni ſunt, quot ad ſubditos ſuos perditionis exempla tranſmittunt; unde neceſſe eſt ut tanto ſe cautius a culpa cuſtodiant, quanto per prava quæ faciunt non ſoli moriuntur. 11. *q.* 1. *c.* 3.

'Altho this Canon reſpects Clergymen who 'have the Cure of Souls, yet it may be ap-'plied to all who exerciſe any Miniſterial Function 'in which they ought to ſhew a good Example.

V. diſt. 36. *cap.* 1. *Ibidem* 38. *cap.* 3. *Conc. Trident. Seſſ.* 23. *de refor. cap.* 14. *Ibidem, Seſſ.* 25. *c.* 18.

See Art. 4. of the foregoing Section, and the Texts there quoted.

II.

2. *Duty of Princes to ſee that Clergymen perform their Duties relating to the Publick.*

Altho the Duty of Edification and good Example which Clergymen owe to the faithful, extends in general to all the ſeveral ſteps of their Conduct which may come to the knowledge of any Perſon whatſoever, ſeeing they ought not to give to any body a bad Example; yet we are not here to enter upon this detail; our Buſineſs being to confine our ſelves to ſuch Duties of Clergymen as have a preciſe relation to the

the publick Order of the Society, and which may deſerve that Princes ſhould imploy their Authority to ſee them punctually obſerved *b*.

b See the following Article.

III.

3. The Right and Duty of Princes, to maintain the Diſcipline of the Church.

This Duty of Princes, to have a watchful Eye over the Clergy in the diſcharge of ſuch of their Functions as have relation to the publick Order, is equally founded both on the Obligation Princes are under to imploy for the Service and Glory of God the Power they hold of him, in every thing which may concern Religion, and may want the aſſiſtance of that Power, and of the Sovereign Authority, which chiefly reſpects the publick Order. Thus in the Old Teſtament the good Princes took care to ſee that the Prieſts performed their Duties *c*. Thus the firſt Chriſtian Emperors *d*, and in imitation of them our Kings *e*, have joined their Power to the Authority of the Church to enforce the obſervance of the Laws and Diſcipline thereof, and have backed by their Laws thoſe touching the Duties of Clergymen, which have moſt relation to the Publick; having judged, *that the Zeal which they had for Religion, the good of the Church, the Dignity of the Prieſthood, and the Welfare of the Publick, obliged them to contribute all in their Power to the maintenance of the ſaid Diſcipline f*: and it is with this View that the Kings of *France* have made the ſeveral Laws which ſhall be explained in the following Articles, and that they therein ſtile themſelves Protectors, Guardians, Conſervators and Executors of what the Church teaches and decrees *g*.

c ‘ And *Jehoaſh* ſaid to the Prieſts, All the Mo-
‘ ney of the dedicated things that is brought into
‘ the Houſe of the Lord, even the Money of every
‘ one that paſſeth the account, the Money that e-
‘ very Man is ſet at, and all the Money that
‘ cometh into any Man's Heart to bring into the
‘ Houſe of the Lord; let the Prieſts take it to
‘ them, every Man of his Acquaintance. 2 *Kings*
‘ 12. 4, 5.

‘ And he brought in the Prieſts, and the *Le-*
‘ *vites*, and gathered them together into the Eaſt
‘ Street; and ſaid unto them, Hear me, ye *Le-*
‘ *vites*, ſanctify now your ſelves, and ſanctify the
‘ Houſe of the Lord God of your Fathers, and
‘ carry forth the filthineſs out of the Holy Place.
‘ 2 *Chron.* 29. 4, 5.

d Omni innovatione ceſſante, vetuſtatem & Canones priſtinos Eccleſiaſticos, qui uſque nunc tenuerunt etiam per omnes Illyrici provincias ſervari præcipimus: ut ſi quid dubietatis emerſerit id oporteat non abſque ſcientia viri reverendiſſimi ſacroſanctæ legis Antiſtitis Eccleſiæ urbis Conſtantinopolitanæ, (quæ Romæ veteris prærogativa lætatur) conventui ſacerdotali ſanctoque judicio reſervari. *l. 6. C. de ſacroſanct. Eccl.*

Qui ſub prætextu Decanorum ſeu Collegiatorum, cum id munus non impleant, aliis ſe muneribus conantur ſubtrahere, eorum fraudibus credimus eſſe obviandum: ne quis ſub ſpecie muneris, quod minus exequitur, alterius muneris oneribus relevetur: ne argentariorum vel nummulariorum munera declinentur ab his, qui dici, tantummodo Collegiati vel Decani feſtinant: ideoque ſi quis eorum ſub nudæ appellationis velamine Collegiatum ſeu Decanum ſe appellat; ſciat pro ſe alium ſubrogandum, qui prædicto muneri ſufficiens approbetur: ſubrogatione videlicet loco memoratorum vel eorum qui moriuntur, primatum ejus, qui ſubrogatur, admiſſa judicio: ab hac diſpoſitione nemine ſe excuſante ſacroſanctarum Eccleſiarum reverentia. *l. 9. eod.*

See the firſt Titles of the Code of *Juſtinian*, and of that of *Theodoſius*.

e See the Treatiſe of Laws, *Chap.* 10. *Numb.* 12.

f Sæpe quidem ipſis talia cuſtodire debere prædicavimus. Videntes autem de his factam nobis relationem in neceſſitatem incidimus, ad præſentem veniendi legem, tum propter noſtrum ſuper Religionis ſtudium, tum etiam propter ſacerdotii ipſius ſimul & communis reipublicæ utilitatem. *l.* 34. §. 2. *C. de Epiſc. aud.*

g See the Ordinance of *Francis* I. in *July*, 1543.

IV.

4. The chief Duties of Paſtors of Souls, are Learning, and a good Life.

The principal Duties of thoſe who exerciſe the Functions of Paſtors of Souls, are a good Life, and the knowledge of their Miniſtry, that they may exerciſe it with Mildneſs and Charity, with Courage, Steddineſs, and a Zeal for Truth and Juſtice: and as ſuch who are called to fill thoſe Places, ought to have theſe eſſential Qualifications, that they may diſpenſe to the faithful the Lights of this Knowledge, and join a good Example to their Inſtructions; ſo is it likewiſe the Duty of Prelates, Patrons and others, who are any way concerned in filling up the places of this Miniſtry, to be as careful as poſſible to nominate only ſuch as theſe Qualities have rendred worthy of the Miniſtry *h*.

h ‘ We require and command all Prelates, Pa-
‘ trons and ordinary Collators to nominate to
‘ Eccleſiaſtical Benefices, and even to Curacies and
‘ others having the Cure of Souls, Perſons of a
‘ good Life and Learning. *Ordinance of Orleans,*
‘ *art.* 4.

For the Prieſts Lips ſhould keep Knowledge, and they ſhould ſeek the Law at his Mouth. Mal. 2. 7.

If there ariſe a matter too hard for thee in Judgment, between Blood and Blood, between Plea and Plea, and between Stroke and Stroke; being matter of Controverſy within thy Gates: then ſhalt thou ariſe, and get thee up into the place which the Lord thy God ſhall chooſe. Deut. 17. 8.

A Biſhop then muſt be blameleſs, the Huſband of one Wife, vigilant, ſober, of good Behaviour, given to Hoſpitality, apt to teach, not given to Wine, no ſtriker, not greedy of filthy Lucre, but Patient, not a Brawler, not Covetous; one that ruleth well his own Houſe, having his Children in ſubjection with all Gravity.——Moreover, he muſt have a good Report of them which are with-

without, leſt he fall into Reproach, and the ſnare of the Devil. 1 Tim. 3. 2, 3, 4, 7.

Let the Elders that rule well, be counted worthy of double Honour, eſpecially they who labour in the Word and Doctrine. 1 Tim. 5. 17.

For a Biſhop muſt be blameleſs, as the Steward of God; not ſelf-willed, not ſoon angry, not given to Wine, no Striker, not given to filthy Lucre, but a lover of Hoſpitality, a lover of good Men, ſober, juſt, holy, temperate; holding faſt the faithful Word, as he hath been taught, that he may be able by ſound Doctrine, both to exhort and to convince the Gainſayers. Tit. 1. 7, 8, 9.

Sit Rector diſcretus in ſilentio, utilis in verbo, ne aut tacenda proferat, aut proferenda reticeſcat. Nam ſicut incauta locutio in errorem pertrahit, ita indiſcretum ſilentium eos qui erudiri poterant, in errore derelinquit. Sæpe namque Rectores improvidi humanam amittere gratiam formidantes, loqui libere recta pertimeſcunt, & juxta veritatis vocem nequaquam jam gregis cuſtodiæ paſtorum ſtudio, ſed mercenariorum vice deſerviunt: quia veniente lupo fugiunt, dum ſe ſub ſilentio abſcondunt. Hinc namque eos, per Prophetam Dominus increpat, dicens: *canes muti non valentes latrare*, hinc rurſus queritur, dicens: *non aſcendiſtis ex adverſo, neque oppoſuiſtis murum pro domo Iſrael, ut ſtaretis in prælio in die Domini*—Sacerdos ergo, ſi prædicationis eſt neſcius, quam clamoris vocem daturus eſt præco mutus? Hinc eſt enim, quod ſuper Paſtores primos in linguarum ſpecie Spiritus ſanctus incedit: quia nimirum quos repleverit, de ſe protinus loquentes facit—ſed cum Rector ſe ad loquendum præparat, ſub quanto cautelæ ſtudio loquatur, attendat: ne ſi inordinate ad loquendum rapiatur, erroris vulnere corda audientium feriantur, & cum fortaſſe ſapiens videri deſiderat, vanitatis compagem inſipienter abſcindat hinc: namque veritas dicit, *habete ſal in vobis, & pacem habete inter vos*; per ſal quippe verbi ſapientia deſignatur. Qui ergo loqui ſapienter nititur, magnopere metuat, ne ejus eloquio audientium unitas confundatur, &c. *Diſt.* 42. *C.* 1.

Cum ſcripturæ ſacræ ſcientia in boni Rectoris pectore ſi eſt virga directionis, ſit & manna dulcedinis. Hinc etiam David ait: *Virga tua & baculus tuus ipſa me conſolata ſunt.* Virga enim percutimur, & baculo ſuſtentamur. Si ergo eſt diſtrictio virgæ, quæ feriat, ſit & conſolatio baculi, quæ ſuſtentet. Sit itaque amor, ſed non emolliens: ſit rigor, ſed non exaſperans: ſit zelus, ſed non immoderate ſæviens: ſit pietas, ſed non plus quam expediat parcens. Intueri libet in Moſis pectore miſericordiam cum ſeveritate ſociatam. Videamus amantem pie, & diſtricte ſævientem. *Diſt.* 45. *C.* 9.

V.

5. Modeſty in their Apparel and Furniture.

Clergymen, and eſpecially thoſe who have the Cure of Souls, ought to obſerve both in their Apparel and Furniture, that decency and modeſty that is proper to their State *i*.

i Clericus profeſſionem ſuam & habitu & inceſſu probet: & ideo nec veſtibus, nec calceamentis decorem quærat. *Diſt.* 41. *C.* 8.

Epiſcopus vilem ſupellectilem, & menſam ac victum pauperem habeat, & dignitatis ſuæ authoritatem fide, & vitæ meritis quærat. *Ibid. C.* 7.

Omnis jactantia, & ornatura corporalis a ſacrato ordine aliena eſt. Eos ergo Epiſcopos, vel Clericos, qui ſe fulgidis, & claris veſtibus ornant, emendari oportet. Quod ſi in hoc permanſerint epitimio tradantur, ſimiliter & eos qui unguentis unguntur. 21. *q.* 4. *C.* 1.

Decet omnino Clericos inſortem Domini vocatos, vitam moreſque ſuos omnes componere, ut habitu, geſtu, inceſſu, ſermone, aliiſque omnibus nil niſi grave, moderatum, ac religione plenum præ ſe ferant. *Conc. Trid. Seſſ.* 22. *C.* 1. *de reform.*

Oportet——Clericos veſtes proprio congruentes ordini ſemper deferre, ut per decentiam habitus extrinſeci, morum honeſtatem extrinſecam oſtendant ——Propterea omnes Eccleſiaſticæ perſonæ, quantumque exemptæ, quæ aut in ſacris fuerint; aut dignitates, perſonatus, officia, aut beneficia qualiacumque Eccleſiaſtica obtinuerint, ſi, poſtquam ab Epiſcopo ſuo, etiam per edictum publicum, moniti fuerint, honeſtum habitum clericalem illorum ordini, & dignitati congruentem & juxta ipſius Epiſcopi ordinationem & mandatum non detulerint, per ſuſpenſionem ab ordinibus, ac officio, & beneficio, ac fructibus, redditibus, & proventibus ipſorum beneficiorum, nec non ſi ſemel correcti denuo in hoc delinquerint, etiam per privationem officiorum & beneficiorum hujuſmodi coerceri poſſint, & debeant. *Ibid. Seſſ.* 14. *C.* 6. *de reform.*

V. Seſſ. 23. *C. de ref.*

'We exhort all Archbiſhops, Biſhops and Prelates, to be punctual in keeping their Reſidence, 'holding their Provincial Councils, obliging the 'Curates and other beneficed Perſons to reſide upon their Livings, and to live with great Simplicity and Modeſty, in ſuch manner as the Decrees 'and Canons of the Church require; and more 'eſpecially in their wearing Apparel. And it is 'our Will and Pleaſure, that the Judges ſhould 'ſeize and apprehend ſuch Eccleſiaſticks as wear 'gawdy and indecent Apparel, and put them in 'Priſon, that they may deliver them over into the 'hands of their Prelates, who ſhall be obliged to 'inflict Corporal Puniſhment on them. *Ordinance 'of* July 27. 1551. *Art.* 45.

VI.

6. They ought not to cohabit with Women.

It is a Conſequence of the good Example which Clergymen are bound to give, that they do not cohabit with any Woman, beſides thoſe whom the Canons of the Church allow them to cohabit with *l*.

l Clericus ſolus ad fœminæ tabernaculum non accedat, nec properet ſine majoris natu Sacerdotis juſſione: nec ſolus Presbyter cum ſola fœmina fabulas miſceat, &c. *Diſt.* 1. *C.* 20.

Interdixit per omnia ſancta Synodus, non Epiſcopo, non Presbytero, non Diacono, vel alicui omnino, qui in Clero eſt, licere ſubintroductam habere mulierem, niſi forte matrem, aut ſororem, aut amitam, aut etiam eas idoneas perſonas, quæ fugiant ſuſpiciones. *Diſt.* 32. *C.* 16.

Hoſpitiolum tuum aut raro aut numquam mulierum pedes terant. Quia non poteſt toto corde cum Deo habitare, qui fœminarum acceſſibus copulatur. Fœmina conſcientiam ſecum pariter habitantis exurit; numquam de formis mulierum diſputes. Fœminæ nomen tuum noverint; vultum neſcient. Fœminam, quam viderint bene converſantem, mente dilige, non corporali frequentia. Si bonum eſt mulierem non tangere, malum eſt ergo tangere. *Ibid. C.* 17. Neque enim hoc ſilere debeo, quod cum gravi animi triſtitia dico: Sacerdotes enim cum fœminis habitare conſpicio: quod neſarium eſt dicere, vel audire, & contra ſanctorum Canonum ſancita. Ubi enim talis fuerit commorantium cohabitatio, antiqui hoſtis ſtimuli non deſunt. *Diſt.* 81. *C.* 23. *Vid. ſeq.*

V. C. Trid. Seſſ. 25. *C.* 14.

Quicun-

Quicunque cujuſcumque gradus Sacerdotio fulciuntur, vel Clericatus honore cenſentur, extranearum ſibi mulierum interdicta conſortia cognoſcant, ac tantum eis facultate conceſſa, ut matres, filias, atque germanas, intra domorum ſuarum ſepta contineant: in his enim nihil ſævi criminis exiſtimari fœdus naturale permittit. *l.* 19. *C. de Epiſc. & Cler.*

Presbyteris autem & Diaconis, & Subdiaconis, & omnibus in Clero conſcriptis, non habentibus uxores ſecundum ſacros Canones, interdicimus etiam nos ſecundum ſanctarum regularum virtutem, mulierem aliquam in propria domo ſuperinductam habere: tamen citra matrem, aut ſororem, aut filiam, & alias perſonas quæ omnem ſuſpicionem effugiunt. Si quis autem abſque hac obſervatione mulierem in ſua domo habet quæ poteſt ei ſuſpicionem inferre, & ſemel & ſecundo a ſuo Epiſcopo, aut a ſuis Clericis admonitus ne cum tali muliere habitaret, ejicere eam de ſua domo noluerit: aut accuſatore apparente approbetur inhoneſte cum muliere converſari, tunc Epiſcopus ejus ſecundum Eccleſiaſticos Canones de clero eum amoveat, curiæ civitatis, cujus Clericus erat, tradendo. Epiſcopum vero nullam penitus mulierem habere, aut cum ea habitare permittimus. Si autem probetur nequaquam hoc cuſtodiens, Epiſcopatu projiciatur, ipſe enim ſe oſtendit indignum Sacerdotio. *Nov.* 123. *c.* 29.

[‘ What is ſaid in this Article, and the Texts here ‘ quoted out of the Civil and Canon Law, in re- ‘ lation to the Celibacy of the Clergy, is not to be ‘ extended to the Marriage of Prieſts in the Proteſ- ‘ tant Churches, where the Clergy are allowed to ‘ marry; the reſtraint under which they were in this ‘ particular in the times of Popery having been taken ‘ off at the Reformation, as an Innovation intro- ‘ duced into the Chriſtian Church in the latter Ages, ‘ contrary to the Rule and Example of our Saviour ‘ and his Apoſtles. *Vid. Stat.* 2. *Ed.* VI. *cap.* 21. ‘ 5 & 6 *Ed.* VI. *cap.* 12.]

VII.

7. They ought to abſtain from publick Shews, and Games of Hazard.

The profane Diverſions of publick Shews are forbidden to all Clergymen; not only becauſe of the oppoſition between ſuch Diverſions and the Lives of Chriſtians, but alſo by reaſon of the Scandal which ſuch an idle diſorderly Life in Perſons of their Character would give to the Faithful *m*; and they ought likewiſe to abſtain from Games of Hazard *n*.

m Non oportet miniſtros altaris, vel quoſlibet Clericos ſpectaculis aliquibus, quæ aut in nuptiis, aut ſcenis exhibentur, intereſſe: ſed antequam Thimelici ingrediantur, ſurgere eos de convivio & abire. *Diſt.* 5. *c.* 37. *de conſecr.*

His igitur lege patrum cavetur, ut a vulgari vita ſecluſi, a mundi voluptatibus ſeſe abſtineant: non ſpectaculis, non pompis interſit. *Diſt.* 23. *c.* 3.

Statuit ſancta Synodus, ut quæ alias a ſummis Pontificibus, & a ſacris Conciliis de Clericorum vita, honeſtate, cultu, doctrinaque retinenda, ac ſimul de luxu, commeſſationibus, correis, aleis, luſibus, ac quibuſcumque criminibus, nec non ſæcularibus negotiis fugiendis copioſe ac ſalubriter ſancita fuerunt, eadem in poſterum iiſdem pœnis vel majoribus arbitrio Ordinarii imponendis obſerventur. *Conc. Trid. Seſſ.* 21. *c.* 1. *de reform.*

Placet noſtræ clementiæ, ut nihil commune Clerici cum publicis actionibus, vel ad curiam pertinentibus (cujus corpori non ſunt annexi) habeant. Præterea his qui parabolani vocantur, neque ad quodlibet publicum ſpectaculum, neque curiæ locum, neque ad judicium accedendi licentiam permittimus: niſi forte ſinguli ob cauſas proprias & neceſſitates judicem adierint. *l.* 17. *c. de Epiſc. & Cl.*

n Epiſcopus aut Presbyter, aut Diaconus, aleæ atque ebrietati deſerviens, aut deſinat, aut certe damnetur. Subdiaconus, aut Lector, aut Cantor ſimilia faciens, aut deſinat, aut communione privetur. *Diſt.* 35. *c.* 1.

Interdicimus ſanctiſſimis Epiſcopis, Presbyteris, & Diaconis, & Subdiaconis, Lectoribus, & omnibus aliis cujuſlibet venerandi Collegii aut Schematis conſtitutis, ad tabulas ludere, aut aliis ludentibus participes eſſe, aut inſpectores fieri, &c. *Nov.* 123. *Cap.* 10.

VIII.

8. The Duty of Reſidence.

Seeing Clergymen, who are engaged in a Miniſtry of which they are bound to exerciſe the Functions, are obliged to perform them in the places to which they are called; Reſidence in thoſe places is an eſſential indiſpenſible Duty incumbent on them. Thus Biſhops ought to reſide in their Dioceſſes, and Rectors, Curates and others in their Pariſhes, and the other places where they ought to exerciſe their Miniſterial Functions *o*.

o Interdicimus autem Deo amabilibus Epiſcopis proprias relinquere Eccleſias, & ad alias regiones venire. Si vero neceſſitas faciendi hoc contigerit, non aliter niſi cum litteris beatiſſimorum Patriarchæ, aut Metropolitæ, aut imperialem videlicit juſſionem hoc faciant. *Nov.* 123. *c.* 9.

‘ We require all Archbiſhops, Biſhops, Abbots, ‘ Prelates and others who have any Dignities within ‘ our Kingdom, and who live and reſide without ‘ the Bounds and Limits of the ſame, and without ‘ our Dominions, to come and appear within the ‘ ſpace of five Months after the Publication of ‘ theſe Preſents, at their reſpective Benefices within ‘ our Kingdom, or one of them, and there to ‘ keep their continual Reſidence upon pain of de- ‘ privation of the Temporalities of their Benefices. ‘ *Ordinance of* Lewis II. *in* 1475.

‘ All Archbiſhops, Biſhops, Abbots and Cu- ‘ rates, ſhall reſide in their reſpective Dioceſes and ‘ Benefices, and there perform every one in Perſon ‘ the Duties of their reſpective Functions, upon ‘ pain of ſeizure of the Temporalities of their ‘ Benefices. We ordain, until it be otherwiſe ‘ provided, that by their Reſidence on their Bene- ‘ fices, or other Office which requires, according ‘ to our Ordinances, Reſidence and actual Service, ‘ which they ſhall be obliged to make a clear ‘ Proof of, they ſhall be diſpenſed from Reſidence ‘ on their other Benefices, which they hold by ‘ Diſpenſation, but upon condition nevertheleſs that ‘ they ſubſtitute for their Vicars Perſons of ſufficient ‘ Abilities, of good Life and Converſation; to ‘ every one of whom they ſhall aſſign ſuch a Por- ‘ tion of the Revenue of the Benefice as may ſerve ‘ for his maintenance: otherwiſe, in default there- ‘ of we enjoin the Archbiſhop or Biſhop of the ‘ Dioceſe to make due Proviſion therein. We ‘ ſtrictly command our Judges and Proctors to ſee ‘ that theſe our Orders be duly executed, and to ‘ cauſe the Temporalities of the Archbiſhopricks, ‘ Biſhopricks, Abbies, or other Benefices above- ‘ mentioned, to be ſeiz'd without any Favour or ‘ Partiality within a Month after they ſhall have ‘ ſummoned the Prelates to reſide themſelves, and ‘ to cauſe the Clergy of their Dioceſſes to reſide ‘ upon their reſpective Benefices. We alſo require

‘ our

‘ our Judges and Proctors to take information of ‘ Non-Reſidences, *&c. Ordinance of* Orleans, *Art.* 5. See the Ordinance of *Blois*, Art. 14, *&c.*

Quia nonnulli modum avaritiæ non imponentes, dignitates diverſas Eccleſiaſticas, & plures Eccleſias Parochiales, contra ſacrorum Canonum inſtituta nituntur accipere, ut cum unum Officium vix implere ſufficiant, ſtipendia ſibi vindicent plurimorum: ne id de cætero fiat, diſtrictius inhibemus. Cum igitur Eccleſia, vel Eccleſiaſticum miniſterium committi debuerit, talis ad hoc perſona quæratur; quæ reſidere in loco & curam ejus per ſe ipſam valeat exercere: quod ſi aliter factum fuerit, & qui receperit, quod contra ſacros Canones accepit, amittat: & qui dederit, largiendi poteſtate privetur. *Cap.* 3. *de Clericis non reſidentibus.*

Quia in tantum quorumdam proceſſit ambitio, ut non duas, vel tres, ſed plures Eccleſias perhibeantur habere, cum nec duabus poſſint debitam proviſionem impendere: per fratres, & Coepiſcopos noſtros hoc emendari præcipimus; & de multitudine (præbendarum) Canonibus inimica, quæ diſſolutionis materiam, & evagationis inducit, certumque continet periculum animarum, eorum qui in Eccleſiis deſervire valeant, indigentiam volumus ſublevari. *Cap.* 5. *Decretal. de præbendis & dignitatibus. V. Tot. T. de Clericis non reſidentibus.*

Et illud etiam definimus, ut nemo Deo amabilium Epiſcoporum foris a ſua Eccleſia pluſquam per totum annum deeſſe audeat, niſi hoc per imperialem fiat juſſionem (tunc enim ſolum erit inculpabile) ſacratiſſimis Patriarchis uniuſcujuſque Diœceſeos compellentibus Deo amabiles Epiſcopos ſuis inhærere ſanctiſſimis Eccleſiis: & non longo itinere ſeparari, neque in peregrinis demorari velle, neque ſanctiſſimas Eccleſias negligere, neque annum excedere; quem & ipſum propter miſericordiam conſtituimus. Si vero ultra annum erraverit & dereliquerit, & non ad Epiſcopatum remeaverit proprium, neque Imperialis aliqua eum (ſicut prædiximus) detineat juſſio: tunc ſi quidem ſit Metropolita, circa Eccleſiaſticam diſpoſitionem ſegregatum, regionis illius Patriarcha revocet quidem cum legitimis inclamationibus, ſervans ubique ſacrarum regularum obſervationem. Si vero maneat per omnia inobediens, expellatur a ſacro Epiſcoporum choro: & alium introducat hujuſmodi & reverentia, & verecundia, & honeſtate dignum. Si vero non Metropolita, ſed aliorum Epiſcoporum aliquis ſit qui erraverit, hæc omnia a Metropolita fiant: nemo enim eorum talem ſuſcipiat occaſionem, ſi dixerint propterea proprias derelinquere Eccleſias, proptereaque litium cauſas aut aliarum rerum propriarum, aut ad ſacras Eccleſias reſpicientium circumluſtrant, & hic conſtituti adhærent, aut in aliis veniunt locis. *Nov.* 6. *c.* 2.

Jubemus fieri omnibus manifeſtum, per ſingulas Metropoles uniuſcujuſque Provinciæ ipſi ſubjectis ſanctiſſimis Sacerdotibus: quoniam non decet aliquem ipſorum aut eorum, qui in aliis Provinciarum civitatibus ſub Metropolitano ordinati ſunt, Epiſcoporum, ſecundum propriam voluntatem abſque divina noſtra ſpeciali juſſione, relinquere quidem gubernatam a ſe ſanctiſſimam Eccleſiam, in hanc vero fœlicem commeare civitatem, qualiſcumque emergat res: ſed mittere oportere huc unum aut duos ex ſibi ſubjecto pio clero, & facere manifeſta noſtræ pietati ea, quibus opus habent, aut per ſe ipſos aut per intermediam tuam beatitudinem: ſicque perfrui juſta & compendiaria noſtra ope. Si enim quippiam eorum, quæ ad nos relata fuerunt, tale nobis viſum fuerit, ut indigeat ipſorum Deo amantiſſimorum Sacerdotum præſentia, confeſtim tum proficiſci jubebimus ipſos. Abſque vero tali divina juſſione neminem proficiſci concedimus. *l.* 43. §. 1. *c. de Epiſc. & Cler.*

Declarat ſancta Synodus omnes Patriarchalibus, Primatibus, Metropolitanis ac Cathedralibus Eccleſiis quibuſcumque, quocunque nomine & titulo præfectos; etiamſi ſanctæ Romanæ Eccleſiæ Cardinales ſint, obligari ad perſonalem in ſua Eccleſia vel Diœceſi reſidentiam, vel injuncto ſibi Officio defungi teneantur, neque abeſſe poſſe, niſi ex cauſis & modis infra ſcriptis. Nam cum Chriſtiana charitas, urgens neceſſitas, debita obedientia, ac evidens Eccleſiæ vel Reipublicæ utilitas aliquos abeſſe poſtulent & exigant; decernit eadem ſancta Synodus has legitimæ abſentiæ cauſas a beatiſſimo Romano Pontifice aut a Metropolitano vel ab eo abſente, ſuffraganeo Epiſcopo antiquiori reſidente, qui idem Metropolitano abſentiam probare debebit. *Conc. Trid. Seſſ.* 23. *de reform.*

[‘ Regularly, Perſonal Reſidence is required of ‘ Eccleſiaſtical Perſons upon their Cures. And ‘ therefore it is, that by the Common Law of *Eng-* ‘ *land*, if he that hath a Benefice with Cure, be ‘ choſen to an Office, as to an Office of Bailiff, ‘ or Beadle, or the like Secular Office, he may have ‘ the King's Writ to exempt him from ſerving in ‘ ſuch Office. *Coke* 2. *Inſtit. pag.* 625.]

IX.

9. Reſidence of Canons.

This Duty of Reſidence reſpects among others the Canons and Prebendaries of Cathedral and Collegiate Churches, who are bound to aſſiſt in the Choir at the Celebration of Divine Service: and this Duty requires not ſo much a bare Preſence without Attention and Modeſty, to recite negligently and without Devotion the Words of the Pſalms, and the other Prayers of the Church, as a ſerious, modeſt, and attentive Preſence, which may edify the Faithful by a grave, diſtinct and articulate ſinging the Words they addreſs to God, which God himſelf has endited, and which by this harmonious recital of them ought to raiſe in the Hearts of the Faithful the Sentiments of Piety which their Senſe contains: and this Duty of Gravity and Modeſty in the Church-Muſick regards likewiſe the other Eccleſiaſticks, and the Regular Communities of both Sexes who celebrate Divine Service in the Quire *p*.

p Canonicus præbendarius niſi unius Eccleſiæ in qua conſcriptus eſſe non debet. *Diſt.* 70. *c.* 2.

Canunt ut excitent ad compunctionem animos audientium. *Diſt.* 21. *C.* 1.

Speaking to yourſelves in Pſalms and Hymns, and ſpiritual Songs, ſinging, and making Melody in your Heart to the Lord. Epheſ. 5. 19.

Moreover, David *and the Captains of the Hoſt ſeparated to the Service of the Sons of* Aſaph, *and of* Heman, *and of* Jeduthan, *who ſhould propheſy with Harps, with Pſalteries and with Cymbals.* 1 Chron. 25. 1.

And he appointed certain of the Levites *to miniſter before the Ark of the Lord, and to record, and to thank and praiſe the Lord God of* Iſrael. 1 Chron. 16. 4.

And when the Burnt-Offering began, the Song of the Lord began alſo with the Trumpets, and with

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with the Inſtruments ordained by David *King of* Iſrael. 2 Chron. 29. 27.

Let the Word of Chriſt dwell in you richly in all Wiſdom, teaching and admoniſhing one another in Pſalms, and Hymns, and ſpiritual Songs, ſinging with Grace in your Hearts to the Lord. Coloſſ. 3. 16.

See the Ordinances, and the Texts quoted on the foregoing Article.

Præterea ſancimus, ut omnes Clerici per ſingulas Eccleſias conſtituti, per ſeipſos pſallant nocturna, & matutina & veſpertina, ne ex ſola Eccleſiaſticarum rerum conſumptione Clerici appareant, nomen quidem habentes Clericorum, rem autem non implentes Clerici circa liturgiam Domini Dei. Turpe enim eſt pro ipſis Scriptos neceſſitate ipſis inducta pſallere. Si enim multi laicorum, ut ſuæ animæ conſulant, ad ſanctiſſimas Eccleſias confluentes ſtudioſi circa pſalmodiam oſtenduntur, quomodo indecens non fuerit Clericos ad id ordinatos non implere ſuum munus? quapropter omni modo Clericos pſallere jubemus, & ipſos inquiri a Deo amantiſſimis pro tempore Epiſcopis & duobus Presbyteris in ſingulis Eccleſiis, & ab eo qui vocatur Archos vel Exarchos, & ab ecdico ſive defenſore cujuſque ſanctiſſimæ Eccleſiæ: & eos qui inventi non fuerint inculpate in liturgiis perſeverantes, extra Clerum conſtituti. Nam qui conſtituerunt vel fundarunt ſanctiſſimas Eccleſias pro ſua ſalute & communis Reipublicæ, reliquerunt illis ſubſtantias, ut per eas debeant ſacræ liturgiæ fieri, & ut in illis a miniſtrantibus piis Clericis Deus colatur. *l.* 42. §. 10. *C. de Epiſc. & Cler.*

Qui cum in choro fuerint, gravitatem ſervent, quam & locus & officium exigunt, non inſimul cum aliis fabulantes, ſeu colloquentes, aut litteras ſeu ſcripturas alias legentes, & cum pſallendi gratia ibidem conveniant, juncta & clauſa labia tenere non debent: ſed omnes præſertim qui majori funguntur honore, in pſalmis, hymnis & canticis Deo alacriter modulentur——Nemo ibidem dum Horæ in communi publice cantantur, legat, vel dicat privatum Officium, nam non ſolum obſequium quo obnoxius eſt choro, ſubtrahit, ſed alios pſallentes perturbat. *Conc. Baſil. Seſſ.* 21.

Omnes vero divina per ſe, & non per ſubſtitutos compellantur obire Officia & Epiſcopo celebranti, aut alia Pontificalia exercenti, adſiſtere, & inſervire, atque in choro ad pſallendum inſtituto, hymnis & canticis Dei nomen reverenter, diſtincte. devote, laudare. *Conc. Trid. Seſſ.* 24. *C.* 12. *de Reſident.*

V. ibidem Seſſ. 21. *c.* 3. *V. ibid. Seſſ.* 24. *de refor. c.* 12.

X.

10. *Viſitations of Biſhops.*

Seeing the Epiſcopal Functions are not confined to the Places of the uſual Reſidence of the Biſhops, but extend to all the Places within their Dioceſſes, and that they ought to inform themſelves of the Condition of every Church, and take care that the Paſtors and others under their Government do acquit themſelves of all their Duties, and that every thing relating to the Adminiſtration of the Sacraments and to the whole ſpiritual Miniſtry be there in good order; the Duty of Reſidence implies, with reſpect to Biſhops, that of viſiting their Dioceſſes, which by the antient Canons of the Church, and the Ordinances of *France*, they are obliged to do once a Year, or at leaſt once in two Years if the Dioceſe be ſo large that they cannot viſit the whole in one Year; and if they cannot viſit in Perſon, they are obliged to viſit by their Vicars-General *q*.

q Patriarchæ, Primates, Metropolitani & Epiſcopi propriam Diœceſim per ſeipſos, aut ſi legitime impediti fuerint, per ſuum generalem Vicarium aut Viſitatorem, ſi quotannis totam, propter ejus latitudinem viſitare non poterunt, ſaltem majorem ejus partem; ita tamen, ut toto biennio per ſe vel viſitatores ſuos compleatur, viſitare non prætermittant. *Conc. Trid. Seſſ.* 24. *c.* 3. *de reform.*

'All Archbiſhops, Biſhops, and Archdeacons 'ſhall viſit in Perſon the Churches and Cures of 'their reſpective Dioceſes. *Ordinance of* Orleans '*in* 1560. *Art.* 6. *See Art.* 7.

'The Archbiſhops and Biſhops ſhall be bound 'to viſit in Perſon, or if they are hinder'd by any 'lawful Impediment, by their Vicars-General, the 'Places of their Dioceſe every Year; and if by 'reaſon of the too great Extent of the Dioceſe the 'Viſitation cannot be finiſhed within that time, 'they ſhall be bound to finiſh it in two Years time. '*Ordinance of* Blois *in* 1579, *Art.* 32.

[The antient Law of the Biſhops Viſitations in the Church of *England* was likewiſe once a Year. *Spelm. Conc. V.* 1. *p.* 246, 293. But the Work of Parochial Viſitations, and alſo that of holding General Synods or Viſitations when the Biſhop did not viſit, having come by degrees to be fixed and eſtabliſhed Branches of the Archidiaconal Office, the preſent Law and Practice in *England* is for the Biſhops to viſit their Dioceſſes only once in three Years: So that the Biſhop is not only not obliged by Law to viſit annually, but is even reſtrained from it: which Reſtraint being in itſelf unreaſonable, and having proceeded merely from the Profits which attend the Act of Viſiting, the Reformers of our Eccleſiaſtical Laws were of opinion that it ought to be moderated after this manner; that is, *That the Biſhop ſhould viſit his whole Dioceſe every third Year, and receive the uſual Procurations; and that it ſhould be lawful for him to viſit likewiſe at other times, as Occaſion ſhould require, but at his own Expence, without burdening the Clergy with new Procurations.* Reform. Leg. pag. 99.]

XI.

11. *Diſintereſtedneſs in Clergymen.*

Since one of the Qualities moſt eſſential to Clergymen is that of Diſintereſtedneſs *r*, in which they ought moſt particu-

r Not given to filthy Lucre. Tit. 1. 7.

Let your Converſation be without Covetouſneſs. Heb. 13. 5.

Having Food and Raiment, let us be therewith content. But they that will be rich, fall into Temptation, and a Snare, and into many fooliſh and hurtful Luſts, which drown Men in Deſtruction and Perdition. For the Love of Money is the Root of all Evil, which while ſome coveted after, they have erred from the Faith, and pierced themſelves through with many Sorrows. Heb. 6. 8, 9, 10.

'If Avarice is a Crime in Laymen, Eccleſiaſti'cal Perſons ought much more to avoid it.

Omnis a Clericis indebitæ conventionis injuriæ, & iniquæ exactionis repellatur improbitas. Nullaque conventio ſit contra eos munerum ſordidorum, & cum negotiatores ad aliquam præſtationem competentem vocantur, ab his univerſis iſtiuſmodi ſtre-

particularly to give a good Example to Lay-men; the Laws of Princes have enjoined them the Obſervance of three eſſential Rules againſt the Corruption of Avarice, and which ſhall be explained in the three following Articles.

pitus conquieſcat. Si quid enim vel parſimonia, vel proviſione, vel mercatura (honeſtati tamen conſcia) conjecerint, id in uſum pauperum atque egentium miniſtrari oportet. *l.* 2. *in princ. C. de Epiſc. & Cler.*

I opened my Mouth, and ſaid, Buy her for your ſelves without Money. Eccluſ. 51. 25.

Yea they are greedy Dogs which can never have enough, and they are Shepherds that cannot underſtand; they all look to their own Way, every one for his Gain, from his Quarter. Iſa. 56. 11.

Uſuris nequaquam incumbant, neque turpium occupationes lucrorum fraudiſque cujuſquam ſtudium appetant: amorem pecuniæ quaſi materiam cunctorum criminum fugiant. *Diſt.* 23. *cap.* 3.

Quoniam quidquid habent Clerici pauperum eſt: & domus illorum omnibus debent eſſe communes: ſuſceptioni peregrinorum & auſpitium invigilare debent. 17. *q.* 1. *c. ult.*

See *Pſal.* 14.

XII.

12. *Plurality of Benefices is unlawful.*

The firſt of theſe Rules is that which forbids Plurality of Benefices, and allows not the having more than one, except in Caſes where there is a juſt Cauſe for diſpenſing with it. Which proves the Rule, that except in thoſe Caſes one cannot poſſeſs more than one Benefice: and this Rule is founded on two very juſt Motives; one for repreſſing Avarice, and the other for engaging every one in the Diſcharge of his Functions *s*.

s Cum Eccleſiaſticus ordo pervertatur, quando unus plurium officia occupat Clericorum: ſancte ſacris Canonibus cautum fuit, neminem oportere in duabus Eccleſiis conſcribi. Verum quoniam multi improbæ cupiditatis affectu ſeipſos, non Deum, decipientes, ea quæ bene conſtituta ſunt, variis artibus eludere, & plura ſimul beneficia obtinere non erubeſcant; ſancta Synodus debitam regendis Eccleſiis diſciplinam inſtituere cupiens, præſenti decreto, quod in quibuſcunque perſonis, quocunque titulo, etiam ſi Cardinalatus honore fulgeant, mandat obſervari, ſtatuit in poſterum unum tantum beneficium Eccleſiaſticum ſingulis conferatur, quod quidem ſi ad vitam ejus, cui confertur, honeſte ſuſtentandam non ſufficiat, liceat nihilominus aliud ſimplex ſufficiens, dummodo utrumque perſonalem reſidentiam non requirat, eidem conferri, &c. *Conc. Trid. Seſſ.* 24.

Quicunque de cætero plura curata, aut alias incompatibilia beneficia Eccleſiaſtica, ſive per viam unionis ad vitam, ſeu commendæ perpetuæ, aut alio quocunque nomine & titulo, contra formam ſacrorum Canonum, & præſertim conſtitutionis Innocentii tertii quæ incipit: De multa, recipere ac ſimul retinere præſumpſerit; beneficiis ipſis juxta ipſius conſtitutionis diſpoſitionem, ipſo iure, etiam præſentis Canonis vigore, privatus exiſtat. *Ibid. Seſſ.* 27. *cap.* 14.

Clericus ab inſtanti tempore non connumeretur in duabus Eccleſiis; negotiationis enim hoc eſt, & turpis lucri proprium, & Eccleſiaſtica conſuetudine penitus alienum. Audivimus enim ex ipſa Dominica voce, quod nemo poteſt duobus dominis ſervire: Aut enim unum odio habebit, & alterum diliget; aut unum ſuſtinebit, & alterum contemnet. Unuſquiſque enim ſecundum Apoſtolicam vocem in quo locatus eſt in hoc debet manere, & in una locari Eccleſia. 21. *q.* 1. *c.* 1.

Non ſit Abbas duorum Monaſteriorum. *l.* 40. §. 1. *c. de Epiſc. & Cler.*

'There is the ſame reaſon for the other Benefices as for Abbies; for it is natural that the Functions of the ſeveral Offices ſhould be divided among ſeveral Miniſters: and if there are particular Reaſons for the Good of the Church, which may make it neceſſary to join in one Perſon the Functions of ſeveral Offices; Order requires that they ſhould be united into one Benefice, to be filled by one Perſon. So that naturally it is contrary to Order, that one Perſon ſhould enjoy more than one Benefice. As to which it is obſervable, that by Art. 5. of the Ordinance of *Orleans*, on the Subject of Reſidence; it is added in relation to thoſe who poſſeſs more than one Benefice, *That becauſe they hold them by Diſpenſation, the King ordains proviſionally and until it be otherwiſe regulated, that they ſhall reſide upon one of their Benefices.* It appears plainly that this Ordinance preſuppoſes that it is only by Diſpenſation that one can have more than one Benefice, and by conſequence that the Rule is to have only one; ſo that one cannot have many Benefices together without a juſt Cauſe, which can only be either the Advantage or the Neceſſity of the Church.

Quod ſi urgens juſtaque ratio & major quandoque utilitas poſtulaverit, cum aliquibus diſpenſandum eſſe, id cauſa cognita ac ſumma maturitate, atque gratis a quibuſcunque ad quos diſpenſatio pertinebit, erit præſtandum, aliterque facta diſpenſatio ſubreptitia cenſeatur. *Conc. Trid. Seſſ.* 25. *de reform. cap.* 18.

XIII.

13. *The Adminiſtration of the Sacraments ought to be gratuitous.*

The ſecond Rule which Princes have preſcribed for reſtraining of Avarice in the Eccleſiaſtical Miniſtry, is the Prohibition of exacting any thing for the Adminiſtration of the Sacraments, and other ſpiritual Functions *t*.

t Freely ye have received, freely give. Mat. 10. 8.

Pro beneficiis medicinæ Dei munera non accipiant. *Diſt.* 23. *C.* 3.

'We prohibit all Prelates, Churchmen, and Curates to ſuffer any thing to be demanded or exacted for the Adminiſtration of the holy Sacraments, Burials, and all other ſpiritual things, notwithſtanding the pretended laudable Cuſtoms and common Uſages, leaving however every one at free liberty to give what in their diſcretion they ſhall think fit. *Ordinance of* Orleans, *Art.* 15.

'The Biſhops and other ordinary Collators, or their Vicars and Officers, may not take any thing, under any pretext whatſoever, for the Collation of any Orders, the Tonſure of Clergymen, for Letters Dimiſſory, and Teſtimonials, *&c. Ordinance of* Blois, *Art.* 20. The 51ſt Article of the ſame Ordinance of *Blois*, and the 27th Article of the Edict of *Melun*, have in ſome meaſure qualified that Article which we have juſt now cited, with reſpect to Oblations and Parochial Duties; which does not change the Spirit of the Rule, nor excuſe thoſe Miniſters who by their Avarice profane the Holineſs of their Miniſtry, and who make the Functions thereof to depend on the Profit they may reap thereby.

Nullus Epiſcopus, aut Presbyter, aut Diaconus qui ſacram diſpenſat Communionem, a percipiente gratiam Communionis aliquod pretium exigat. Neque enim venditur gratia, neque pro pretio gratiam Spiritus ſancti damus; ſed dignis munere ſine defraudatione participare concedimus. Si quis vero eorum, qui connumerantur in Clero, ab eo cui ſacram Communionem diſpenſat, aliquod pretium exegerit, deponatur ſicut imitator ſimoniacæ fraudis. 1. *q.* 1. *c.* 100.

Nihil pro collatione quorumcunque ordinum, etiam Clericalis tonſuræ, nec pro litteris dimiſſoriis, aut teſtimonialibus, nec pro ſigillo, nec alia quacumque de cauſa, etiam ſponte oblatum Epiſcopi, & aliorum ordinum collatores, aut eorum miniſtri, quovis prætextu accipiant——Nec Epiſcopo ex Notarii commodis, aliquod emolumentum ex eiſdem ordinum collationibus directe vel indirecte provenire poſſit: tunc enim gratis operam ſuam eos præſtare omnino teneri decernit. *Conc. Trid. Seſſ.* 21. *c.* 1.

V. Cap. 29. *de Simonia.*

Sed neque Clericum cujuſcunque gradus dare aliquid ei a quo ordinatur, aut alii cuilibet perſonæ permittimus: ſolas autem præbere eum conſuetudines iis qui ordinantium miniſtrantes ſunt, ex conſuetudine accipientibus, unius anni emolumenta non tranſcendentem. In ſancta vero Eccleſia, in qua conſtituitur, ſacrum complere miniſterium, & nulla penitus propriis Clericis dare pro ſua inſinuatione: nec ob hanc cauſam propriis emolumentis, aut aliis portionibus hunc privari. Sed neque xenodochum aut noſocomon, aut prochotrophum, aut alium quemlibet venerabilis domus gubernatorem, aut quamcunque Eccleſiaſticam ſollicitudinem agentem, dare aliquid illi a quo conſtituitur, aut alii cuicunque perſonæ pro commiſſa ſibi gubernatione. Qui vero præter hæc quæ diſpoſuimus, aut dat, aut accipit, aut mediator fit Sacerdotio aut Clero, hujuſmodi commiſſæ ſibi cujuſcunque gubernationis nudabitur: iis quæ accipiuntur vindicandis venerabili loco cujus talis perſona ordinationem, aut ſollicitudinem, aut gubernationem accipit. Si autem ſæcularis ſit qui accipit; aut mediator factus eſt: quod datum eſt, duplum repetitur, & venerabili loco in quo talis perſona ordinationem, aut gubernationem, aut ſollicitudinem ſuſceperit, præbeatur. Si quis autem Clericus cujuſlibet gradus, ſive gubernator cujuſlibet venerabilis domus, aut ante ordinationem commiſſam ſibi cujuſcunque gubernationis, aut ſollicitudinis, aut poſtea aliquid voluerit ſuarum rerum offerre Eccleſiæ in qua ordinatur, aut loco cujus gubernationem aut ſollicitudinem ſuſcepit: non ſolum prohibemus hoc fieri, ſed etiam magis invitamus eos talia pro ſalute animæ ſuæ facere: nos enim illa ſolum dari prohibemus, quæ propriis perſonis, quibuſdam præbentur, non quæ ſanctis Eccleſiis, aut aliis venerabilibus locis offeruntur. *Nov.* 123. *cap.* 16.

XIV.

14. *A good Uſe of the Eccleſiaſtical Revenues.*

The third Rule, which the Laws of Princes have eſtabliſhed for the execution of the Laws of the Church, in what concerns the Diſintereſtedneſs of Clergymen, is that which ordains them to make a good Uſe of their Revenues, and which diſtinguiſhes their own proper Goods from thoſe which come to them by their Eccleſiaſtical Functions, and obliges them to look upon theſe as Goods conſecrated and devoted to a pious Uſe, and depoſited in their hands in order to their being ſo employed; which implies two different Duties: The firſt, to render them worthy by their good Lives, to take out of the Revenues they may have from the Goods of the Church a ſuitable and decent Maintenance: For it would be impious to imagine that the Church would be willing to maintain them at ſuch a rate as not to allow them Neceſſaries, and thereby bring Shame upon herſelf. And the ſecond is, to employ in Works of Charity and Piety, purſuant to the Intentions of the Church, and of the Founders and Benefactors, that which remains over and above their own neceſſary Maintenance, and cannot be deſigned for any other than pious and holy Uſes *u*.

u Convenit igitur hujuſmodi eligi & ordinari Sacerdotes, quibus nec liberi ſint, nec nepotes. Etenim fieri vix poteſt ut vacans hujus quotidianæ vitæ curis, quas liberi creant parentibus maximas, omne ſtudium omnemque cogitationem circa divinam liturgiam & res Eccleſiaſticas conſumat. Nam cum quidam ſumma in Deum ſpe, & ut animæ earum ſalvæ fiant, ad ſanctiſſimas adcurrant Eccleſias, & eis omnes ſuas facultates afferant, & derelinquant ut in pauperes & egentes & alios pios uſus conſumentur, indecens eſt Epiſcopos in ſuum illas auferre lucrum, aut in propriam ſobolem & cognatos impendere. Oportet enim Epiſcopum minime impeditum affectionibus carnalium liberorum, omnium fidelium ſpiritualem eſſe patrem. Has igitur ob cauſas prohibemus habentem natos aut nepotes, ordinari Epiſcopum. De his vero Epiſcopis, qui nunc ſunt, vel futuri ſunt ſancimus, nullomodo habere eos facultatem teſtandi, vel donandi, vel per aliam quamcunque excogitationem alienandi quid de rebus ſuis; quas, poſtquam facti fuerint Epiſcopi, poſſederint & acquiſierint, vel ex teſtamentis, vel donationibus vel alia quacunque cauſa exceptis: duntaxat his, quas ante Epiſcopatum habuerunt ex quacunque cauſa, vel quas poſt Epiſcopatum a parentibus & theis, hoc eſt patruis vel avunculis, & a fratribus ad ipſos pervenerunt, perventuræque ſunt. Quæcunque enim poſt ordinationem ex quacunque cauſa extra præfatas perſonas ad ipſos pervenerunt, ea jubemus ad ſanctiſſimam Eccleſiam, cujus Epiſcopatum tenuerint, pertinere, & ab ea vindicari & evinci: nulla alia perſona poteſtatem habente, ex eo proprium quid auferre lucrum. Quis enim dubitaverit eos qui ipſis proprias res relinquunt aut reliquerint, & ſi in aliam perſonam transferunt aut tranſtulerunt, non potius ipſum Sacerdotium contemplantes quam ejus perſonam & cogitantes, quia non ſolum ab ipſis relicta pie inſument, ſed & ſuas ipſorum res adjicient id feciſſe. *l.* 42. §. 1, & 2. *C. de Epiſc. & Cleric.*

Interdicimus ſanctiſſimis Epiſcopis, res mobiles aut immobiles, ſeſeque moventes; quæcunque poſt Epiſcopatum ad eos quoquo modo pervenerint, in proprios cognatos aut in alias quaſcunque transferri perſonas. In captivorum vero redemptionem, & egentium pabula, & alias pias cauſas, aut pro utilitate propriæ Eccleſiæ, & ex his expendere licentiam habeant: & quidquid ex hujuſmodi rebus poſt obitum eorum in ipſorum facultate remanſerit, jubemus hoc ad proprietatem Eccleſiarum quarum Sacerdotium habuerunt, competere. In illis enim

ſolummodo rebus licentiam eis alienandi aut relinquendi quibus voluerint, damus quas ante Epiſcopatum probantur habuiſſe: poſt Epiſcopatum vero, quæ ex genere ſibi conjuncto ad eos devolutæ ſunt, quibus ab inteſtato uſque ad quartum gradum ſuccedere poterunt. *Nov.* 131. *cap.* 13.

'We muſt diſtinguiſh in theſe Laws of *Juſtinian*, that which he ordained in them, that is not in uſe with us, from that which they contain that is agreeable to the ſpirit and intention of the Church, and that is in uſe at all times, and which was the foundation of the whole Tenour and Diſpoſition of theſe Laws. He forbad the promoting to the Office of a Biſhop Perſons who had Children or Grand-children; which was founded on the two Conſiderations explained in the firſt of theſe two Laws: one, that the domeſtick Care for Children took up the time neceſſary for the Epiſcopal Functions; and the other, to prevent the Goods that were deſtined for the Church, from being diverted to the uſes of the Family of him who had the management and diſtribution of them. And theſe Laws enacted farther, that the Biſhops who were the diſpenſers of the Goods of the Church, ſhould not be at liberty to diſpoſe of their own proper Goods, except ſuch as they were poſſeſſed of before their advancement to the Epiſcopal Dignity; and that whatever they ſhould acquire after their ſaid promotion, by what Title ſoever it were, ſhould belong unalterably to their Church, except what ſhould come to them from their Parents, Uncles, or Brothers upon their dying inteſtate; this Law preſuming that no body would give them any thing, except on account of their Miniſtry, and with an intention that the Gift ſhould go to the Church: To which the ſame Emperor added this temperament by the ſaid 131ſt Novel, *c.* 13. That they might likewiſe enjoy as their own the Succeſſions of their Collateral Relations who ſhould die inteſtate to the fourth degree. Theſe are the diſpoſitions of the ſaid Laws, which are not agreeable to the uſage of our time; and the obſervance of them would be liable to great difficulties, and to many inconveniences. But the motive of theſe diſpoſitions, which was the good uſe of the Revenues of the Church according to its intention, ſubſiſts ſtill; and tho it is permitted to all Clergymen to poſſeſs Goods and to acquire them after their promotion, yet it can never be lawful for them to apply the Goods of the Church that come into their hands to other uſes than thoſe which it preſcribes, or permits, and to thoſe which are conformable to the intention of the Founders and Benefactors; that is to ſay, as it is ordained by theſe very Laws, for the maintenance of the Poor, redemption of Captives, and other works of Charity which may be uſeful to the Church, and worthy of the ſanctity which the Miniſters thereof profeſs, and whoſe moſt eſſential quality is the being free from all Covetouſneſs: for if all Covetouſneſs be forbidden to mere Laymen *a*, what is that Crime in thoſe who have taken God for their Portion, who ought to be a Light and an Example to all others, and who are in poſſeſſion of the Goods of the Church, only that they may diſpenſe them according to the Spirit and Intention thereof, and with a Heart in which Covetouſneſs has not the predominancy *b*?

a Take heed and beware of Covetouſneſs. Luk. 12. 15.

Sancta Synodus——non ſolum jubet, ut Epiſcopi modeſta ſupellectili, & menſa ac frugali victu contenti ſint; verum etiam in reliquo vitæ genere, ac tota eorum domo caveant, ne quid appareat, quod a ſancto hoc inſtituto ſit alienum; quodque non ſimplicitatem, Dei zelum, ac vanitatum contemptum præ ſe ferat. Omni vero eis interdicit, ne ex redditibus Eccleſiæ conſanguineos, familiareſve ſuos augere ſtudeant: cum & Apoſtolorum Canones prohibeant, ne res Eccleſiaſticas, quæ Dei ſunt, conſanguineis donent, ſed ſi pauperes ſint, iis ut pauperibus diſtribuant, eas autem non diſtrahant, nec diſſipent illorum cauſa: imo quam maxime poteſt, eos ſancta Synodus monet, ut omnem humanum hunc erga fratres, nepotes, propinquoſque carnis affectum, unde multorum malorum in Eccleſia Seminarium extat, penitus deponant, *&c. Seſſ.* 25. *de reform. c.* 1.

'What is ſaid in this Text, ought to be underſtood of all the Miniſters of the Church who enjoy Eccleſiaſtical Revenues, of which they are only the Depoſitaries.

Quoniam quidquid habent Clerici, pauperum eſt: & domus illorum omnibus debent eſſe communes: ſuſceptioni peregrinorum & hoſpitum invigilare debent. 17. *q.* 1. *c. ult.*

Let your Converſation be without Covetouſneſs; and be content with ſuch things as you have. Heb. 13. 5.

b Not Covetous. 1 Tim. 3. 3.

They are Shepherds that cannot underſtand; they all look to their own way, every one for his Gain, from his quarter. Iſa. 56. 11.

From the leaſt of them even unto the greateſt of them, every one is given to Covetouſneſs; and from the Prophet even unto the Prieſt, every one dealeth falſly. Jerem. 6. 13.

'We have not thought fit to enter here into the queſtion, whether Clergymen poſſeſſed of Benefices may with a ſafe Conſcience diſpoſe by Teſtament, or otherwiſe, of the fruits of their Benefices, in favour of their Relations; we have only remarked here what the Laws have ordained touching this matter.

'We are not to expect to find in the New Teſtament prohibitions to Eccleſiaſtical Perſons, to make a wrong uſe of the Goods of the Church. Thoſe who were forbidden to poſſeſs any Goods at all *c*, did not ſtand in need of any ſuch Rule, which is become neceſſary only ſince the Diſcipline of the Church has put into the hands of the Succeſſors of the Apoſtles and of the Diſciples of Jeſus Chriſt, Revenues for their Maintenance, for Alms, and other Works of Piety. But this change hath not made any in the Rule of the diſpoſitions which they ought to have in the Heart; for the changes which the Diſcipline may make, regard only the external part, and do not diſpenſe with the inward diſpoſitions enjoined by the Law of God in the Goſpel. Thus the external manner, of being poſſeſs'd of Goods belonging to the Church, does not diſcharge the Clergy from the Duty of not ſetting their Hearts upon them, and of making only a good and pious uſe of them, ſuch as may be the natural effect of a Poſſeſſion without an inordinate love of Riches. It is in order to promote this pious uſe of the Goods of the Church, that the Council of *Trent* ordains expreſly that the Miniſters of the Church ſhould abſtain from all ſuperfluous Expences, and gives the Clergy Directions how they ſhould uſe the Revenues of the Church.

c Provide neither Gold, nor Silver, nor Braſs in your Purſes. Mat. 10. 9.

See concerning the different Duties of Clergymen, which may be applied to all thoſe mentioned in the preceding Articles, 1 *Cor.* 3. 9. *Heb.* 5. 1, 2, 3, 4, 5. *John* 15. 16. *Mark* 3. 13. *Numb.* 3. 6. *Pſ.* 14.

2 *Chron.* 26. 16.

XV.

15. *The Duties of Profeſſors of Divinity.*

We muſt reckon in the number of the Duties of Eccleſiaſticks which regard the Publick, thoſe of the Profeſſors and Doctors of Divinity, which have been explained in their proper places *x*.

x See Sect. 2. of the Title of Univerſities.

TIT. XI.

Of the Perſons whoſe Condition engages them in the Profeſſion of Arms, and of their Duties.

WE muſt not confound the Subject of this Title with that of the 4th, where we have treated of the Duties of thoſe who are in the Service of the Army. For in that 4th Title mention is made only of the Perſons actually in the Service of the War, and of their Duties in that Service, which make up the Military Government; and in this Title we purpoſe to explain who are the Perſons, whoſe Condition regards the Profeſſion of Arms, whether they ſerve actually in the War, or whether they be not in actual Service: and this ſhall be the ſubject matter of two Sections; the firſt ſhall be of the diſtinctions of thoſe Perſons; and the ſecond of their other Duties beſides thoſe of Service in the War. So that the ſubject matter of this Title is altogether different from that of the 4th Title.

SECT. I.

Diſtinction of the Perſons.

The CONTENTS.

1. *The right of imploying Arms reſides in the Perſon of the Prince.*
2. *Princes of the Blood.*
3. *The firſt Officers who wear Swords, are next to the Princes of the Blood.*
4. *Knights of the King's Orders.*
5. *The King's Vaſſals.*
6. *Gentlemen.*
7. *Officers of War, and others who belong to the Profeſſion of Arms.*

I.

1. *The right of imploying Arms reſides in the Perſon of the Prince.*

WE cannot conſider the Body of a State without diſtinguiſhing in it the Prince who is Head thereof, and who in that Auguſt Rank is infinitely above the moſt exalted Conditions, which cannot be filled but with his Subjects, ſeeing he is the only Perſon in whom God hath placed the fulneſs of Authority and Power for the Government, and for the diſpenſation of Juſtice, together with the force of Arms to make it reign, not only over his own Subjects by the Empire which Juſtice ought naturally to have over all Mankind, but alſo by War againſt Strangers in the caſes where this way becomes neceſſary *a*. Thus the Prince is the firſt Perſon engaged to the Profeſſion of Arms by the Right which puts the uſe of them into his hands, and which makes him the diſpenſer of the ſaid uſe of Arms.

a See Tit. 2. Sect. 2. Art. 2.

II.

2. *Princes of the Blood.*

It is from this Glory and Grandeur of the Prince that the Glory of thoſe Perſons proceeds who have the honour of filling the Ranks which are neareſt to his own. Thus, in *France*, the firſt of all are the Princes who are the King's Children; and next to them, the other Princes of his Blood. For beſides the ſingular Dignity of ſo illuſtrious a Birth, they may ſucceed to the Crown, as alſo their Deſcendants, when it ſo falls out. And it is by reaſon of the elevation of this Rank, and of this Birth, which has the ſame Original with that of the Prince, that, among other marks of Grandeur and Dignity, they have the firſt ſhare in the Glory of the Arms which God puts into the hands of the Prince. For as he cannot make uſe of them but by communicating the uſe of his Right to other Perſons, ſo this Honour regards in the firſt place and moſt naturally the Princes of the Blood, who are not engaged in the Eccleſiaſtical State *b*.

b 'The firſt Rank is that of the Perſons whom 'their Birth unites moſt nearly to the Prince.

III.

3. *The firſt Officers who wear Swords, are next to the Princes of the Blood.*

Next to the Princes of the Blood, the firſt of thoſe who wear Swords, are the great Officers of this Profeſſion; ſuch as the Admiral, the ſecular Peers, the other Officers of the Crown, and thoſe of the King's Houſhold who belong to this Profeſſion of Arms, the Officers of War whether they ſerve by Sea or Land, the Governours of Provinces, and of fortified Places *c*.

c 'We do not pretend to mark here the Ranks 'of theſe Perſons, nor even to diſtinguiſh their 'ſeveral Offices; for that matter comes not with-

'in

‘ in the deſign of this Book: this detail may be ‘ eaſily met with elſewhere; and we muſt only ‘ remark, that we have diſtinguiſhed in the Article the Peers, and other Officers of the Crown, ‘ and of the King's Houſhold who wear a Sword. ‘ For the Biſhops who are Peers, and the great ‘ Almoner do not wear it, nor the Chancellor who ‘ is an Officer of the Crown.

IV.

4. Knights of the King's Orders.

We muſt comprehend in the ſame Order the diſtinguiſhed Rank of thoſe whom the King honours with the Title of Knights of his Orders, and to whom he gives the particular Badges thereof, which he himſelf wears on his own Body; and which he gives with this Title to his Children aſſoon as they are born, giving it to other Perſons only out of a particular Conſideration of their Services, and as a Recompence of a Merit worthy of this diſtinction *d*.

d ‘ We do not here pretend to explain theſe ‘ ſeveral Orders, and their Privileges; and it ſuf- ‘ ficeth to mark in general this diſtinction of the ‘ Knights of the King's Orders.

V.

5. The King's Vaſſals.

We ought to diſtinguiſh in this Order of the Profeſſion of Arms, the Vaſſals who have Fiefs of the Crown, Principalities, Dutchies, Counties, Marquiſates, and other Lands erected into Titles, which have been given, either originally to the preſent Poſſeſſors, or to thoſe from whom the preſent Poſſeſſors derive their Title as a Fief, on condition to pay Homage and Fealty for them to the King; that is to ſay, to ſwear Allegiance to him, that they will be always devoted to his Service, according to the different Conditions of the Fiefs: and the ſame Order takes in likewiſe Vaſſals of an inferior Rank, whether they have Fiefs held in chief, or Meſne-Fiefs, which the firſt Vaſſals have diſmembred from their own, and given away to others on the ſame Conditions of paying Homage and Fealty for them. Thus all Vaſſals or under-Vaſſals who have ſuperior or inferior Fiefs, are the King's Men to ſerve him in the War, according to the quality of the Fee they hold; and they are bound to yield this Service whenever required to do it by the Prince's Order, which is called in *France* the Ban and Arrier-Ban *e*.

e ‘ See the Ordinance of *Charles* VI. and the ‘ other Ordinances relating to the Ban and Arrier Ban. Every body knows that there are ‘ Kingdoms held in Fee, and what is the uſe of ‘ Fees in general: but this is a matter, the detail whereof ought not to be inſerted in this ‘ Book; for beſides that the Rules of this detail ‘ are different according to the Cuſtoms of places, ‘ the publick Order takes no farther notice of it ‘ than what is ſaid in this Article.

VI.

6. Gentlemen.

It is likewiſe to this Order of the Profeſſion of Arms that Gentlemen belong; that is to ſay, thoſe who are Noble by Birth, and to whom this Name properly belongs, and whoſe Anceſtors have deſerved by their Services in the War, the diſtinction which a Patent of Nobility makes among them. And this Quality engages them to ſerve in the War, according as occaſion may require, in the ſame manner as Vaſſals, and gives them alſo divers Privileges. We muſt place in this Rank of Gentlemen, thoſe who not having this Quality by Birth, have deſerved by their Services in the Wars, to be created Noble. And there are likewiſe ſome who by the Privileges of their Offices, or for other Cauſes, are made Noble, and enter into the Condition and Engagements of thoſe who are Gentlemen by their Services in the Wars, or by thoſe of their Anceſtors *f*.

f See the Ordinances cited on the foregoing Article.

VII.

7. Officers of War, and others, who belong to the Profeſſion of Arms.

Laſtly, we ought to place in the Order of the Profeſſion of Arms, all Officers of War, Generals, Colonels, Captains, Lieutenants and others; and alſo the Soldiers, and all Perſons whoſe Functions have relation to the Service of the War by Land or Sea: and this comprehends, beſides thoſe who carry Arms, thoſe who ſerve in the Artillery, in Fortifications, and in all the other Functions of War *g*.

g All theſe Perſons belong to the Profeſſion of Arms.

SECT. II.

Of the other Duties of the Perſons mentioned in this Title, beſides thoſe of actual Service in the War, according as theſe Duties have relation to the publick Order.

IT is neceſſary to diſtinguiſh, as has been obſerved in the Preamble of this Title, two ſorts of Duties of Perſons whom their Condition engages to the Profeſſion of Arms: the firſt, of the Duties which regard the actual Service in the War; and the ſecond, of ſome

ſome other Duties which are different, and do ſeverally belong to the Conditions treated of under this Title. The Duties of the firſt of theſe two ſorts have been explained in the 4th Title; and thoſe of the ſecond ſort ſhall be the Subject matter of this Section, as has been already obſerved in the ſame place.

The CONTENTS.

1. *The firſt Duty, to ſerve in the Wars, when commanded.*
2. *The other Duties different according to the differences of Conditions.*
3. *Duties of the Princes of the Blood.*
4. *Vertues of the Princes.*
5. *A faithful Affection to the Perſon and Intereſts of the Prince.*
6. *Duty of Princes of the Blood who are Members of the Prince's Council.*
7. *Duty of cauſing Juſtice to be adminiſtred in their own Lands.*
8. *Duty of the great Officers concern'd in the Adminiſtration of Juſtice.*
9. *Duties of Lords of Mannors.*
10. *Duty of chuſing good Officers.*
11. *Duty to ſee that Juſtice be rightly adminiſtred.*
12. *That there be no oppreſſion or vexation in collecting their Dues.*
13. *To avoid Abuſes in the uſe of the Honorary Rights in the Churches.*
14. *Gentlemen ought not to be concern'd in Trade, nor farm any of the Lands or Goods belonging to the Church.*

I.

1. *The firſt Duty, to ſerve in the Wars, when commanded.*

The firſt Duty common to all, whoſe diſtinctions have been explained in the foregoing Section, is that which obliges them to ſerve in the War, whenever called upon to do it *a*, and there to obſerve the Rules of the Military Diſcipline, which have been explained in the 4th Title, according as the ſaid Rules may regard them, whether it be to command, or to obey.

a And ye came near unto me every one of you, and ſaid, we will ſend Men before us, and they ſhall ſearch us out the Land, and bring us word again by what way we muſt go up, and into what Cities we ſhall come. And the ſaying pleaſed me well, and I took twelve Men of you, one of a Tribe, &c. Deut. 1. v. 22, & 23.

See Judges 7.

See the 4th Title.

II.

2. *The other Duties different according to the differences of Conditions.*

Seeing the other Duties proper to theſe Perſons, regard them differently according to the differences of their Conditions, we ſhall diſtinguiſh them according to their Order by the Articles which follow *b*.

b See the following Articles.

III.

3. *Duties of the Princes of the Blood.*

The Princes of the Blood being the firſt in Honour and Dignity by their Birth, and by the Rank which their Birth gives them about the Sovereign, this elevation engages them towards the Publick to give to all a good Example by their zeal and fidelity in the Service of the Prince, and the good of the State; and the ſame Rank makes it a Duty incumbent on them to embrace and even find out occaſions where their Protection may be uſeful, either to the Church, or to the Order of the Government, or for the Adminiſtration of Juſtice to particular Perſons; which comprehends the Duty of uſing the freedom of acceſs they naturally have to the Prince, for acquitting themſelves both towards him and towards the Publick, of what may be neceſſary to be done on their part for the ſupport of Juſtice *c* and Truth, according to the Rules explained in the third Title.

c I will ſet no wicked thing before mine Eyes; I hate the work of them that turn aſide. Pſal. 101. 3.

Mine Eyes ſhall be upon the faithful of the Land, that they may dwell with me: he that walketh in a perfect way, he ſhall ſerve me. He that worketh deceit, ſhall not dwell within my Houſe; he that telleth lyes, ſhall not tarry in my ſight. Pſ. 101. 6, 7.

See Tit. 3. Sect. 2.

See the Texts quoted on Art. 8. of the ſame Section.

IV.

4. *Vertues of the Princes.*

The diſtinction of the Rank of Princes ought to diſtinguiſh alſo their Vertues, and eſpecially thoſe the exerciſe whereof regards ſome publick good. Thus Liberality, which is a Duty common to all great Men, to do the good which their Conditions may require of them when they have opportunities of exerciſing this quality, ought to be in Princes a Magnificence, which they ought to diſpenſe according to the Rules of Prudence. Thus Courage and Generoſity, which are Vertues common to all Perſons on occaſions where they may be of uſe, ought to be in Princes a true Magnanimity *d*.

d 'The Vertues of Princes ought to be proportionable to their Elevation.

When thou goeſt out to Battle againſt thine Enemies, and ſeeſt Horſes and Chariots, and a People more than thou, be not afraid of them: for the Lord thy God is with thee, which brought thee up out of the Land of Egypt.——*Let not your Hearts faint, fear not and do not tremble; neither be ye terrified becauſe of them.* Deut. 20. 1, 3.

And there is no diſcharge in that War. Eccleſ. 8. 8.

V.

V.

5. *A faithful Affection to the Person and Interests of the Prince.*

Altho the Princes of the Blood, or their Descendants, may in due time succeed to the Crown, yet seeing they are always in the Rank of Subjects of the Prince, it is an essential Duty incumbent on them to join to an uncorrupted Fidelity which this Rank of Subjects demands, a disinterested Affection and Zeal for the Person and Interests of the Prince, which may be proportionable to the Honour they have of being related to him *e*.

e ‘ Among other great Qualities of *David* which ‘ shine in all the Actions of his Life, we cannot but ‘ take notice of and admire his Conduct towards ‘ *Saul*, whom he was to succeed in the Government. For on all occasions, and even when ‘ *Saul* was trying all means to destroy him, he ‘ gave the greatest Marks of his Respect and Zeal ‘ for that ungrateful Prince, and laid hold on all ‘ occasions to save his Life.

VI.

6. *Duty of Princes of the Blood who are Members of the Prince's Council.*

The Princes of the Blood who are Members of the Prince's Council, are bound to the same Duties as others who have that Honour, and especially on such Occasions where Truth or Justice may be concerned, and may stand in need of Protection against the Oppression of Persons who should abuse their Authority, or the Credit they have with the Prince, to hinder the Truth from coming to his knowledge. For in these Cases the Interests of Truth and Justice being the same with those of the Prince, they who have the honour to approach neareſt his Person, are singularly obliged by the free Access they have to him, and the Honour they have of being nearly related to his Person, to pay him that important Duty, of acquainting him with the Facts which the Cause of Justice requires he should be informed of, and of embracing the Protection of Justice in a manner worthy of their Rank *f*.

f *For by wise Counsel thou shalt make thy War; and in multitude of Counsellors there is Safety.* Prov. 24. 6.

How can I my self alone bear your Cumbrance, and your Burden, and your Strife? Take ye wise Men and understanding, and known among your Tribes, and I will make them Rulers over you. And ye answered me, and said, The thing which thou hast spoken is good for us to do. So I took the Chief of your Tribes, Wisemen and known, and made them Heads over you, Captains over thousands, and Captains over Hundreds, and Captains over fifties, and Captains over tens, and Officers among your Tribes. And I charged your Judges at that time, saying, Hear the Causes between your Brethren, and judge righteously between every Man and his Brother, and the Stranger that is with him, &c. Deut. 1. 12, *&c.*

Excellent Speech becometh not a Fool, much less do lying Lips a Prince. Prov. 17. 7.

See these Duties in Tit. 3. Sect. 2.

See *Prov.* 29. 12. and 20. 18.

‘ Altho all these Texts have not a precise relation to this Rule, yet they may all of them be ‘ applied to it.

See the Text cited on Art. 1.

VII.

7. *Duty of causing Justice to be administred in their own Lands.*

It is likewise an important Duty incumbent on Princes of the Blood, but what is common to them with all great Lords, and others who have Lands with a Jurisdiction thereto annexed, to take care, as shall be explained in the 10th and other following Articles, that the Officers under them administer Justice in their Courts, and that those to whom they entrust the Care of their Rights, whether they be their Domesticks, or Tenants, or others, do not commit any Act of Violence or Oppression; and that on the contrary all who live under their Jurisdictions may feel the Effects of Protection and Authority, which may maintain every one of them in the Possession of their Rights *g*.

g See Art. 10, *&c.*

See the Texts cited on Art. 11.

VIII.

8. *Duty of the great Officers concerned in the Administration of Justice.*

The Duties of the Officers of the Crown and others, of whom mention has been made in Sect. 1. Art. 3. of this Title, are different according to the different Functions of their Offices. And those among them who are called to assist in the Prince's Council, are also obliged to the Duties explained in Tit. 3. Sect. 2. in so far as the same may concern them. And as for the Functions of their Offices, seeing they have all of them some Jurisdiction, and even those Peers who are Judges of the Affairs in which the Crown is any way concerned, they have for general Rules of their Duties in those Functions the Rules of the Officers of Justice, which shall be explained in the second Book, in so far as they may be applicable to them. And every one of them has moreover for his Rules peculiar to his Office those which are prescribed by the Ordinances in *France*. Thus the Admiral, and other Officers of the Crown, the Governours of Provinces and of fortified Places, and the Officers of War have their respective Rules prescribed by the Ordinances. And the Knights of the King's Orders have also there the Rules of their Functions, and of their Duties *h*.

h ‘ It is a necessary Consequence of Offices, ‘ and other Imployments, to discharge well the ‘ Functions thereof.

IX.

9 *Duties of Lords of Mannors.*

Vaſſals who have Lands erected into Titles, Principalities, Dutchies, Counties, Marquiſates, and all thoſe who hold Lands either immediately or mediately of the Crown, with a Juriſdiction annexed to them, are obliged by this Right of Juriſdiction to ſeveral different Duties, which ſhall be explained in the following Articles. And ſeeing the Princes of the Blood, the Officers of the Crown, and others mention'd in *Sect.* 1. *Art.* 3. have alſo the ſame Right of Juriſdiction in their reſpective Lands, they are alſo bound to the ſame Duties *i*.

i 'The right of Juriſdiction implies eſſentially 'the general Duty of cauſing Juſtice to be adminiſtred, and the particular Duties which are the 'Conſequences of this primary Duty.

By me Kings reign, and Princes decree Juſtice. Prov. 8. 15.

See upon this and the following Articles, the Ordinances of *Francis* I. in 1535. Art. 5. in 1515. Art. 21. Of *Charles* VIII. in 1453. Art. 47. Of *Francis* II. 1560. Of *Henry* II. 1550. Ordinance of *Blois*, Art. 65, 66. Of *Moulins*, Art. 13.

X.

10. *Duty of chuſing good Officers.*

As thoſe who have Lands with a Juriſdiction annexed to them, have a Right to put in Officers into the places belonging to their Juriſdiction, when they fall void; this Right neceſſarily implies the Duty of conferring them only on Perſons who have both Capacity and Probity ſufficient for diſcharging the Functions thereof. And altho in theſe Caſes the Lords of Mannors who have a Juriſdiction within themſelves, have a Right to ſell the ſaid Offices, yet that Right is not ſo abſolute but that they are obliged to make a good choice of Perſons duly qualified for performing the Functions thereof; and does not extend ſo far as to leave them at liberty to beſtow the ſaid Offices on ſuch as give moſt for them, if they have not the Qualities neceſſary for the due Execution of the Office to which they are named. For beſides that the Duty of thoſe who have the nomination of Judges, to nominate Perſons in all reſpects duly qualified for the Office, is more antient, more natural, and more eſſential than their Right to ſell the Offices; neither Equity nor good Senſe will ever bear that he who has a Right to a Function, for the good of the Publick, ſhould be at liberty to exerciſe it otherwiſe than well: which is not to be underſtood as if all thoſe who have the appointment of Judges, ought to be capable themſelves of judging of their Qualities; but only that thoſe who are capable of judging, may uſe their ſaid capacity ſo as to make a good Choice for the publick good; and that thoſe who are not able of themſelves to make a right Judgment of the Perſons, may therein take the advice of wiſe and diſintereſted Perſons *l*.

l ¶ Altho it be true that the Lords of Mannors who have Courts of Juſtice within themſelves, are not all of them capable of judging of the Qualifications of thoſe whom they appoint to be Judges of the ſaid Courts; and that the Perſons named to the ſaid Offices are to be examined by the Judges who are to admit them, in order to be ſatisfied as to their Capacity, their Religion, Life and Converſation; yet the Duty of theſe Judges who are to examine the qualifications of the Perſons nominated, does not diſcharge the Lords of the Mannor of their Duty to nominate fit Perſons. For beſides that they cannot be certain that the Judges who are to examine them will do their Duty therein faithfully, they on their part are under an engagement to make a good choice, if they are capable of doing it by themſelves, or to recommend it to Perſons in whom they can confide to make this choice for them. For otherwiſe they make themſelves Accomplices in the injuſtices which may be committed by thoſe whom they appoint Judges, without examining their qualifications for the diſcharge of that Office. If the Lord of the Mannor were a Perſon incapable of making this choice, as a Child under Tuition; this Duty would regard the Tutor, who ought to take the meaſures neceſſary to preſerve on one part the intereſts of his Minor, and on the other part to do juſtice to the Publick by making a good choice. And if the Relations whoſe advice he ought to take in this matter, ſhould refuſe to concur in theſe Meaſures, he might apply for redreſs to a Court of Juſtice; or take ſuch other courſe as Prudence ſhould direct for the diſcharge of his Conſcience.

It is not the ſame thing with reſpect to thoſe who are in poſſeſſion of venal Offices, and have a right to ſell them, as it is with thoſe who have the diſpoſal of the Title of an Office. For theſe make the Officer, and give him a Salary; but the others do not confer on the purchaſer any Title of an Officer, and ſell to him only their ſurrender or reſig-

reſignation of the Office, which diveſts them of the right they had to it, and which they may tranſmit to any one that will buy it, whether it be to diſpoſe of that Right in favour of other Perſons, or to reap the benefit of the Salary or Perquiſites belonging to the ſaid Office. Thus nothing obliges thoſe who ſell their Offices, whether it be the Officers themſelves or their Widows, or Heirs, or others who have their Rights, to make any enquiry into the qualifications of the Purchaſers, whom they do not make Officers, and who may perhaps make the purchaſe for other Perſons.

The Ordinance of *Orleans* forbids expreſly thoſe who have Lands with a Juriſdiction annexed to them, to ſell the Offices or Places of Judicature. *The Lords of Mannors, whether they be Eccleſiaſtical or Secular Perſons, and of what quality ſoever they be, who ſhall ſell directly or indirectly the Places of Judicature, ſhall be deprived of their Right of Preſentation and Nomination to the ſaid Offices; and in the like manner all other Perſons of what Quality ſoever they are, who ſhall have the Right of Preſentation and Nomination.* Ordinance of *Orleans*, Art. 40. See that of *Blois*, Art. 100, 101.

'[By an Act of Parliament in *England* 5 & 6 'Edw. VI. cap. 16. made for the avoiding of 'Corruption in the Adminiſtration of Juſtice, 'and in the execution of Offices of Truſt, it is 'enacted, That if any Perſon ſhall bargain or ſell, 'directly or indirectly, any Office, or Deputation 'of any Office, which ſhall in any wiſe touch or 'concern the Adminiſtration or Execution of Juſtice, or the Receipt, Comptrolment or Payment 'of any of the King's Treaſure or Revenue, or the 'ſurveying any of the King's Honours, Caſtles, Mannors, Lands, Tenements, Woods or Hereditaments, 'or any of the King's Cuſtoms, or the keeping 'any of the King's Towns, Caſtles or Fortreſſes; 'or which ſhall concern or touch any Clerkſhip to 'be occupied in any manner of Court of Record 'wherein Juſtice is to be adminiſtred; That then 'all and every ſuch Perſon and Perſons that ſhall 'ſo bargain and ſell any of the ſaid Offices, or 'Deputations, ſhall not only loſe and forfeit all 'their Right, Intereſt and Eſtate in and to the 'ſaid Offices or Deputations; but likewiſe the 'Perſons purchaſing the ſame ſhall be adjudged 'diſabled Perſons in the Law, to all intents and 'purpoſes, to have, occupy or enjoy the ſame.

'The like Prohibition we find in the Canon Law, againſt the Sale of Offices of Eccleſiaſtical Juriſdiction; by which the Biſhop who 'ſells any ſuch Office, is diſabled to confer the 'ſame for the future, and the Perſon who purchaſes the Office is deprived of it. *Extra. Lib.* 5. *Tit.* 4. *cap.* 1.]

XI.

11. *Duty to ſee that Juſtice be rightly adminiſtred.*

This Right of Juriſdiction which Lords of Mannors have in their Lands, obliges them to ſee that Juſtice be duly adminiſtred by their Officers, and that recourſe be had to the King's Officers in the Caſes which are called Royal Caſes, and which are not properly cognizable in the Courts of Lords of Mannors, whether it be in Civil matters, ſuch as relate to the publick Taxes, and other Duties belonging to the Crown, which it is not neceſſary we ſhould enumerate here; or in Criminal matters, ſuch as High-Treaſon in all its kinds, counterfeiting the Coin, unlawful Aſſemblies, and many other matters, the cognizance whereof is reſerved to the King's Judges. And this Duty of the Lords of Mannors, to ſee that Juſtice be duly adminiſtred in their Lands, conſiſts in reſtraining the injuſtice of their Officers by ſuch ways as their Authority may furniſh them with; and even by depriving the Officers of their Places in the caſe of Miſdemeanors which may deſerve ſuch a Puniſhment; in taking due care that Crimes be puniſhed; in protecting the Perſons ſubject to their Juriſdiction againſt the Oppreſſions, Violences and other Injuſtices, whether of their Officers, or other Perſons; in maintaining Peace among them as much as poſſible; in procuring the Rules and Orders relating to the Civil Policy to be obſerved; in taking care of the good Order of Churches, of Hoſpitals, and of the relief of the Poor. For all theſe Functions being part of the Adminiſtration of Juſtice, they particularly concern thoſe who have a Right of Juriſdiction within the bounds of their own Lands. And as the Lords of Mannors have in their Lands the diſpenſation of Juſtice, in proportion to what the Prince from whom they derive their Rights has in his Kingdom; and as they have the profits of Confiſcations, Fines and other Perquiſites of Juriſdiction; ſo they are alſo obliged in proportion to do, within the bounds of their Lands, all that lies in their Power, for procuring therein a ſtrict obſervance of Juſtice, a compliance with all the Rules and Orders of the Civil Policy, and the advancement of the publick Good *m*.

m 'All theſe Duties are natural Conſequences 'of the Right of Juriſdiction.

Hear therefore, O ye Kings, and underſtand; learn ye that be Judges of the ends of the Earth; give ear, you that rule the People, and glory in the multitude of Nations: For Power is given you of the Lord, and Sovereignty from the higheſt, who ſhall try your Works, and ſearch out your Counſels. Becauſe being Miniſters of his Kingdom, you have not judged aright, nor kept the Law, nor walked

walked after the Counſel of God. Horribly and ſpeedily ſhall he come upon you; for a ſharp Judgment ſhall be to them that be in high places. For Mercy will ſoon pardon the meaneſt, but mighty Men ſhall be mightily tormented. For he which is Lord over all, ſhall fear no Man's Perſon, neither ſhall he ſtand in awe of any Man's Greatneſs; for he hath made the ſmall and great, and careth for all alike. Wiſdom of *Sol.* ch. 6. v. 1, 2, 3, &c.

XII.

12. *That there be no oppreſſion or vexation in collecting their Dues.*

If the Lords of Mannors are obliged to take care that Juſtice be adminiſtred in their Courts, they are likewiſe as much obliged, or rather more, not to commit any injuſtice themſelves, nor to convert into Violence, Tyranny and Oppreſſion, an Authority which is put into their hands only for the ſupport of Juſtice. Thus for their Dues, whether they collect them themſelves, or imploy others to do it, or let them out to Farmers; it is their Duty in all theſe Caſes to regulate the collecting of them, ſo as it may be as little burdenſom to the People as poſſible: whether it be by uſing mildneſs and humanity in the Seizures, Executions and other Diſtreſſes; or by exacting Payment of their Dues at times when it may be eaſieſt for the People to pay, and eſpecially for the poorer ſort; or by not demanding, either as to the quantity or quality of the Grain, or other kinds of things that are due, or for Work and all other Rights that may belong to them, any more than what may be juſtly due to them by virtue of their Titles *n*.

n Thou ſhalt not defraud thy Neighbour, neither rob him. Levit. 19. 13.

Behold, here I am, witneſs againſt me before the Lord, and before his anointed; whoſe Ox have I taken? or whoſe Aſs have I taken? or whom have I defrauded? whom have I oppreſſed? or of whoſe hand have I received any Bribe, to blind mine Eyes therewith? and I will reſtore it you. 1 Sam. 12. 3.

See *Amos* 4. 1. *Zeph.* 3. 3.

'We prohibit all Lords, and others, of what 'condition and quality ſoever they be, to demand, 'take, or ſuffer to be taken or demanded upon 'their Lands, or from any of the Inhabitants or 'Poſſeſſors thereof, any Sum of Money or other 'thing not really and truly due, whether it be 'on account of Taxes, Aids, Work or other 'thing, under what colour ſoever it may be; ex'cept in the Caſes where the Subjects and others 'are bound by Law, and may be compelled by 'courſe of Juſtice, *&c.* upon pain of being pu'niſhed according to the rigour of the Ordinances, 'the penalties of which it ſhall not be in the power 'of our Judges to mitigate. *Ordinance of* Blois, '*Art.* 280, 283.

'We ſtrictly require and command our Judges 'to do their Duty, and to adminiſter Juſtice to 'all our Subjects, without exception of Perſons, of 'what quality ſoever they may be; and we require 'our Advocates and Proctors to ſee to the due 'execution of theſe Preſents, and not to ſuffer 'our poor Subjects to be vexed and oppreſſed by 'the power of their Lords of Mannors, or others, 'whom we forbid to intimidate and threaten their 'Vaſſals who are to pay Duties and Acknowledg'ments to them: and we require them to carry 'themſelves with humanity towards them, and to 'ſue for their Rights by the ordinary ways of Juſ'tice. *Ordinance of* Orleans *Art.* 106.

XIII.

13. *To avoid Abuſes in the uſe of the Honorary Rights in the Churches.*

Seeing Lords of Mannors have in the Churches ſituated within their Lands ſome of thoſe ſorts of Rights called Honorary, and which for the greateſt part are real Abuſes diſapproved by the ſacred Canons; it is a Duty incumbent on them, and alſo on thoſe who have in other Churches Rights of the like nature, and a Duty not only of Juſtice, but alſo of Religion, to uſe the ſaid Rights, ſo as not to tranſgreſs in the leaſt againſt the Dignity and Sanctity of the Churches, the Order of Divine Service, and the Functions of the Paſtors, and other Eccleſiaſtical Perſons; and that by paying them the Duty which Religion demands, they may give to others a good Example of a modeſt and reſpectful Carriage in the Churches, and of a dutiful Behaviour towards thoſe who exerciſe any ſpiritual Function *o*.

o Piæ mentis amplectenda devotio eſt, qua ſe Julius nobis in re Juliana ſui juris fundaſſe prohibetur Eccleſiam: quam in honorem ſancti Viti Confeſſoris ejus nomine cupit conſecrari. Hanc igitur, frater chariſſime (ſi ad tuam diœceſim pertinere non ambigis) ex more convenit dedicari, collata primitus donatione ſolemni, quam miniſtris Eccleſiæ deſtinaſſe ſe præfati muneris teſtatur oblator, ſciturus ſine dubio præter proceſſionis aditum, qui omni Chriſtiano debetur, nihil ibidem ſe proprii juris habiturum. 16. *q.* 7. *c.* 26.

Et ideo frater chariſſime, ſi ad tuam pertinet Parochiam, benedictionem ſupra memoratæ baſilicæ ſolemni veneratione depende. Nihil tamen ſibi fundator ex hac Baſilica noverit vindicandum, niſi proceſſionis aditum, qui Chriſtianis omnibus in commune debetur. *C.* 27. *eod.*

Ut Laici ſecus altare quando ſacra myſteria celebrantur, ſtare vel ſedere inter clericos non præſumant ſed pars illa, quæ cancellis ab altari dividitur, tantum pſallentibus pateat clericis. Ad orandum vero & communicandum Laicis, & fœminis (ſicut mos eſt) pateant ſancta ſanctorum. *Cap.* 1. *extr. de vita & hon. cler.*

XIV.

14. *Gentlemen ought not to be concern'd in Trade, nor farm any of the Lands or Goods belonging to the Church.*

The Duties of Gentlemen, who are engaged in any Condition or Profeſſion, are the ſame with thoſe of the other Perſons in the ſame Imployments. And theſe Duties are explained in their proper places, as has been ſaid in the Preamble of *Tit.* 9. And as for the Gentlemen who have no particular Engagements, either in the Church, or the Adminiſtration of Juſtice, or in the Profeſſion of Arms, the Duty proper to

their Condition, it to live in it without derogating from their Nobility, that is, to abſtain from the exerciſe of Profeſſions unworthy of this Rank, and not to make a bad uſe of the Authority they may have. Thus they are prohibited to take to farm, either in their own Name or that of other Perſons, Lands or Goods belonging to the Church *p*. And the ſame Prohibition is likewiſe extended to Officers. Thus in the ſame manner Gentlemen and Officers are forbid to carry on any Trade or Commerce, either by themſelves or their Servants, or in the name of other Perſons *q*, as has been mentioned in another place *r*.

p ‘ We forbid all Gentlemen and Officers, as ‘ well thoſe imployed under us, as thoſe belonging to Lords and Gentlemen, to take for the future, or to be any way concerned directly in ‘ taking Leaſes or Farms of Church Benefices, ‘ Tithes, Rents, and other Eccleſiaſtical Revenues, ‘ under what colour ſoever it be, or indirectly by ‘ uſing the names of other Perſons, and they to ‘ go ſharers with them: And we likewiſe enjoin ‘ them to give no manner of diſturbance to Eccleſiaſtical Perſons in the Leaſes they have already granted, or may hereafter grant, nor to ‘ intimidate thoſe who are willing to take the Leaſes, or to advance the Rent; upon pain of being ‘ declared ignoble, and as ſuch made liable to the ‘ Taxes, and their Succeſſors after them. *Ordinance of* Blois *Art.* 48.

q ‘ We prohibit all Gentlemen and Officers of ‘ Juſtice, to deal in any ſort of Merchandize, and ‘ to take or hold any Farms, either in their own ‘ Names, or of other Perſons; upon pain, as to ‘ the Gentlemen, of being deprived of their Nobility, and made ſubject to the Land-Tax, and ‘ as to the Officers, of being deprived of their ‘ Offices and Commiſſions. *Ordinance of* Orleans ‘ *Art.* 109.

See the other Ordinances on the ſame ſubject.

r See *Tit.* 7. *Sect.* 4. *Art.* 10. and *Sect.* 1. of the following Title.

Nobiliores natalibus, & honorum luce conſpicuos, & patrimonio ditiores, pernicioſum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius ſit emendi vendendique commercium. *l.* 3. *C. de Commerc.*

TIT. XII.

Of Commerce.

WE have already ſpoke of Commerce in the 7th Title, but only with reſpect to the ſubject matter of that Title, which is of the means of procuring plenty of all things in a Kingdom; ſo that what has been there ſaid, regards principally the Commerce carried on with Strangers, in order to bring into a Kingdom the Commodities that muſt be fetched from other Parts. But we have not there treated of what relates in general to the Nature and Uſe of Commerce, and the Duties of thoſe who make profeſſion of it. And this ſhall be the ſubject of this Title: where we ſhall explain, in the firſt Section, the Nature and Uſe of Commerce; and in the ſecond, the Duties of thoſe who exerciſe it.

SECT. I.

Of the Nature and Uſe of Commerce.

CONTENTS.

1. *Definition of Commerce.*
2. *Neceſſity of Commerce.*
3. *This Commerce is not underſtood of Immoveables.*
4. *Three ſorts of Perſons who trade differently in ſeveral things.*
5. *Thoſe who ſell the Produce of their own Lands.*
6. *Artificers who ſell their Work.*
7. *Definition of thoſe properly called Merchants.*
8. *It is by Commerce that the Inhabitants of every Country have the uſe of all things.*
9. *Precautions in favour of Commerce.*
10. *Monopolies forbidden.*
11. *A Juriſdiction peculiar to Merchants for their Commerce.*

I.

1. *Definition of Commerce.*

WE give the name of Commerce in general to the uſage of buying and ſelling, and bartering, which has been introduced, to the end that every one might have the Things they ſtand in need of. Thus we may diſtinguiſh two manners of Commerce: one by Sale, when a Thing is given for Money; and the other by Exchange, when on both ſides a Thing is given, and not Money *a*.

a See Tit. 7. Sect. 2. Art. 2.

II.

2. *Neceſſity of Commerce.*

The uſe of Commerce is a neceſſary Conſequence of the variety of the wants of Mankind. For ſince no body can have always, and in all places, whatever he ſtands in need of, it is neceſſary that he get it from thoſe who have it; which he cannot do but by Commerce, either by bartering Commodity

modity for Commodity, or by purchaſing it with Money: for the other ways of applying things to ones uſe, would not be ſufficient to ſupply this want. Thus altho one may have a Thing, either by Donation, or by a Loan, by hiring it, or otherwiſe; yet theſe ways of having Things do not extend to all thoſe Things which one may ſtand in need of, nor to all the ſeveral uſes of each Thing without diſtinction *b*.

b ‘ It is but few things that are acquired by Do-
‘ nations; and the letting of a thing to hire, and
‘ the lending the uſe of it, give only a certain Uſe
‘ for a certain Time.

III.

3. This Commerce is not underſtood of Immoveables.

The Commerce here mentioned, doth not extend to the Sale or Exchange of Immoveables; for tho theſe ſorts of Acquiſitions make a kind of Commerce, yet it is of a nature altogether different from that which is the ſubject of this Title, and which relates only to Sales and Exchanges of moveable Things called Merchandize, whether they be Proviſions or other Things which it is neceſſary to be Maſter of, in order to have the intire free uſe of them *c*.

c ‘ The Commerce mentioned here is under-
‘ ſtood only of thoſe kinds of Things called Mer-
‘ chandize.

IV.

4. Three ſorts of Perſons who trade differently in ſeveral things.

Altho the name of Merchant is commonly given to thoſe who drive a Trade either in ſelling or exchanging Goods or Merchandizes; yet it is neceſſary to diſtinguiſh three ſorts of Perſons who carry on this Commerce, and of which there is only one ſort to whom the name of Merchant does properly belong, as will appear by the three Articles which follow *d*.

d See the following Articles.

V.

5. Thoſe who ſell the Produce of their own Lands.

The firſt ſort of Perſons who carry on a Commerce by ſelling Goods or Merchandizes, is of thoſe who, let them be of what condition ſoever they will, have to themſelves, and draw from their own Lands, Grain, Fruits, Flax, Hemp, and other Produce; or who have Cattle from which they reap ſeveral Profits: For theſe Perſons, without being Merchants, ſell or cauſe to be ſold that Grain, thoſe Fruits, thoſe Profits. And it is the ſame with reſpect to thoſe who have Leaſes of the Lands or Eſtates of other Perſons, or who cultivate them for a certain Portion of the Fruits *e*.

e ‘ We don't call thoſe Merchants, who ſell the
‘ Product of their own Lands.

‘ It may be proper to remark on this Article,
‘ what is ſaid in the ſecond Law *ff. de nundinis*,
‘ which is taken out of the ſecond Book of the Re-
‘ publick of *Plato*; That Husbandmen and Arti-
‘ ficers ought not to be ſo long diverted from their
‘ Labours, as to tarry in Towns to diſpoſe of what
‘ they carry there for Sale, and that they ought to
‘ leave that attendance to other Perſons who take
‘ upon them the charge of ſelling their Goods.

Si quis ipſos cultores agrorum, vel piſcatores deferre utenſilia in civitate juſſerit, ut ipſi ea diſtrahant, deſtituetur annonæ præbitio, cum avocentur ab opere ruſtici. Qui confeſtim ubi detulerunt mercem, tradere eam, & ad opera ſua reverti debeant. *l.* 2. *ff. de nund.*

‘ This Regulation would not ſuit with our Taſte,
‘ nor with our Uſage, and would be attended with
‘ many Inconveniencies. Husbandmen and Tradeſ-
‘ men have buſineſs of their own to tranſact in the
‘ Fairs and Markets of Towns; and it would coſt
‘ them too dear to have their Affairs tranſacted by
‘ thoſe Brokers or Retailers, who might perhaps
‘ not be faithful enough in the diſcharge of their
‘ Truſt.

VI.

6. Artificers who ſell their Work.

The ſecond ſort of Perſons who trade in Goods or Merchandizes, are the Handicraftſmen, who ſell what their Handicraft produces, and what they manufacture themſelves, whether they contribute nothing of their own to it beſides their Workmanſhip, or put into it ſome Materials of their own *f*.

f ‘ Handicraftſmen are not properly Mer-
‘ chants.

VII.

7. Definition of thoſe properly called Merchants.

The third ſort of Perſons who deal in buying and ſelling Goods or Merchandizes, are thoſe who are properly called Merchants, whoſe Profeſſion conſiſts in buying for Money, or purchaſing with other Goods the Things in which they deal, and in ſelling them after the ſame manner, whether they ſell by wholeſale or retail *g*.

g ‘ Merchants are diſtinguiſhed from the Per-
‘ ſons who ſell the Produce of their own Lands,
‘ in that they procure from others, either by Sale
‘ or Exchange, the Things which they ſell. And
‘ they are diſtinguiſhed from Handicraftſmen, in
‘ that they do not manufacture the Merchandizes
‘ which they ſell. There are indeed Merchants
‘ who manufacture the Stuffs or other Merchandi-
‘ zes which they themſelves ſell: But as they do
‘ not aſſiſt in the Manufacture with their own
‘ Hands, they are not Handicraftſmen, but true
‘ Merchants.

VIII.

8. It is by Commerce that the Inhabitants of every Country have the uſe of all things.

It is by the means of theſe different ſorts of Commerce that there is in every Kingdom, in every Province, in every Place, a ready and preſent uſe of the things neceſſary to all Perſons, for Food and Raiment, for Cures, and for all the other Wants and Conveniences of Life; and it is alſo by this means that the Publick is ſupplied with the things neceſſary for War, for Navigation,

vigation, and in general, with every thing neceſſary for the ſubſiſtence of a Kingdom, and of the Families whereof it is compoſed. Thus the natural effect of Commerce is to facilitate to every one the uſe of all Things, and even of thoſe which are to be fetched from the moſt remote Countries *h*.

h See the 7th Title.

IX.

9. Precautions in favour of Commerce. It is becauſe of this uſefulneſs, and of this neceſſity of Commerce, that in order to facilitate the uſe thereof, the Laws have made divers Regulations about it. Thus the Ordinances in *France* have prohibited Officers to drive any Trade in Merchandizes, to the end not only that they may not be diverted from the exerciſe of their proper Functions, but alſo that a Liberty of Commerce may not be left to Perſons, who by their Authority might ingroſs the whole Trade to themſelves, and render the condition of the Merchants and Buyers worſe. And the ſame Conſideration has procured all manner of Commerce to be prohibited to the Gentry in *France*. And the ſaid Prohibitions extend even to the Commerce which the ſaid Officers and Gentlemen might carry on in the Names of other Perſons, for their own behoof *i*.

i Nobiliores natalibus, & honorum luce conſpicuos & patrimonio ditiores, pernicioſum urbibus mercimonium exercere prohibemus, ut inter plebeios & negotiatores facilius ſit emendi vendendique commercium. *l.* 3. *C. de comm. & mercat.*

See the 10th Article of the 4th Section of the 7th Title, and the 14th Article of the 2d Section of the preceding Title.

X.

10. Monopolies forbidden. It is upon the ſame Conſideration of the Liberty of Commerce, that the Laws have ſeverely prohibited all Monopolies, as has been explained elſewhere *l*.

l See Tit. 7. Sect. 4. Art. 8.

XI.

11. A Juriſdiction peculiar to Merchants for their Commerce. It is alſo in order to promote Commerce, that the Kings of *France* have eſtabliſhed the Juriſdiction of the Judges and Conſuls of Merchants, for determining the differences which may ariſe among them in relation to their Merchandizes, by a way that is more ſummary, and of leſs expence, than the ordinary Proceedings in other Law-Suits. And they have likewiſe ordained, that the differences among Co-Partners in any Commerce, ſhall be adjuſted by Arbitrators, whom both ſides ſhall agree on *m*.

m See the Ordinances of *Charles* IX. in *November* 1563. and that of 1673. See the Code of the Merchant Law.

SECT. II.

Of the Duties of thoſe who drive any Trade or Commerce.

ALTHO it may ſeem that the Duties treated of in this Section, regard only the Perſons comprehended under the name of Merchants, in the ſenſe explained in the 7th Article of the preceding Section, and that therefore they have no relation to thoſe who ſell what is the produce of their own Eſtates, nor to Handicraftſmen, who are diſtinguiſhed from Merchants, as has been explained in the 5th and 6th Articles of the ſame Section; yet ſeeing theſe Duties are eſſential to all Sellers, it is neceſſary to extend the Rules explained in this Section to all ſorts of Sellers, ſo far as they may be applicable to them. And we muſt likewiſe apply to all ſorts of Commerce, and to all Sellers, the Rules explained in the Title of *the Contract of Sale* in the *Civil Law in its natural Order*, according as they may be capable of being applied to them.

The CONTENTS.

1. *Commerce an occaſion of Injuſtice; the firſt Duty is to avoid it.*
2. *Duty of Merchants, to ſay nothing contrary to Truth.*
3. *Another Duty, not to give one Commodity inſtead of another.*
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5. *Another, not to hide the faults of the Merchandize.*
6. *Another, to have good Weights and Meaſures.*
7. *Another, not to make Monopolies, nor to carry on any prohibited Trade.*
8. *Prohibition of Combinations among Merchants not to ſell but at a certain Price.*

I.

1. Commerce an occaſion of Injuſtice; the firſt Duty is to avoid it. OF all Profeſſions, there is none more expoſed to Avarice, and to Injuſtice which is the Conſequence of it, than that of Commerce. For ſince thoſe

thoſe who exerciſe it, draw Profit from the bare trouble of buying in order to ſell again; ſince they have the Liberty of demanding what they pleaſe, and the facility to cheat in the price and quality of their Merchandizes, the deſire of Gain being joined with a favourable opportunity, leads them eaſily to the Commiſſion of theſe Injuſtices *a*. Thus the firſt Duty of thoſe who exerciſe this Profeſſion, is to propoſe to themſelves therein other Views than that barely to make Gain by it *b*, and to confine themſelves to an honeſt Profit, abſtaining from all manner of lying, from all unfaithfulneſs, and to ſell the things in which they deal only at a reaſonable Price.

a As a Nail ſticketh faſt between the joinings of the Stones; ſo doth Sin ſtick cloſe between buying and ſelling. Eccluſ. 27. 2.

By the multitude of thy Merchandize they have filled the midſt of thee with Violence, and thou haſt ſinned.——Thou haſt defiled thy Sanctuaries by the multitude of thine Iniquities, by the iniquity of thy Traffick. Ezek. 28. 16, 18.

b Qui emolumenta negotiationibus captant. *l.* 1. *Cod. de comm. & mercat.*

c That no Man go beyond and defraud his Brother in any matter. 1 Theſſ. 4. 6.

Qualitas lucri negotiantem aut excuſat, aut arguit: quia eſt & honeſtus quæſtus & turpis——Quia difficile eſt inter mentis vendentiſque commercium non intervenire peccatum. *C. qualitas diſt.* 5. *de pœnit.*

II.

2. *Duty of Merchants to ſay nothing contrary to Truth.*

This firſt general Duty of Fidelity in Commerce, and the Duty common to all Men never to tranſgreſs the ſincerity that is owing to Truth, obliges Merchants of all ſorts never to tell a lye concerning the Price they paid for the thing they are about to ſell. For they may very well decline telling what the Price of it is, but they ought not to ſay it is greater than really it is: ſeeing on one ſide they tranſgreſs againſt Truth by the lye; and on the other ſide they cheat, and are guilty of Unfaithfulneſs, which is near of kin to Theft *d*.

d Keep thee far from a falſe matter. Exod. 23. 7.

Uſe not to make any manner of lye; for the cuſtom thereof is not good. Eccluſ. 7. 13.

Speak ye every Man the truth to his Neighbour.——Love no falſe Oath. Zech. 8. 16, 17.

Wherefore putting away lying, ſpeak every Man truth with his Neighbour; for we are Members one of another. Eph. 4. 25. Mat. 5. 37. Jam. 5. 12. Luk. 19. 8. Exod. 20. 7. Levit. 19. 11.

The getting of Treaſures by a lying Tongue, is a vanity toſſed to and fro of them that ſeek Death. Prov. 21. 6.

III.

3. *Another Duty, not to give one Commodity inſtead of another.*

The ſame Duty of Fidelity obliges alſo the Merchants not to give one Merchandize inſtead of another *e*. For this is likewiſe a Lye and a Cheat, worſe than that of telling a lye about the price of the Purchaſe; ſeeing it is much eaſier not to give Credit to what they ſay of the Price the thing coſt them, than to judge of the quality of the Merchandize: ſo that this Unfaithfulneſs comes much nearer to Theft than the other, and even deſerves a Puniſhment which a good Judge would not fail to inflict if the matter were proved.

e Si æs pro auro veneat non valet (venditio.) *l.* 14. *in f. ff. de contr. empt.*

Menſam argento coopertam mihi ignoranti pro ſolida vendidiſti imprudens, nulla eſt emptio pecuniaque eo nomine data condicitur. *l.* 41. §. 1. *eod.*

Si error aliquis intervenit, ut aliud ſentiat puta qui emit, aut qui conducit: aliud qui cum his contrahit, nihil valet quod acti ſit. *l.* 57. *ff. de obl. & act.*

Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putaſti, quia in corpore diſſenſimus, emptio nulla eſt. *l.* 9. *ff. de contr. empt.*

See *Sect.* 8. *Art.* 11. of the Contract of Sale in the *Civil Law in its Natural Order.*

‘ If Error vacates the Sale, altho the Seller had ‘ acted fairly and honeſtly; if he had fraudulently ‘ ſold one thing for another, he would be puniſh‘ able.

IV.

4. *Another, to declare the faults of the Merchandize.*

Seeing things are in Commerce only for their uſe; it is not enough not to give one Commodity inſtead of another, but it is neceſſary that the thing given, be of the quality which it ought to be of for the uſe it ought to yield. And if it has any faults which diminiſh the value of it, the Merchant is obliged to declare them, if they be ſuch that were they known, he who bargains for the thing would not buy it, or at leaſt not give ſo great a Price for it *f*.

f Certioreſve faciant emptores qui morbi vitiive cuique ſit. *l.* 1. §. 1. *ff. de ædil. ed.*

Qui forraſſe ſi hoc cognoviſſet, vel empturus non eſſet, vel minoris empturus eſſet. *l.* 39. *ff. de act. empt. & vend.*

See Sect. 11. of the Contract of Sale in the *Civil Law in its Natural Order.*

Si quis in vendendo prædio confinem celaverit, quem emptor ſi audiſſet, empturus non eſſet; teneri venditorem. *l.* 35. §. *ult. ff. de cont. empt.*

Si quid tale fuerit vitii ſive morbi, quod uſum miniſteriumque hominis impediat, id dabit redhibitioni locum. *l.* 1. §. 8. *ff. de æd. ed.*

V.

5. *Another, not to hide the faults of the Merchandize.*

It is a Conſequence of the Duty of not deceiving in the quality of the Merchandize, to do nothing likewiſe that

that may conceal from the Buyers the faults they might otherwiſe diſcover in the thing. Thus thoſe who with this View make uſe of any ſlight or cunning which may have this effect, offend againſt this Duty *g*.

g Every one that doth Evil, hateth the Light. Joh. 3. 20.

But they counted our Life a Paſtime, and our time here a Market for Gain: for, ſay they, we muſt be getting every way, tho it be by evil means. Wiſd. of Sol. 15. 12.

He that haſteth to be rich, hath an evil Eye, and conſidereth not that Poverty ſhall come upon him. Prov. 28. 22.

VI.

6. Another, to have good Weights and Meaſures.

The command of not ſtealing, which is common to all Men, is a Law to all Merchants to keep juſt Weights and Meaſures *h*.

h Divers Weights, and divers Meaſures, both of them are a like abomination to the Lord. Divers Weights are an Abomination unto the Lord, and a falſe Ballance is not good. Prov. 20. 10, 23.

Thou ſhalt not have in thy Bag divers Weights, a great and a ſmall. Thou ſhalt not have in thine houſe divers Meaſures, a great and a ſmall. But thou ſhalt have a perfect and juſt Weight, a perfect and juſt Meaſure ſhalt thou have——For all that do ſuch things, and all that do unrighteouſly, are an Abomination unto the Lord thy God. Deut. 25. 13, &c.

Aurum quod infertur a collatoribus, ſi quis vel ſolidos voluerit, vel materiam appendere, æqua lance & liberamentis paribus ſuſcipiatur. *l.* 1. *c. de pond. V. l.* 18. §. 3. *ff. de min.* 25. *ann.*

VII.

7. Another, not to make Monopolies, nor to carry on any prohibited Trade.

We may add as a general Duty of Merchants, that of obſerving the Ordinances *i*, and the Regulations which concern them; particularly thoſe which forbid Monopolies, and the ſelling of certain things to Strangers *l*.

i Jubemus ne quis cujuſcumque veſtis vel piſcis, vel pectinum forte, aut echini. vel cujuſlibet alterius ad victum, vel ad quemcumque uſum pertinentis ſpeciem, vel cujuſlibet materiæ, pro ſua authoritate, vel ſacro jam elicito aut in poſterum eliciendo reſcripto, aut pragmatica ſanctione, vel ſacra noſtræ pietatis adnotatione, monopolium audeat exercere. *l. un. C. de monopol.*

l Nemo alienigenis Barbaris cujuſcumque gentis ad hanc urbem ſacratiſſimam ſub legationis ſpecie, vel ſub quocunque alio colore venientibus, aut in diverſis aliis civitatibus vel locis, loricas, ſcuta, & arcus, ſagittas, & ſpathas, & gladios, vel alterius cujuſcunque generis arma audeat venundare. Nulla prorſus iiſdem tela, nihil penitus ferri vel facti jam, vel adhuc infecti, ab aliquo diſtrahatur. *l.* 2. *c. quæ res export. non deb.*

VIII.

8. Prohibition of Combinations among Merchants not to ſell but at a certain Price.

The ſame Juſtice which forbids Monopolies, forbids alſo Combinations among Merchants not to ſell certain Commodities at a lower Price than what they agree on among themſelves *m*.

m Ne quis illicitis habitis conventionibus conjuret, aut paciſcatur, ut ſpecies diverſorum corporum negotiationis, non minoris quam inter ſe ſtatuerint, venundentur. *l. un. C. de monopol.*

TIT. XIII.

Of Trades and Handicrafts.

WE muſt not comprehend in the number of Arts treated of here, thoſe which are called Liberal, and which we ſhall handle under the Title of Univerſities. For thoſe Liberal Arts have the dignity of Sciences, and are greatly diſtinguiſhed from theſe which are the ſubject of this Title, and which are called Mechanick Arts, becauſe they are exerciſed by the labour of Hands, and with Tools.

The uſe of Trades and Handicrafts has been a Conſequence of the nature of Man, and of his deſtination to Society. For by his Nature, he is compoſed of Senſes and of Members made for Labour, and he was deſtined to it even before his Fall *a*; and by the deſtination of Men to a ſociable Life, which ought to unite them, God has rendred neceſſary to them the uſe of an infinite number of Labours for the multitude of different Wants. But tho it be true that Labour was natural to Man, even in the State of Innocence, and that the ſaid Labour during that State had nothing painful in it, yet his Fall having changed his Condition, without changing in his Nature what regards his deſtination to Labour, God has by a Law enjoined Labour to him as a Puniſhment; and he has ordained that even the Life of every one ſhould depend on a painful Labour, and that no one ſhould have his Bread but with the ſweat of his Brow, and by his exerciſe in ſome Occupation that ſhould intitle him to his Nouriſhment *b*: and he declares all thoſe to be unworthy of eating, who do not earn, or deſerve their ſubſiſtence by ſome Labour *c*.

a And the Lord God took the Man and put him into the Garden of Eden, *to dreſs it, and to keep it.* Gen. 2. 15.

b In the ſweat of thy Face ſhalt thou eat thy Bread. Gen. 3. 19.

c For even when we were with you, this we commanded you, that if any would not work, neither ſhould he eat. 2 Theſſ. 3. 10. Prov. 6. 6, 7, &c.

'There is no Condition, even thoſe of the 'higheſt Dignity not excepted, which has not for 'its

One may eaſily judge by theſe Principles, of the neceſſity of divers Labours in the Society of Men, how enormous the Vice of lazineſs and idleneſs is, and how many People whom this Law which enjoins Labour renders unworthy of Life, would be worthy of Death it ſelf, upon the account of the bare abſtaining from Labour, if the Juſtice due to them, were not reſerved to another Seaſon, and to other Puniſhments.

The Labours of Men are of ſeveral ſorts: and we may diſtinguiſh them, firſt, into thoſe which might be natural before the Fall of Man, ſuch as Huſbandry which he was to exerciſe in the Terreſtrial Paradiſe; and thoſe which were only a Conſequence of his Fall, ſuch as the Labours neceſſary for Cloathing and Lodging, of which the innocent Man, being ignorant of his Nakedneſs, would have had no occaſion *d*. And we may place in this ſecond Rank, the Labours of the Mind, which ſerve to reſtrain the Injuſtices of Men, and to contain them within the Order of their Society; which takes in all the different Imployments neceſſary for the Government, and the Adminiſtration of Juſtice.

All theſe ſorts of Labours, which are neceſſary in the preſent ſtate of the Society of Mankind, may be reduced to two general kinds, which comprehend every thing that may employ the Perſons both of the one and the other Sex.

The firſt, to begin with the chief of the Wants of Men, is that of the Labours of Hands which produce ſome uſeful Work, whether it be for Nouriſhment, Lodging, Diet, or for all the other ſorts of Wants. And it is this firſt kind of Labours which imploys thoſe whom we call Artificers and Handicraftſmen, and thoſe who ſpend their time in tilling the Ground, and looking after Cattle, Labourers, Shepherds and others *e*, who are diſtinguiſhed from Artificers, altho in reality they do exerciſe certain kinds of Arts. But becauſe the Labours of theſe Perſons do not produce Works made with Hands, ſuch as the Works of thoſe who build Houſes, who make Stuffs, and all the other things which are the different Works of Arts, and of an Induſtry acquired only by a pretty long ſtudy of many Rules, and long Experience, before they can attain to the habit of exerciſing the Art, we do not place the Labour of Shepherds and Husbandmen in the number of Arts.

The ſecond kind, is that of the Labours of the Mind, which do not produce a Work made with Hands; ſuch are the Labours of thoſe who have the care of the Government, of thoſe who are concerned in the Adminiſtration of Juſtice, of the Paſtors and Teachers of the Church, of the Profeſſors of Sciences, of the Officers of the Revenue, and an infinite number of other different Imployments. And we may reckon among the Labours of the Mind, Writings, Treatiſes, Books, whether they relate to matters of Religion, or of Sciences, or others, from which the Publick may reap any Advantage: and altho Books and Writings appear to be a Work of the Hands, that which is ſenſible in the Writing or Printing being without doubt the Handy-work of the Writer or Printer; yet this Work, which is undoubtedly the Product of the Art and of the Artiſt, is not the Work of the Mind of

'its eſſential Character, and for its chief and indiſpenſible Duty, an Engagement to that Work and Labour for which it is eſtabliſhed; and thoſe who pretend to be exempted from Labour, are ignorant of their own Nature, they overturn the foundations of Order and Society, they tranſgreſs the Law of Nature and the Divine Law; ſo that it ought to be no ſurprize to any body what St. *Paul* has ſaid, that he who does not labour is unworthy of Life, which is deſigned only for Labour; and we learn in the Goſpel, that he who leads an unprofitable and idle Life, is not only unworthy of that Life, but even deſerves eternal Death. See *Mat.* 25. 30. *Ezek.* 16. 49.

We beſeech you, Brethren, that ye encreaſe more and more; and that ye ſtudy to be quiet, and to do your own Buſineſs, and to work with your own Hands, as we commanded you. 1 Theſſ. 4. 10, 11. See Prov. 19. 24. 1 Cor. 3. 8. Eccluſ. 33. 28.

d And the Eyes of them both were opened, and they knew that they were naked; and they ſewed Fig-Leaves together, and made themſelves Aprons. Gen. 3. 7.

e 'Since it is a natural effect of theſe Labours, 'to be painful and burdenſome to thoſe who exerciſe them, one ought not to make them ſtill 'more ſo to thoſe poor People, by an unjuſt 'keeping back the Wages they may deſerve.

The Bread of the needy is their Life: he that defraudeth him thereof is a Man of Blood. He that taketh away his Neighbour's Living, ſlayeth him; and he that defraudeth the Labourer of his hire, is a Bloodſhedder. Eccluſ. 34. 21, 22.

Thou ſhalt not oppreſs an hired Servant that is poor and needy, whether he be of thy Brethren, or of thy Strangers that are in thy Land within thy Gates. At his Day thou ſhalt give him his hire, neither ſhall the Sun go down upon it, for he is poor, and ſetteth his Heart upon it, leſt he cry againſt thee unto the Lord, and it be Sin unto thee. Deut. 24. 14, 15.

Thou ſhalt not defraud thy Neighbour, neither rob him: the wages of him that is hired, ſhall not abide with thee all Night until the Morning. Levit. 19. 13. See Exod. 22. 25, 26, 27.

Let not the Wages of any Man, which hath wrought for thee, tarry with thee, but give him it out of hand. Tobit 4. 14.

him who compoſed the Writing or the Book; but is only a ſign of it, invented to ſupply the want of Speech, which Speech it ſelf is only a ſign or indication of the Thought; and it is by the means of this ſign of the Book or Writing that the depoſit of the Thoughts of the Writer is preſerved for thoſe who can underſtand the Writing, or the Book.

It is eaſy to judge by this account of the nature of Labour, and by the Law which impoſes it on Man, that of all the different Conditions of which Society is compoſed, there is none to which the obſervance of this Law is more natural than that of Artificers, whoſe direct Profeſſion is a continual and painful Application to ſome Labour of the Body, who earn their Bread with the ſweat of their Brow; whereas in the other Conditions, the occaſion of Labour is not ſo continual, and it is eaſier and more uſual to abſtain from it: ſo that upon this Conſideration, and that of the uſefulneſs of Trades and Handicrafts, thoſe who exerciſe them have their merit in the Society, and ought to be accounted as neceſſary and uſeful Members of it.

It is not our buſineſs here to enter into the detail of the diſtinctions of the different ſorts of Trades and Handicrafts, which we might diſtinguiſh under ſeveral Views; ſuch as thoſe who work in things neceſſary for Life, for Health, for Clothing, for Habitation, thoſe who work for other ſorts of Neceſſities or Conveniencies, whether it be for Diverſion, as the makers of Inſtruments of Muſick, or for ſeveral ſorts of Furniture; thoſe whoſe Labours ſerve for the uſes of the War, in making Arms, Artillery, or for the uſe of Navigation; thoſe who are diſtinguiſhed by the value of the Materials in which they work, Gold, Silver, Jewels, and other precious matters; thoſe who are employed in a much greater variety of Works, ſuch as Carpenters, Maſons, Iron-mongers, Lock-ſmiths; and thoſe whoſe Works, and the Materials they work upon, are more confined, ſuch as Hatters, Glovers, Shoemakers, and others.

It is neceſſary alſo to diſtinguiſh, under another view, certain Arts which contain as it were two ſorts of Profeſſions: one is of thoſe which join to the induſtry of the Hand, the Art of inventing Works exquiſite in their kind; and the other, of thoſe who with little or no Invention, work on what others have invented.

Thus, we give the name of Painters to thoſe who are the moſt skilful Inventers in the Art of Painting; and the ſame name is given to thoſe of the ſame Art who only copy after Originals: and it is the ſame thing in Sculpture, in Architecture, in Mechanicks. But there is a wide difference between thoſe great Inventers, and the others in theſe ſorts of Arts. For thoſe of the inferior degree are but little more regarded than many other Artificers; but the others have a ſingular Merit, which even places ſome of them in the number of illuſtrious Men, according as they excel in their Art.

It is to be remarked on this ſubject, that we are not to reckon in the number of Artificers who exerciſe the different Profeſſions of Trades and Handicrafts, thoſe who for their diverſion, imploy themſelves, either in deſigning, or in ſome handy-work, without making a Trade of it. For this uſe of Arts, does not make it their Profeſſion, but ſerves only as an innocent Amuſement, and as an Occupation, which ſome make choice of in obedience to the Law which enjoins Labour.

Laſtly, it is neceſſary to obſerve on the ſubject of Trades and Handicrafts, and in general on all ſorts of Profeſſions; that they ought all of them to have the Character of Honeſty, and of Uſefulneſs for the publick Good; to be ſuch as may be exerciſed without any danger to the Order of the Society, and to have nothing in them contrary to the Spirit of Religion, or the Laws of the Church. For no Trade, no Profeſſion whatſoever can be lawful, that has not theſe Characters.

All the Rules concerning Trades and Handicrafts are reduced to two kinds: one of thoſe which regard in general the Diſcipline or Policy of Trades and Handicrafts; and the other of the Rules of the Duties of the Perſons who exerciſe them: and theſe two ſorts of Rules ſhall be the ſubject matter of the two following Sections.

SECT.

SECT. I.

Of the Government or Diſcipline of Trades and Handicrafts.

The CONTENTS.

1, *The Uſefulneſs of cultivating Trades and Handicrafts.*
2. *Freedoms in Trades.*
3. *Companies of Trades.*
4. *The Policy of thoſe Companies.*

I.

1. *The Uſefulneſs of cultivating Trades and Handicrafts.*

SINCE it is of Importance to the Publick, that every Trade and Handicraft be carried to all the Perfection it is capable of, by all the Ways which may render the Uſe of it profitable or eaſy; the Exerciſe of Trades demands in general, that they improve in every one of them all the old Inventions which have been preſerved in memory until our Days, and that they add to them new ones as much as is poſſible, and particularly that every one of thoſe Perſons who exerciſe Trades and Handicrafts be thorowly inſtructed in that which he makes Profeſſion of, and that he have, beſides the Knowledge of the Rules of his Art, an Experience which may be ſufficient to enable him to practiſe *a*.

a See the following Article, and the Remark there made on it.

And Moſes *ſaid unto the Children of* Iſrael, *See the Lord hath called by Name* Bezaleel *the Son of* Uri, *the Son of* Hur, *of the Tribe of* Judah. *And he hath filled him with the Spirit of God, in Wiſdom, in Underſtanding, and in Knowledge, and in all manner of Workmanſhip, and to deviſe curious Works, to work in Gold, and in Silver, and in Braſs; and in the cutting of Stones to ſet them, and in carving of Wood to make any manner of cunning Work. And he hath put in his Heart that he may teach, both he and* Aholiab *the Son of* Ahiſamach, *of the Tribe of* Dan. *Them hath he filled with Wiſdom of Heart, to work all manner of Work, of the Engraver, and of the cunning Workman, and of the Embroiderer, in Blue and in Purple, in Scarlet, and in fine Linen, and of the Weaver, even of them that do any Work, and of thoſe that deviſe cunning Work.* Exod. 35. 30, 31, &c.

And Hiram *King of* Tyre *ſent Meſſengers to* David, *and Cedar-Trees, and Carpenters, and Maſons, and they built* David *a Houſe.* 2 Sam. 5. 11.

Moreover there are Workmen with thee in abundance, Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver, and the Braſs, and the Iron, there is no number. 1 Chron. 22. 15, 16.

He built alſo the Houſe of the Foreſt of Lebanon, *the Length thereof was a hundred Cubits, and the Breadth thereof was fifty Cubits, and the Height thereof thirty Cubits, upon four Rows of Cedar Pillars, with Cedar Beams upon the Pillars. And it was cover'd with Cedar above upon the Beams, that lay on forty five Pillars, fifteen in a Row,* &c. 1 Kings 7. 2, 3.

See the following Articles.

II.

2. *Freedoms in Trades.*

It is for this purpoſe of improving Trades and Handicrafts, that it is not permitted to any to make Profeſſion of them, unleſs they have ſpent a ſufficient time in acquiring the Knowledge and Habits neceſſary for practiſing them; at leaſt in Trades which are of ſuch a Conſequence as to demand this Regulation, and in Places where it may be obſerved *b*.

b It is for this end that Freedoms in Trades are eſtabliſhed, and Regulations made for Apprentices.

And for all manner of Work made by the hands of Artificers. 1 Chron. 29. 5.

III.

3. *Companies of Trades.*

It is for the ſame purpoſe that it is permitted to the Maſters of each Trade to form a Body, and to meet together for common Affairs, to make Statutes and Regulations, which are to be approved of by the Ordinances, or by a proper Court of Juſtice, and particularly in what relates to the Policy and good Uſe of every Trade and Handicraft, for the Improvement of it. And it is for the Obſervance of thoſe Rules and Orders, that they appoint in the ſaid Companies ſome of their own number, by the Name of Wardens, Jurates, or other Names, to inſpect and viſit the Work, and to judge if it is ſuch as it ought to be, and to ſee that all the Rules of the Company be duly obſerved *c*.

c Collegia Romæ certa ſunt quorum corpus Senatuſconſultis atque conſtitutionibus principalibus confirmatum eſt: veluti piſtorum & quorundam aliorum & naviculatiorum qui (&) in provinciis ſunt. *l.* 1. *ff. quod cuj. univ.*

Sodales ſunt, qui ejuſdem collegii ſunt, quam Græci Ἑταιείαν vocant. His autem poteſtatem facit lex, pactionem quam velint ſibi ferre, dum ne quid ex publica lege corrumpant. *l.* 4. *ff. de colleg. & corp.*

Enimvero ad negotiationem aut quid aliud, quidquid hi diſponent, ad invicem firmum ſit, niſi hoc publicæ leges prohibuerunt. *d. l. in f.*

IV.

4. *The Policy of thoſe Companies.*

The Companies of Trades, or other Corporations, have their common Affairs, their Rights, their Privileges and Policy for the Obſervance of the Statutes and Rules made in order to maintain the good Exerciſe of the Trade

and Handicraft for the Service of the Publick. And they are to be called to account by the Officers of Juſtice for what they do contrary to the ſaid Regulations *d*.

d Quibus permiſſum eſt corpus habere collegii, ſocietatis ſive cujuſque alterius eorum nomine, proprium eſt, ad exemplum reipublicæ habere res communes, arcam communem, & actorem ſive ſyndicum per quem tamquam in republica quod communiter agi fierique oporteat, agatur, fiat. *l.* 1. §. 1. *ff. quod cujus un. nom.*

SECT. II.

Of the Duties of Artificers and Handicraftſmen.

The CONTENTS.

1. *The Artificer ought to be skilful in his Art.*
2. *He ought to exerciſe his Trade faithfully.*
3. *Coſts and Damages for Works that are faulty.*
4. *Monopolies and Combinations of Artificers.*
5. *Reports made by skilful Artificers in Courts of Juſtice.*
6. *General Duty of Artificers, to obſerve the Regulations preſcribed them.*

I.

1. *The Artificer ought to be skilful in his Art.*

THE firſt Duty of every one in the Trade he profeſſes, is not to be ignorant of the Rules of it, that he may not cheat the Publick *a*.

a See Sect. 1. Art 2.

Imperitia culpæ adnumeratur. *l.* 132. *ff. de reg. jur.*

Quod per imperitiam commiſit imputari ei debet. Prætextu humanæ fragilitatis delictum decipientis in periculo homines innoxium eſſe non debet. *l.* 6. §. 7. *ff. de off. præſ.*

Moreover there are Workmen with thee in abundance, Hewers and Workers of Stone and Timber, and all manner of cunning Men, for every manner of Work: Of the Gold, the Silver and the Braſs, and the Iron there is no number. 1 Chron. 22. 15, 16.

Send me now therefore a Man cunning to work in Gold, and in Silver, and in Braſs, &c. 2 Chron. 2. 7.

II.

2. *He ought to exerciſe his Trade faithfully.*

It is neceſſary to join to the Knowledge of the Rules of an Art, Fidelity in the Work, to make it ſuch as it ought to be for the Uſe it is deſigned for, and according to the Regulations that have been made for Works of that kind *b*.

b Poterit ex locato cum eo agi, qui vitioſum opus fecerit. *l.* 51. §. 1. *ff. locat.*

III.

3. *Coſts and Damages for Works that are faulty.*

If the Work is not ſuch as it ought to be according to the Regulations, or according to the Bargain made about it, the Workman is bound either to take it back, or to abate in the Price, if the Perſon who beſpoke it is willing to take it as it is. And if the Work was ſuch that the Faults of it had Conſequences which occaſioned ſome Damage, the Workman or Undertaker of the Work would be liable for it. Thus, an Architect or a Maſon is anſwerable for the Damages done by a Wall that has no good Foundation, or that is ill built, or which may have proceeded from other Faults in Maſonry which he had undertaken *c*.

c Celſus imperitiam culpæ adnumerandam, libro octavo digeſtorum, ſcripſit. Si quis vitulos paſcendos, vel ſarciendum quid, poliendumve conduxit, culpam eum præſtare debere: & quod imperitia peccavit, culpam eſſe. Quippe ut artifex conduxit. *l.* 9. §. 5. *ff. locat.*

Tenebitur in id quod intereſt, nec ignorantia ejus erit excuſata. *l.* 19. §. 1. *ff. eod.*

‘ All the Maſters of the ſaid Company ſhall ‘ be bound and anſwerable for all Miſcarriages, ‘ Faults and Abuſes which ſhall be found in Works ‘ marked with their Punchion or Mark. *Ordinance* ‘ *of* Henry II. 1555. *Art.* 6.

‘ Altho this Ordinance relates only to a certain ‘ Profeſſion, yet it may be applied here.

IV.

4. *Monopolies and Combinations of Artificers.*

As there are Monopolies of Merchandize, ſo there are alſo Monopolies in Undertakings of Mechanick Works, if the Undertakers to whom application is made, combine together to inſiſt all of them on a certain Price, and engage not to do it at a cheaper rate; and this kind of Monopoly is not leſs prohibited than that of Merchandize. And the Laws forbid and puniſh with greater Reaſon the Combinations of Undertakers who agree among themſelves, that none of them ſhall undertake either to begin or to continue a Work which another of them had begun, or undertaken to do *d*.

d Nullus id proficere prohibeatur, quod ab altero cœptum opus fuerit: quod præſumi cognovimus a quibuſdam artificibus vel redemptoribus, nec iis quæ ipſi cœperint, finem imponentibus, nec alios id proficere ſinentibus, atque inde damnum intolerabile inferentibus iis, qui domos ſuas fabricari cupiunt. Qui itaque hoc ſolo recuſat opus perficere, quod ab alio antea inchoatum ſit, is eandem pœnam excipiat quam is excepit qui opus reliquit. *l.* 12. §. 8. *C. de opere publ.*

Jubemus——ne quis illicitis habitis conventionibus conjuret, aut paciſcatur, ut ſpecies diverſorum corporum negotiationis, non minoris quam inter ſe ſtatuerint, venundentur. Ædificiorum quoque artifices

tifices vel ergolabi, aliorumque diverſorum operum profeſſores & balneatores penitus arceantur pacta inter ſe componere, ut ne quis quod alteri commiſſum ſit opus impleat, aut injunctam alteri ſollicitudinem alter intercipiat, data licentia unicuique ab altero inchoatum & derelictum opus per alterum ſine aliquo timore diſpendii implere: omniaque hujuſmodi facinora denuntiandi ſine ulla formidine, & ſine judiciariis ſumptibus. Si quis autem monopolium auſus fuerit exercere, bonis propriis expoliatus, perpetuitate damnetur exilii: cæterarum præterea profeſſionum primates ſi in poſterum, aut ſuper taxandis rerum pretiis, aut ſuper quibuſlibet illicitis placitis auſi fuerint convenientes hujuſmodi ſeſe pactis conſtringere, quadraginta librarum auri ſolutione percelli decernimus. *l. un. C. de monopol.*

'It is likewiſe a Conſequence of this Rule, that 'it is prohibited to Workmen to leave a Work 'they have begun.

Provideat magnificentia tua, ne quis redemptorum, aut fabrorum, aut artificum opus a ſe inchoatum relinquat imperfectum; ſed ut accepta mercede opus quod incepit, perficere cogatur; vel omne damnum quod inde ædificare volens acceperit, & quidquid omnino diſpendii ſenſit ex eo quod opus perfectum non fuerit, ſarciat. *l.* 12. §. 8. *C. de æd. priv.*

V.

5. Reports made by skilful Artificers in Courts of Juſtice.

Seeing it often happens that there is occaſion, either in a Court of Juſtice between Parties who are at Law together, or extrajudicially by the mutual Conſent of Parties, to have Works viewed and examined in order to know whether they be of the Quality they ought to be of, or to make an Eſtimation of them, or to regulate the Coſts and Damages occaſioned by faulty Works; and that in order to have theſe ſorts of Views and Eſtimations, one is obliged to call in Artificers and Handicraftſmen, that they may faithfully report what is within their Knowledge; it is a Duty incumbent on them to make theſe Reports exactly according to Truth and Juſtice. For in this Function they hold the Place of Judges, and when theſe Reports are made judicially, they are alſo obliged to ſwear they will make them according to their Conſcience *e*.

e Fides bona exigit ut arbitrium tale præſtetur quale viro bono convenit. *l.* 24. *ff. locat.*

Stari debet ſententiæ arbitri, quam de re dixerit. *l.* 27. §. 2. *de recep. qui arb. recep.*

VI.

6. General Duty of Artificers to obſerve the Regulations preſcrib'd them.

We may ſet down as a general Duty of Artificers and Handicraftſmen, and which comprehends the Detail of their principal Duties, as to what concerns their Profeſſion, that of obſerving the Statutes and Regulations of the Art they exerciſe; and the Policy eſtabliſhed by the Ordinances for the Quality and Price of their Works, for their Wages, and for the whole Detail of every thing relating to their Profeſſion *f*.

f See the foregoing Section.

TIT. XIV.

Of Husbandry, and the Care of Cattel.

OF all the Arts and Labours of Men, the firſt in order of Time, and in the order of Nature, was that of Husbandry; and it was alſo the firſt which God commanded of Man, even while he was in the State of Innocence *a*: And after his Fall the Neceſſity of Food and Raiment made the Care of Cattle neceſſary, they yielding to Man divers Aſſiſtances for theſe two Wants. And Cattle are likewiſe in many reſpects ſerviceable for Husbandry.

It was theſe two Labours which the two firſt Children of the firſt Man ſhared between them *b*, and which for many Ages were the Occupation of the Men of the firſt Rank *c*; as they are at this day the Occupation of the greateſt part of Mankind: So that there is not only no one Profeſſion that employs ſo many Perſons as Husbandry and the Care of Cattel, but the number of the Perſons employ'd therein,

a And the Lord God took the Man and put him into the Garden of Eden, *to dreſs it, and to keep it.* Gen. 2. 15.

I am no Prophet, I am an Husbandman; for Man taught me to keep Cattel from my Youth. Zech. 13. 5.

The Earth is ſatisfy'd with the Fruits of thy Works: He cauſeth the Graſs to grow for the Cattel, and Herb for the Service of Man. Pſal. 104. 13, 14.

See the Treatiſe of Laws, chap. 2. num. 2.

Summæ prudentiæ & authoritatis apud Græcos Plato, cum inſtitueret, quemadmodum civitas bene beate habitari poſſit, in primis iſtos negotiatores neceſſarios duxit. *l.* 2. *ff. de nund.*

b And Abel *was a Keeper of Sheep, but* Cain *was a Tiller of the Ground.* Gen. 4. 2.

c And Noah *began to be an Husbandman.* Gen. 9. 20.

And Pharoah *ſaid unto his Brethren, what is your Occupation? And they ſaid unto* Pharaoh, *Thy Servants are Shepherds, both we and alſo our Fathers. They ſaid moreover unto* Pharaoh, *for to ſojourn in the Land are we come; for thy Servants have no Paſture for their Flocks.* Gen. 47. 3, 4.

Alſo he built Towers in the Deſart, and digged many Wells, for he had much Cattel, both in the low Country and in the Plains; Husbandmen alſo and Vine-Dreſſers in the Mountains, and in Carmel; *for he loved Husbandry.* 2 Chron. 26. 10.

ſurpaſſes

ſurpaſſes that of all the other Profeſſions put together.

It is not neceſſary to explain what is the Neceſſity and Uſefulneſs of Husbandry and of the Care of Cattel, ſeeing it is the ſame as that of Life and of Clothing. We ſhall only make one bare Reflection on the Difference between theſe two Profeſſions and all the others, and which ſeems to have been the Cauſe of the two ſingular Advantages God has thought fit to annex both to the one and the other: The firſt of which is, that they are of all Profeſſions the moſt neceſſary, the moſt natural, and of the moſt univerſal Uſe for Mankind; and the other, which is a Conſequence of the firſt, that they are more removed from, and leſs expoſed to the Occaſions which excite the moſt dangerous Paſſions, and diſturb moſt the inward Peace and Tranquillity of the Mind. So that if thoſe who are employ'd in theſe Vocations, had the good fortune to be well inſtructed in the Principles of Religion, that they might join the Spirit thereof to thoſe Advantages, they would eſteem their Condition as one of the happieſt, whereas the greateſt part of them look upon it as the hardeſt.

There is this in common to all the Employments which take up the time and Thoughts of Men, and compoſe the Order of their Society; that they all tend to a publick Good upon this Principle, of the Order and Providence of God, who to unite Men together, renders neceſſary to all of them the ſeveral Labours, which he divides to every one for their own private Uſe as well as that of others. But of all theſe Labours, there is none of which the Uſe is of ſo large an Extent as that of Husbandry, and of the Care of Cattle, and which could be leſs ſpared. Thus, there is no other Labour which is of ſo great Conſequence to the Publick, or ſerves to ſo neceſſary Uſes, ſeeing there is no Perſon alive who is able to ſubſiſt without the help of theſe two Profeſſions: So that for this reaſon they are as it were a primary Foundation or Element of the Life of Man.

Seeing we are not to explain in this Book all the particular Rules which relate to the Exerciſe of Husbandry and the Care of Cattle, no more than the Rules of the other Trades and Handicrafts, and that we conſider here in every one of them only the Relation it has to the Publick, and in general its Uſe in the Society; we ſhall only explain in this Title two ſorts of Rules concerning this Matter: One, of thoſe which regard this Uſe and this Relation to the publick Order, and that ſhall be the Subject of the firſt Section; and the ſecond ſhall be concerning the Duties of theſe two Profeſſions with reſpect to that Order.

SECT. I.

Of the Uſe of Husbandry, and of the Care of Cattle, with reſpect to the publick Order.

THE Reader may conſult in relation to the Matter treated of in this Section, the 1ſt Section of the 7th Title.

The CONTENTS.

1. *Definition of Husbandry.*
2. *Wherein the Care of Cattel conſiſts.*
3. *Neceſſity of theſe two Profeſſions.*
4. *Good Uſe of Husbandry.*
5. *Good Uſe of the Care of Cattle.*

I.

By Husbandry is meant the Art of tilling the Ground in order to draw from it the ſeveral ſorts of things which it may produce, and eſpecially that which may ſerve for the Nouriſhment of Man, ſuch as Corn, Fruits, and other kinds; or for his Clothing, ſuch as Hemp, Flax, Cotton, and all other things *a*. *1. Definition of Husbandry.*

‘ *a* There is an infinite number of things which ‘ the Earth produces without Tillage, ſuch as many ‘ Plants, many Trees, Minerals, and other things; ‘ but it is only by Tillage that we draw from it the ‘ things moſt neceſſary for Life.

II.

By the Care of Cattle is underſtood here the looking after thoſe ſorts of Animals which ſerve for the Tillage and Manure of the Ground, and likewiſe for the Food and Raiment of Man; ſuch as Oxen, Sheep, Horſes, and others, which ſerve differently, ſome of them for all theſe Uſes, and others only for a part of them *b*. *2. Wherein the Care of Cattel conſiſts.*

‘ *b* No body is ignorant of the different Uſes ‘ of theſe ſeveral ſorts of Animals.

III.

Husbandry and the Care of Cattel are Labours which of their own nature *3. Neceſſity of theſe two Profeſſions.*

ture have a relation to the Publick; for the Labour of every one of those who employ themselves about either the one or the other, is not confined to their own particular Use, but the Labour of one Person alone serves for many, and both the one and the other Profession are essential to the Life of Man. Thus these two Professions are of the greatest Necessity and Usefulness in the Society of Mankind *c*.

c The first and great Necessity is that of Food and Raiment.

IV.

4. Good Use of Husbandry. For the good Use of Husbandry, it is of importance to the general Good of a Kingdom, as well as for the Interest of the particular Proprietors of Lands, that they cultivate therein what the Land is capable of producing that is most necessary and most useful, whether it be things consumed for Nourishment and Cloathing, or others of which one may make a more profitable Commerce, whether it be within the Kingdom it self, or with Strangers: and it is the Business of the Government to take care thereof, and to give the proper Directions therein, as there is occasion *d*.

d See Tit. 7. Sect. 1. Art. 2, 3.

V.

5. Good Use of the Care of Cattel. It is the same thing with respect to the Care of Cattel, which ought to be suited to the Nature of the Country, to breed in it such Cattel as may best succeed in that Climate and Soil, and from which may be drawn the greatest Profit *e*.

e Altho the greatest part of the Animals mentioned in this Title are brought up almost every where, yet there are some of them which succeed better in some Countries than in others.

SECT. II.

Of the Duties of those who are employed in Husbandry, and looking after Cattel.

The CONTENTS.

1. *A Duty to cultivate the Lands.*
2. *A Duty to use the several Cultures in their proper Seasons.*
3. *The Duty of caring for the Cattel.*

I.

1. A Duty to cultivate the Lands. THOSE who exercise Husbandry only for their own Use in their own proper Lands, are nevertheless obliged, in regard to the Publick, to cultivate them; not only for this general Reason, that it is the Interest of the Publick that every one should make a good use of that which belongs to him *a*; but also in consideration of the Consequence of Husbandry, and of the Necessity of drawing from the Earth Subsistence for the Life of Man. Thus the Government might oblige the Proprietors of Lands to cultivate them, and in case of their Neglect appoint others to take that Care, both in consideration of gathering from them the Fruits which they may produce, and likewise that they may be able to contribute their Share towards the publick Taxes *b*.

a Expedit enim Reipublicæ ne sua re quis male utatur. §. 2. *inst. de his qui sui vel al. jur. sunt.*

It was one of the Functions of the Censor at *Rome*, to take notice of, and to punish those who neglected to cultivate their Lands.

b Qui agros domino cessante desertos vel longe positos vel finitimos ad privatum pariter publicumque compendium excolere festinat, voluntati suæ nostrum noverit adesse responsum: ita tamen, ut si vacanti ac destituto solo novus cultor insederit, ac vetus dominus intra biennium eadem ad suum jus voluerit revocare, restitutis primitus quæ expensa constiterit, facultatem loci proprii consequatur. Nam si biennii fuerit tempus emensum, omnis possessionis & dominii carebit jure qui siluit. *l.* 8. *c. de om. agr. deserto.*

Si quis authoritate nostri numinis de fundis patrimonialibus steriles sub certi canonis pollicitatione susceperit, firmiter eum volumus possidere: sub ejusdem tamen canonis solutione, quem nostræ majestatis authoritas per annos singulos solvendum esse præscripsit: nullamque eos descriptionem sive adjectionem, aut innovationem in posterum sustinere: quoniam nimis absurdum est eos qui nobis hortantibus fundos inopes atque egenos magno labore (impenso) aut exhausto patrimonio vix forte meliorare potuerunt, utpote deceptos, inopinatum onus suscipere: illudque velut quadam circumventione deposci, quod si se daturos præsciissent. fundos minime suscipere aut etiam colere paterentur. *l.* 16. *eod.*

See the Texts cited in the Preamble of Tit. 9. Sect. 2.

II.

2. A Duty to use the several Cultures in their proper Seasons. Those who undertake for others to cultivate their Estates, whether it be for Money, or for a Portion of the Fruits, or upon other Conditions, do contract, besides their Obligation towards the Publick, an Engagement to the Owners of the Lands; the Duties whereof oblige them to do every thing necessary for tilling, sowing, and reaping in the proper Seasons, observing the several Cultures according to the Quality

Quality of the Lands, every one of them in their proper time, and according to Uſage and Cuſtom *c*.

c Conductor omnia ſecundum legem conductionis facere debet, & ante omnia colonus curare debet, ut opera ruſtica ſuo quoque tempore faciat: ne intempeſtiva cultura deteriorem fundum faceret. *l.* 25. §. 3. *ff. locat.*

Divi fratres reſcripſerunt, in venditionibus fiſcalibus fidem & diligentiam a procuratore exigendam —— ſicut enim diligenti cura pretia prædiorum ampliantur: ita, ſi negligentius habita ſint, minui ea neceſſe. *l.* 3. §. 5. *ff. de jure fiſc.*

III.

3. *Duty of caring for Cattel.*

The Duties of thoſe who have the Care of Cattel conſiſt in leading them out to Paſture, in watching them, and taking care that they be not ſtolen, nor go aſtray, that they do no damage, nor receive any, and in taking all the other care of them as is neceſſary or uſual *d*.

d See in the *Civil Law in its natural Order*, the 2d Section of Damages occaſioned by Faults which do not amount to a Crime, nor to an Offence.

TIT. XV.

Of Communities in General.

HAVING explained the Diſtinctions of the different Orders of Perſons, we proceed now to the Conſideration of Communities, which are Bodies compoſed of many Perſons for a publick Good, and which are conſidered in a State as holding the Place of Perſons *a*; both becauſe of their Functions which are proper to the whole Body which is formed by the Community, as alſo becauſe thoſe Bodies of Men have their Goods, their Affairs, their Rights, Burdens, and Privileges in the ſame manner as particular Perſons. Thus Corporations of Towns, the Bodies of Univerſities, Chapters, Monaſteries, and others, are Aſſemblies of many Perſons linked together for certain Functions directed to ſome publick Good.

a See Sect. 2. Art. 2. of this Title.

The Uſe of theſe ſeveral ſorts of Communities and Corporations was natural in the Society of Mankind, and has had the ſame Origin and Foundations as the Union of many Families, and of many Nations under one and the ſame Government of Monarchy, or of a Commonwealth. For as it is the Multitude of the Wants of Men, and the Neceſſity every one has of the Aſſiſtance of many others, that has been the occaſion of forming Monarchies and Commonwealths, as has been explained in its Place *b*; ſo the ſame Neceſſities and Wants have made it neceſſary to have ſtill more cloſe and particular Conjunctions of many Perſons together, which might form Companies and Corporations deſtined to different Uſes for the Publick Good.

Seeing there can be no Companies nor Corporations without the Permiſſion of the Prince, as has been explained in its Place *c*, and that they all tend to ſome publick Good, which makes them in ſome meaſure depend on the Temporal Government; theſe two Conſiderations are the reaſon why Eccleſiaſtical Bodies are comprehended under the Name of Communities, which are treated of in general under this Title: where we purpoſe to explain the Nature and Uſe of Communities, and their different Kinds, which ſhall be the ſubject Matter of the firſt Section; and we ſhall explain in the ſecond the Rules which relate to the Order and Policy of the ſaid Communities.

Theſe two Sections ſhall contain the Rules common to all ſorts of Communities and Corporations; and becauſe there are ſome of them which have Rules peculiar to them which it is neceſſary to diſtinguiſh, we ſhall explain what relates to theſe ſorts of Communities in the enſuing Titles.

b See Tit. 1. Sect. 2. Art. 3.
c See Tit. 2. Sect. 2. Art. 14.

SECT.

SECT. I.

Of the Nature and Uſe of Communities, and of their Kinds.

The CONTENTS.

1. *Definition of Communities.*
2. *Three ſorts of Communities.*
3. *Uſe of Communities.*
4. *Communities are a part of the Body of the State; and this Body is not of the number of Communities.*
5. *The Clergy ought not to be put in the number of Communities.*
6. *Three ſorts of Eccleſiaſtical Communities.*
7. *All theſe Communities have a relation to the Temporal Government.*
8. *Corporations of Towns, and other places.*
9. *Courts of Juſtice.*
10. *Societies of Advocates.*
11. *Societies of Proctors, Regiſters and others.*
12. *Other ſorts of Companies or Corporations.*

I.

1. *Definition of Communities.*

COmmunities are Aſſemblies of many Perſons united into one Body, which is formed with the leave of the Prince, diſtinguiſhed from the other Perſons who compoſe a State, and eſtabliſhed for the common good of thoſe who are Members of the ſaid Body, and which hath alſo a view to the publick Good of the whole Kingdom. Which is the Reaſon why Communities are perpetual, and which diſtinguiſhes them from the Companies or Societies treated of, under the Title of Partnerſhip, in *the Civil Law in its Natural Order:* for thoſe Partnerſhips are formed only for particular Intereſts, without any neceſſity of having the Prince's leave, and only for a certain time, or at moſt during the Life of the Co-partners *a*.

a Collegia Romæ certa ſunt quorum corpus Senatuſconſultis atque conſtitutionibus principalibus confirmatum eſt. *l.* 1. *ff. quod cujuſqu. univ. nom.*

II.

2. *Three ſorts of Communities.*

Theſe Communities are of three ſorts. The firſt is of thoſe which regard chiefly Religion; ſuch as the Chapters of Cathedral and Collegiate Churches, Monaſteries and others *b*. The ſecond is of thoſe which relate to the Temporal Government, as the Corporations of Towns, the Companies of Tradeſmen, and others *c*. And the third is of thoſe which concern both Religion and the Temporal Government; as the Univerſities, which are compoſed of Profeſſors of Divinity, and of Profeſſors of human Sciences *d*.

b V. tot. Tit. C. de ſacroſ. Eccleſ.

c V. tot. Tit. ff. ad municip. Tit. C. de piſtor. & ſeq. de fabricenſibus.

d See hereafter the Title of Univerſities.

See upon this Article, the laſt Article of the 2d Section of Perſons in *the Civil Law in its Natural Order.*

III.

3. *Uſe of Communities.*

The uſe of Communities is to provide, by the Aſſembly and Aſſiſtance of many Perſons, for ſome good that is uſeful to the Publick. Thus, in the caſe of Eccleſiaſtical Societies, Chapters are eſtabliſhed, not only for the common good of the Canons and Prebends, but alſo for the uſe of the Publick, which has an Intereſt in the Offices of the Church. Thus likewiſe for Communities which relate to Temporal Affairs, the Corporations of Towns are eſtabliſhed, not only for the common good of the Inhabitants of the Towns, but alſo for the publick Good of the Kingdom, which is obtained many ways from that of the Towns, as will be ſeen in the following Title. Thus again for the Univerſities, which have a mixture both of Spiritual and Temporal Concerns, they are uſeful both for the good of the Church, and for the good of the State, as will appear in the Title of Univerſities *e*.

e See the following Titles.

IV.

4. *Communities are a part of the Body of the State, and this Body is not of the number of Communities.*

Since Communities are compoſed of Perſons of the ſame Order, or of different Orders, yet ſo as that no one of them comprehends Perſons of all Orders; we ought not to place in the number of Communities and Corporations, the Body of the State, which comprehends all the Orders, and takes in every thing which regards the publick Good, whether in the Conduct of particular Perſons, or in that of Communities, whereas theſe have all of them their bounds in ſome kind of particular Good *f*.

f 'All the Communities here treated of are 'Members of the Body of the State, which conſiſt 'of particular Conjunctions of certain ſorts of Perſons.

V.

5. *The Clergy ought not to be put*

Altho we may look upon the different Orders of Perſons who compoſe the Body

in the number of Communities.

Body of a State, to be as it were certain Bodies distinguished among themselves, and that some of the said Orders have Affairs belonging to them in common, as the Clergy; yet it is not proper to place them in the number of Communities: for by the word Community is understood only certain Bodies of Persons united together for continual uses, for which they have a right to meet whenever they see good. Thus Chapters, Corporations of Towns, Companies of Merchants, and those of Tradesmen, meet together for their Affairs whenever they please. But the Body of the Clergy does not assemble in the same manner without the leave of the Prince, neither do all the Officers of Justice belonging to the several Courts meet together, altho they be all of one and the same Order; but each Court of Justice makes a Body apart *g*.

g See the following Articles.

VI.

6. *Three sorts of Ecclesiastical Communities.*

The Ecclesiastical Communities are of three sorts. The first consists of those who are called the secular Clergy, because they are composed of Ecclesiasticks who live in the World among the rest of Mankind, every one on his own Patrimony or Income: and this Kind comprehends the Chapters of the Cathedral and Collegiate Churches, the Canons of which do not belong to any particular Order of Monks. The second is of the regular Communities, which are composed of Monks who make Profession by Vows to spend their days in common together under the direction of Superiors, and according to a Rule prescribed by their Founder, and approved by the Church. The third is that of Communities of Ecclesiasticks, who without taking upon them any Vows live in common together in order to serve the Church in their respective Functions under the Authority of Bishops, such as are some Congregations, and Seminaries for the Instruction of those who are to be promoted to Holy Orders, and of those who are to be imployed in Missions, and other Vocations *h*.

h ‘ All the Ecclesiastical Coummunities may be ‘ reduced to these three kinds.

[In *England*, since our Reformation from Popery, and the Dissolution of Monasteries, our Ecclesiastical Communities are reduced to the first sort mentioned in this Article.]

VII.

7. *All these Communities have a relation to the Temporal Government.*

Altho all these sorts of Ecclesiastical Communities be chiefly intended for the service of Spiritual Affairs, yet they have also a relation to the Temporal Government, and are subject to many of the Rules thereof in several respects; and therefore the distinction of these Communities is a part of the Publick Law *i*.

i See the following Section.

VIII.

8. *Corporations of Towns, and other places.*

In the order of the Communities which relate only to the Temporal Government, and of which the use is perpetual, the first with respect to the publick Order, and in consideration of the Multitude, are those which are composed of the Inhabitants of a Town, or of another place, for the Affairs which are common to them; and these sorts of Communities shall be the subject of the following Title, which see.

IX.

9. *Courts of Justice.*

We may place in the number of Companies and Communities of Lay-persons, and that in the first Rank, because of their Dignity, the Judges of the supreme Courts of Justice and others; for the said Courts have every one of them their Chiefs, and Members who compose them, and who are united and linked together, not only by their Functions to render Justice together, but also by their common Interests, which respect their Dignity, their Jurisdiction, their Rights, Privileges, Salaries, and other Affairs; such as to regulate among them the Discipline and Decorum necessary for maintaining their Dignities and Functions, the Times of their sitting, and all other things of the like Nature; and in a word to settle every thing which may concern the Interest and good order of Justice, the Administration of which is committed to them *m*.

m ‘ The Judges of every Court of Justice make ‘ a Body, in which they are united by the double ‘ tie of their Functions to render Justice together, ‘ and of the Interests which are common to them ‘ in respect of their Offices.

X.

10. *Societies of Advocates.*

As the Judges of the Courts of Justice have their common Affairs, and common Interests, which unite them together in Society; so the Advocates who exercise their Profession before the same Judges, have also their Society

Society for the Affairs which concern them in common *n*.

n Petitionem virorum diſertiſſimorum Advocatorum Alexandrinæ ſplendidiſſimæ civitatis, quam de fori ſui matricula & fiſci patrono obtulerunt, merito admittentes, hac ſanctione decernimus quinquaginta ſtatutos haberi: eorumque nomina pro tempore matriculæ conficiendæ inſcribi: & eos Advocationis officium in judicio tam viri ſpectabilis Præfecti auguſtalis, quam viri ſpectabilis Ducis Ægyptiaci limitis petentibus adhibere: cæteros vero ultra memoratum numerum conſtitutos, apud alios judices ejuſdem Alexandrinæ civitatis perorare: filiis ſcilicet ſtatutorum in loco deficientium ſupernumeratis anteponendis. Egredientem autem poſt biennium fiſci patronum, contemplatione laborum, ex conſularis moderatoris provinciæ dignitate decorari: licentia facultateque ei non deneganda, cum uſus exegerit. Tam pro ſe quam pro filiis, parentibus, & uxoribus, nec non etiam perſonis ex tranſverſo latere uſque ad quartum gradum conſtitutis, patrocinium ſuum adhibere. Quando autem fiſci patronum mori contigerit, gradu eum ſequentem ſine ulla dilatione in locum ejus ſubrogari: hæredibus defuncti nihil exinde ſibi commodi acquiri poſſe ſperaturus, cunctis privilegiis quæ hactenus habuiſſe noſcuntur, nec non his, quæ ſuggeſtio tuæ magnitudinis continent, etiam in poſterum intactis inviolatiſque ſervandis: quatenus hujuſmodi delato eis liberalitate noſtræ ſerenitatis honore poſſint in otio & tranquillitate reliquum vitæ ſuæ tempus peragere, nulla eis invitis ingerenda ſollicitudine. *l.* 13. *C. de advocat. diver. judicior.*

Jubemus, advocationem fori tui culminis centum quinquaginta (ſicut antea conſtitutum fuerat) advocatis concludi: eundemque numerum, quoties vel profeſſionis fine, vel morte, vel quocumque fuerit caſu imminutus, electione magnificæ tuæ ſedis impleri: ita ut in præſenti quidem, & hinc uſque ad biennium adimpletionem ſupra definiti numeri ſubrogandi, ſine ulla cohortalis aut cujuſlibet deterioris conditionis quæſtione ſuccedant: ſalva videlicet adverſus eos apparitoribus, ſi qua competit, actione: quam certum eſt poſtquam fiſci patronatum officio impleto exegerint, evaneſcere. Poſt lapſum vero biennium foro tuæ magnificæ poteſtatis inſeri poſtulantes, non aliter, niſi ſub geſtorum confectione minime eos cohortali conditioni ſubjacere patefactum fuerit, admittantur. *l.* 17. *eod.*

V. Tot. h. T.

XI.

11. *Societies of Proctors, Regiſters, and others.*

The Proctors, belonging to one and the ſame Court of Juſtice, have alſo their Societies and Companies: and it is the ſame thing with reſpect to the other Perſons who exerciſe any Function in the Order of the Adminiſtration of Juſtice; ſuch as Regiſters, Publick Notaries, and others *o*.

o 'Theſe ſeveral Offices render common to all 'who exerciſe them, the Affairs which relate to 'their Functions.

XII.

12. *Other ſorts of Companies or Corporations.*

There are likewiſe divers other Companies and Corporations of ſeveral ſorts of Merchants, according to the differences of the Commerce they deal in, and according to the differences of Trades and Handicrafts. There are alſo divers Bodies of Artificers diſtinguiſhed into ſeveral Companies *p*.

p 'Every one of theſe Companies or Corpora-'tions have their particular Statutes, eſtabliſhed or 'approved by the Ordinances.

SECT. II.

Of the Order and Policy of Communities and Corporations.

The CONTENTS.

1. *Communities ought to have the leave of the Prince.*
2. *Communities are in the place of Perſons.*
3. *The changes of Perſons do not change the Communities.*
4. *Two ſorts of Communities.*
5. *Communities have their Rights, their Goods, and Statutes.*
6. *Communities are compoſed of Perſons of certain Orders.*
7. *In what ſenſe one can be a Member only of one Community.*
8. *The Goods and Rights of Communities belong not to the particular Perſons who compoſe them.*
9. *Communities name Syndicks for the management of their Affairs.*
10. *In what manner Communities deliberate about their common Affairs.*

I.

1. *Communities ought to have the leave of the Prince.*

THE firſt Rule of the Order of the Policy of Communities and Corporations, is that they be eſtabliſhed for a publick Good, and by the Order or Permiſſion of the Prince; for, as has been mentioned in its proper place, all Aſſemblies of many Perſons, without the ſaid Order or Permiſſion, would be unlawful *a*.

a See Tit. 2. Sect. 2. Art. 14, 15.

Quibuſdam collegiis, vel corporibus quibus jus coeundi lege permiſſum eſt, &c. *l.* 5. §. 12. *ff. de jure imm.*

Sed religionis cauſa coire non prohibentur, dum tamen per hoc non fiat contra ſenatuſconſultum, quo illicita Collegia coarcentur. *l.* 1. §. 2. *ff. de coll. & corp.*

Collegia ſi qua fuerint illicita, mandatis, & conſtitutionibus, & ſenatuſconſultis diſſolvuntur.——— In ſumma autem, niſi ex ſenatuſconſulti authoritate, vel Cæſaris, Collegium vel quodcumque tale corpus coierit, contra ſenatuſconſultum, & mandata, & conſtitutiones collegium celebrat. *l.* 3. *eod.*

II.

2. *Communities are in the place of Perſons.*

Communities that are lawfully eſtabliſhed, are in the place of Perſons; and their Union, which renders common to all who are Members of them, their Intereſts, Rights and Privileges,

makes them to be considered as one single Person. And as every particular Person exercises his Rights, manages his Affairs, and sues in Judgment; so it is the same with Companies and Corporations *b*.

b Personæ vicè fungitur municipium & decuria. *l.* 22. *ff. de fidejuss.*

Cum Senatus temporibus Divi Marci permiserit collegiis legare, nulla dubitatio est, quod si corpori cui licet coire, legatum sit, debeatur cui autem non licet, si legetur, non valebit, nisi singulis legetur. Hi enim non quasi collegium, sed quasi certi homines, admittentur ad legatum. *l.* 20. *ff. de reb. dub.*

See Sect. 2. Art. 15. of Persons.

See the Text cited on Art. 6. of this Section.

III.

3. *The Changes of Persons do not change the Communities.*

Communities being established for a publick Good, the Cause of which always subsists, it is of their Nature to last always, so that the said Bodies subsist still the same, and are perpetuated without receiving any alteration, altho all the Persons of which they are composed should happen to be changed *c*. And if it should happen that there remain one Person of a Corporation, he would represent it whilst he continued single, and would exercise the Rights thereof, which might subsist and go to him, until others should fill up the vacant places *d*.

c In decurionibus vel aliis universitatibus nihil refert utrum omnes iidem maneant, an pars maneat, vel omnes immutati sint. l. 7. §. 2. *ff. quod cujusq. univers.*

Proponebatur, ex his judicibus, qui in eandem rem dati essent, nonnullos causa audita excusatos esse, inque eorum locum alios esse sumptos, & quærebatur, singulorum judicum mutatio eandem rem, an aliud judicium fecisset. Respondi, non modo si unus, aut alter, sed etsi omnes judices mutati essent, tamen & rem eandem & judicium idem quod antea fuisset, permanere: neque in hoc solum evenire, ut partibus commutatis eadem res esse existimaretur, sed & in multis cæteris rebus: nam & legionem eandem haberi, ex qua multi decessissent, quorum in locum alii subjecti essent: & populum eundem hoc tempore putari, qui abhinc centum annis fuissent, cum ex illis nemo nunc viveret; itemque navem si adeo sæpe refecta esset ut nulla tabula eadem permaneret, quæ non nova fuisset, nihilominus eandem navem esse existimari. Quod si quis putaret partibus commutatis aliam rem fieri, fore ut ex ejus ratione nos ipsi non iidem essemus, qui abhinc anno fuissemus; propterea quod, ut Philosophi dicerent, ex quibus particulis minimis consisteremus, hæ quotidie ex nostro corpore decederent, aliæque extrinsecus in earundem locum accederent; quapropter, cujus rei eadem species consisteret, rem quoque eandem esse existimari. *l.* 76. *ff. de judiciis & ubi quis.*

d Sed si universitas ad unum redit, magis admittitur posse eum convenire & conveniri, cum jus omnium in unum redierit, & stet nomen universitatis. *l.* 7. *in f. ff. quod cujusq.*

‘ If all those who compose a Society or Commu-
‘ nity should chance to die, and it were such a Com-
‘ munity as were necessarily to be re-established,
‘ the Places would be filled up with Persons who
‘ are duly qualified to be Members thereof. Thus,
‘ for example, if all the Canons or Prebendaries
‘ of a Chapter should happen to die by a Plague,
‘ or in a War, their Places would be filled up by
‘ those who have the Collation of the Prebends,
‘ and the new Prebendaries would compose the
‘ same Chapter.

IV.

4. *Two sorts of Communities.*

It is necessary to distinguish among the Communities those which consist only of Persons who have a right to assist in the Assemblies where their Affairs are to be transacted, and those which, besides the Persons called to assist at their Assemblies, comprehend other Members who have not this right. Thus for example, a Chapter comprehends only the Dignitaries, and the Canons, or Prebendaries, who compose it, and who have all of them a right to deliberate upon their common Affairs, if the defect of Age, or some other Cause does not exclude them. Thus likewise the Corporation of a Town comprehends all the Inhabitants, who are all of them interested in the common Affairs of the Corporation. But it being impossible to assemble together the whole multitude to consult about their Affairs, a certain number is chosen from among them, who represent the whole Body of all the Inhabitants, consult and deliberate about the Affairs of the Community, and direct what they think proper to be done therein, as shall be explained in the following Title *e*.

e ‘ This is a Consequence of the different Na-
‘ tures of Communities.

V.

5. *Communities have their Rights, their Goods, and Statutes.*

It is common to all Societies and Communities to have their Rights, their Affairs, their Privileges *f*, and to have also their Statutes and Regulations, whether they have been prescribed to them by the Prince, or that they have a right to make them themselves. But in this last case, they can make no Statutes but what are conformable to the Laws of the Kingdom, and to good Manners, and such as tend to the good of the Community, and to the benefit which the Publick ought to reap from it: and if it be necessary that their Statutes should be confirmed by a Court of Jus-

f Quibus permissum est corpus habere collegii societatis, sive cujusque alterius eorum nomine, proprium est, ad exemplum reipublicæ habere res communes, arcam communem. *l.* 1. §. 1. *ff. quod cujusq. univers.*

tice

tice, they will not have their effect till they have been ſo confirmed *g*.

g Sodales ſunt, qui ejuſdem collegii ſunt quam Græci ἑταιείαν vocant, his autem poteſtatem facit lex pactionem quam velint ſibi ferre, dum ne quid ex publica lege corrumpant. *l. ult. ff. de colleg. & corpor.*

Quidquid his diſponent ad invicem firmum ſit, niſi hoc publicæ leges prohibuerint. *d. l. in f.*

VI.

6. Communities are compoſed of Perſons of certain Orders.

Seeing Communities are eſtabliſhed for an end that is common to all who are to be Members thereof, and which regards the good that is to be expected from each reſpective Community; no Perſon is capable of being a Member of any of them but ſuch to whom the ſaid end is alſo common, and who are of that Order or Profeſſion which diſtinguiſhes the Members of that Community from others. Thus in order to be a Member of a Community, or of a Company of Tradeſmen, one ought to be of the Profeſſion of the ſame Company; which Company ought to be eſtabliſhed by the permiſſion of the Prince *h*.

h Neque ſocietas, neque collegium, neque hujuſmodi corpus paſſim omnibus haberi conceditur. Nam & legibus & ſenatuſconſultis & principalibus conſtitutionibus ea res coercetur. Paucis admodum in cauſis conceſſa ſunt hujuſmodi corpora: ut ecce vectigalium publicorum ſociis permiſſum eſt corpus habere, vel aurifodinarum, vel argenti fodinarum & ſalinarum. Item collegia Romæ certa ſunt quorum corpus ſenatuſconſultis atque conſtitutionibus principalibus confirmatum eſt, veluti piſtorum & quorumdam aliorum, & navicullariorum qui & in provinciis ſunt. *l.* 1. *ff. quod cujus univerſ.*

Immunitas tribuitur ſcilicet eis collegiis vel corporibus, in quibus artificii ſui cauſa unuſquiſque aſſumitur, ut fabrorum corpus eſt, & ſi qua eandem rationem originis habent: id eſt, idcirco inſtituta ſunt, ut neceſſariam operam publicis utilitatibus exhiberent. *l.* 5. §. 12. *ff. de jure imm.*

VII.

7. In what ſenſe one can be a Member only of one Community.

It is not enough for being of the number of thoſe who compoſe a Community, to be of the Order or Profeſſion of the Perſons who compoſe it; but it is alſo neceſſary that he who has a mind to be one of the Members of a Community or Corporation, be not a Member of another Community which may have Rights or Intereſts oppoſite to thoſe of the Community into which he would enter, or of which the Deliberations ought to be concealed from other Perſons for good Reaſons. Thus he who ſhould profeſs two Trades, could not be a Member of the two Companies, both of the one and the other. But as for Communities whoſe Intereſts do not claſh, and which are ſuch as that one may without any inconvenience be at the ſame time a Member both of the one and the other, this Rule ceaſes. Thus an Officer belonging to a Court of Juſtice, may be either the Head or one of the Members of the Corporation of a Town; and Merchants, Artificers, and alſo all others may be of the ſaid Corporation, altho they be Members of others *i*.

i Non licet autem amplius quam unum collegium licitum habere, ut eſt conſtitutum & a Divis fratribus, & ſi quis in duobus fuerit, reſcriptum eſt eligere eum oportere in quo magis eſſe velit. *l.* 1. §. *ult. ff. de colleg. & corpor.*

VIII.

8. The Goods and Rights of Communities belong not to the particular Perſons who compoſe them.

The Goods and Rights of a Community or Corporation, belong in ſuch a manner to the Community, that none of the particular Perſons who are Members of it have any Right or Property in them, or can any way diſpoſe of them: which is the Reaſon that ſeeing the ſaid Communities are perpetual, and always ſupported for the publick good, their Goods and Rights which are their ſupport, ought always to remain to the Corporation. And 'tis this that makes the ſaid Goods and Rights inalienable *l*. But if the Community were

l See the laſt Article of the 2d Section of Perſons, the Remark there made upon it, and the Texts there cited.

Jubemus nulli poſthac Archiepiſcopo in hac urbe regia ſacroſanctæ orthodoxæ Eccleſiæ præſidenti nulli œconomo, cui res Eccleſiaſtica gubernanda mandatur, eſſe facultatem fundos vel prædia ſive urbana, ſive ruſtica, vel poſtremo immobiles, aut in his prædiis colonos, vel mancipia conſtituta, aut annonas civiles cujuſcunque ſuprema vel ſuperſtitis voluntate ad religioſas eccleſias devolutas, ſub cujuſque alienationis ſpecie ad quamcunque transferre perſonam. Sed ea etiam prædia dividere quidem, colere, augere, & ampliare: nec ulli iiſdem prædiis audere cedere. Verum ſive teſtamento quocunque jure facto, ſeu codicillo, vel ſola nuncupatione, legato, ſeu fideicommiſſo, aut mortis cauſa donatione, aut alio quocunque ultimo arbitrio, aut certe inter viventes habita largitate, ſive contractu venditionis, ſive donationis, aut alio quocunque titulo quiſquam ad præfatam venerabilem Eccleſiam patrimonium ſuum, partemque certam patrimonii in fundis prædiis, ſive domibus, vel annonis, mancipiis, & colonis, eorumque peculiis voluerit pertinere: inconcuſſa ea omnia ſine ulla penitus immutatione conſerventur. Scientes nulla ſibi occaſione vel tempore, ad viciſſitudem beneficii collocati aut gratiæ referendæ, donandi, vel certe hominibus volentibus emere, alienandi aliquam facultatem permiſſam: nec ſi omnes cum religioſo Epiſcopo & œconomo clerici in earum poſſeſſionum alienationem conſentiunt, ea enim, quæ ad beatiſſimæ Eccleſiæ jura pertinent, vel poſthac forte pervenerint, tanquam ipſam ſacroſanctam & religioſam Eccleſiam, intacta convenit venerabiliter cuſtodiri: ut ſicut ipſa religionis & fidei mater perpetua eſt, ita ejus patrimonium jugiter ſervetur illæſum. *l.* 14. *C. de ſacroſ. Eccleſ.*

diſſolved,

dissolved, either by order of the Prince, or otherwise; those who were Members of it, would take out what they had of their own in the said Community *m*.

m Collegia si qua fuerint illicita mandatis & constitutionibus & senatusconsultis dissolvuntur, sed permittitur eis cum dissolvuntur pecunias communes si quas habent dividere, pecuniamque inter se partiri. *l.* 3. *in princip. ff. de colleg. & corp.*

IX.

9. Communities name Syndicks for the Management of their Affairs.

Since those who compose a Community, cannot all act together for their common Affairs, and exercise their Rights, they may chuse some of their own number to whom they may intrust the Direction and Care of their Affairs, under the name of Syndicks, Directors, or other Names, according to the Usage and Quality of the respective Communities: and the said Directors have their Functions regulated by their Nomination, and exercise them pursuant to the Rules explained in the Title of Syndicks, Directors, and other Administrators of Companies and Corporations *n*.

n Quibus permissum est corpus habere collegii, societatis, sive cujusque alterius, eorum nomine proprium est ad exemplum reipublicæ habere res communes; arcam communem, & actorem sive Syndicum per quem tanquam in republica quod communiter agi fierique oporteat, agatur, fiat. *l.* 1. §. 1. *ff. quod cujusq. univers.*

Syndicus fiat. *l.* 1. §. 2. *ff. de muner. & honor.*

See in the *Civil Law in its Natural Order*, the Title of Syndicks.

X.

10. In what manner Communities deliberate about their common Affairs.

The Meetings of Communities, whether for the Nomination of those who are to have the Management of their Affairs, or for other Causes, are held according to their Statutes and Regulations, whether it be in reference to the number of the Persons who are to assist at the said Meetings, or for the number of Votes necessary to form a Resolution, as has been explained in the Title already quoted of Syndicks. We have likewise explained the Rules which relate to the Engagements of Communities by the Ministry of their Governours and Directors, and the other Rules which may regard Communities, besides those which are explained under this Title *o*.

o See in the *Civil Law in its Natural Order* the Title of Syndicks.

TIT. XVI.

Of the Corporations of Towns, and other Places; of Municipal Offices, and of the Domicil of every Person.

THERE is this Difference between the Corporations of Towns or other Places, and all the other sorts of Communities and Corporations; That whereas all the others are confined to certain Orders of Persons, those of Towns and other Places regard divers Orders of different Professions, Judges, Advocates, Merchants, and others who are Inhabitants of the Towns, and who have all of them their common Affairs, for the dispatch of which they are permitted to assemble together: as for example, to order what relates to the repairing of Market-Places, the paving the Streets, the supplying the Town with Water, the Expence of publick Entertainments for the Bishops or Governours of the Place, and all other sorts of Affairs. But altho these sorts of Interests be common to all the particular Inhabitants of the Places, yet they have not all of them a Share in the Direction of Affairs; but they are transacted by those who are appointed to take this Care, as Mayors, Sheriffs, Aldermen, Common-Council-men, and others, according to the different Usages of the Places.

These are the Offices which are called Municipal, because they cannot be exercised but by the Inhabitants of the Places who are capable of them, and who have no Excuse, and who, for this reason, are called in *Latin*, *Municipes*.

It is because of this variety of Interests and common Affairs of Towns and other Places, that we have distinguished this Matter from that of Communities and Corporations in general, which has been explained in the foregoing Title; and we shall explain in this what is peculiar to Corporations of Towns and other Places: which comprehend, first, the Distinctions of their several sorts of Affairs; and, in the second place, the Distinctions of the

the Perſons intruſted with the Management of them, their Functions and Duties: And this ſhall be the ſubject of the two firſt Sections. And becauſe the Care of thoſe Affairs cannot be committed to any beſides the Inhabitants of the Places, who are to be called to that Truſt in the manner preſcribed by the Regulations and Uſages of the Places; we ſhall explain in a third Section the matter of Domicil, which cauſes every one to be reckoned an Inhabitant of the Place where he has his Domicil or Abode, and that he ought to bear his Proportion of the Burdens of the ſaid Place *a*. And this Matter of the Domicil, the chief and principal uſe whereof is in ſettling and diſtributing the Burdens and Offices in Towns and other Places, hath alſo other different Uſes: As, for example, that of regulating before what Judge one ought to cite thoſe whom he intends to ſue at Law; for it is before the Judge of their Domicil that they ought to be ſued. But ſeeing the Matter of the Domicil of every Perſon hath its Order more naturally in this Title than in any other, we ſhall diſcuſs it here; and explain in a fourth and laſt Section what concerns the Election to Municipal Offices, and the Cauſes which exclude or exempt Perſons from them.

There is likewiſe another Matter, which is a part of that treated of under this Title, and which might have had a place here, and which ſome will be of opinion ought not to have been omitted; and that is the Order and Rank of Precedency among Perſons called to thoſe Municipal Offices; becauſe Diſputes about Precedency in ſuch Caſes are very frequent: but ſeeing we have treated in general of Rank and Precedency in the 3d Section of the 9th Title of the ſeveral Orders of Perſons, we need not repeat here what has been there ſaid on this Subject.

a Ejus patriæ oneribus reſpondere debes cui te attributum eſſe commemoras. *l.* 1. *C. quemadm. civ. mund. indic.*

SECT. I.

Of the ſeveral ſorts of common Affairs in Towns and other Places.

The CONTENTS.

1. *The Policy of publick Places.*
2. *Choice of Perſons to take care of the publick Places.*
3. *Impoſition and levying of Monies for the publick Uſe.*
4. *Other ſorts of common Affairs in Towns.*
5. *Extraordinary Affairs of Towns.*
6. *Government of Hoſpitals.*
7. *Erecting of Univerſities and Colleges.*
8. *Eſtabliſhment of Phyſicians.*
9. *Divers Officers of Towns for the ſeveral Affairs.*

I.

1. *The Policy of publick Places.*

THE ſame Cauſe which has linked Men together in Society, for ſupplying the Wants of every one by the Concourſe and Aſſiſtance of many others, has produced the firſt Societies of Villages, of Boroughs, and of Towns: And the firſt Buſineſs of every one of the ſaid Societies has been to regulate the Order thereof by ſome Policy, whether the ſame has been at firſt eſtabliſhed by the Prince, or by the People themſelves; and it has been by means of this Policy that they incloſed them with Ditches and Walls, that they built Towers, and erected Guard-Houſes for the defence of the Inhabitants, that they built Churches and ſet apart Church-yards, Market-places, and other Places for publick Uſes. So that we may ſay that the firſt ſort of Affairs of Towns is this Policy, which eſtabliſhes and preſerves theſe ſorts of Places and Conveniences *a*.

a Tutelæ civitatis inſtructæ murorum præſidio providebitur. *l. un. C. de expenſ. lud. publ.*

‘ In what manner ſoever a State hath had its ‘ Origin, and People have begun to build Towns ‘ and other Places, thoſe who aſſembled in them ‘ could not do it but by uniting themſelves by a ‘ Policy which might regulate all thoſe publick ‘ Conveniences.

II.

2. *Choice of Perſons to take care of the publick Places.*

Theſe firſt Wants have been attended with a Neceſſity of chuſing Perſons who ſhould take care, either to build or keep in repair, theſe ſorts of Places and Conveniences, and who ſhould find out Funds for defraying the Expences neceſſary for that purpoſe. Thus the manner of making this Choice of the Perſons to be ſet over the ſaid Functions, has been a ſecond ſort of common Affairs *b*.

‘ *b* The Neceſſity of publick Places has ren- ‘ der'd the Function of taking care of them ne- ‘ ceſſary.

Viarum publicarum cura pertinet ad magiſtratus. *l.* 2. §. 24. *ne quid in loc. publ.*

Conſtituti ſunt eodem tempore quatuor viri qui curam viarum gererent. *l.* 2. §. 30. *ff. de orig. jur.*

III.

3. *Impoſition and levying of Monies for*

The Neceſſity of Expences for theſe firſt kinds of common Affairs, has made it

the publick Use.

it neceſſary to lay Taxes on the Inhabitants, and to have Permiſſion from the Sovereign *c* to regulate and to levy them; and it has been neceſſary alſo to impoſe and levy the publick Taxes for the Expences of the Nation; and the impoſing and levying theſe two kinds of Taxes has made it neceſſary to employ Perſons in that Buſineſs *d*, and alſo in gathering in the Revenues of the Eſtates belonging to the Communities of Towns, and other Places, which have any Eſtates belonging to the Community, and which may be called the Patrimony of the ſaid Towns, in order to diſtinguiſh it from the Monies levied on the Inhabitants by the Permiſſion of the Prince.

c ‘ The Neceſſity of theſe Expences has made ‘ theſe Impoſitions neceſſary, which cannot be ‘ laid on without the Permiſſion of the Prince.

Vectigalia ſine Imperatorum præcepto, neque præſidi, neque curatori, neque curiæ conſtituere, nec præcedentia reformare, & his vel addere vel diminuere licet. *l.* 10. *in princ. ff. de publ. & vectig.*

Vectigalia quæcumque quælibet civitates ſibi ac ſuis curiis ad anguſtiarum ſuarum ſolatia quæſierunt: ſive illa functionibus curialium ordinum profutura ſunt, ſive quibuſcumque aliis earundem civitatum uſibus deſignantur: firma his, atque ad habendum perpetua manere præcipimus, neque ullam contrariam ſupplicantium ſuper his moleſtiam formidari. *l.* 10. *C. de vectigal. & comm.*

V. l. 1. *C. vectig. nov.*

d Publicani dicuntur qui publica vectigalia habent conducta. *l.* 12. §. 3. *ff. de public. & vectig.*

V. l. 1. §. 1. *eod. l.* 16. *ff. de verb. ſignif.*

IV.

4. Other ſorts of common Affairs in Towns.

All theſe firſt kinds of Affairs have been followed by others of a different nature. For it was neceſſary to repreſs thoſe who attempted any thing againſt the publick Places, either by encroaching upon them, cauſing any damage to them, hindring the uſe of them, or rendring the ſame inconvevenient or otherwiſe, which required Regulations of Policy to guard againſt ſuch Attempts. It was neceſſary to conſtrain thoſe who are called to publick Offices to ſerve in them *f*; or to enquire into their Excuſes, if they had any to alledge *g*; to audit the Accounts of thoſe who have collected the publick Monies of the Town, to recover the Remainder that is in their hands *h*, and to apply the ſame to the publick Service. It was neceſſary to oblige the particular Inhabitants to pay their Share of the Contributions, to judge of the Exemptions and Privileges of thoſe who ſhould pretend to any without a juſt Title *i*, to adjuſt other Affairs ariſing from theſe firſt, to chuſe Perſons for the conſtituting of a Council in which all theſe ſorts of Affairs may be examined, and in which they may conſult about the means of maintaining the publick Intereſt; and this Council was neceſſary likewiſe for the other Affairs, which ſhall be mentioned hereafter.

e ‘ All theſe ſorts of Affairs are neceſſary Con‘ ſequences of the Eſtabliſhment of Towns and o‘ ther Places.

Prætor ait ne quid in loco publico facias, inve eum locum immittas qua ex re quid illi damnum detur. *l.* 2. *in princ. ff. ne quid in loc. publ.*

V. T. h. T.

f Ædiles ſtudeant ut quæ ſecundum civitates ſunt viæ adæquentur. *l.* 1. *ff. de via publ. & ſi quid.*

Si quis Magiſtratus in municipio creatus munere injuncto fungi detractet per præſides munus agnoſcere cogendus eſt. *l.* 9. *ff. de muner. & honor.*

g Qui non habet excuſationem etiam invitus cogitur. *l.* 13. §. 2. *ff. de vac. & excuſ.*

V. l. 12. *ff. de muner. & honor.*

h Reliquatores vectigalium. *l.* 9. §. 2. *ff. de publ. & vectig.*

V. l. 16. §. 12. *eod.*

V. l. 2. *in princip. C. de debit. civit.*

i Omnis excuſatio ſua æquitate nititur. Sed ſi prætendentibus aliquod ſine judice credatur, ut paſſim ſine temporis præfinitione prout cuique libuerit permiſſum fuerit ſe excuſare: non erunt, qui munera neceſſaria in rebus publicis obeant. Quare & qui liberorum incolumium jure a muneribus civilibus ſibi vindicant excuſationem, appellationem interponere habent. *l.* 1. *ff. de vacat. & excuſ. muner.*

V.

5. Extraordinary Affairs of Towns.

Beſides the ordinary Affairs mentioned in the preceding Articles, there fall out extraordinary Affairs; as, for example, the Entry of the Prince, or of a Biſhop or Governour into a Town; an Order to make Bonefires and other Rejoicings on account of ſome happy Succeſs to the Publick, it being of ſervice to the publick Good, that the People, who ought to feel the Effects of it, ſhould partake alſo of the Joy; which unites the particular Inhabitants among themſelves, and engages them to contribute to the Support of the State. And there happen alſo Occaſions to provide for the Safety of the Inhabitants in times of War *l*, of the Plague, of Famine and Scarcity; which makes it

l ‘ Theſe extraordinary Affairs are Conſequences ‘ of the Policy of Towns, and of the Affairs of ‘ the State.

Et nomen & materiam caducorum ex bellis ortam, & auctam civilibus, quæ in ſe populus Romanus movebat, neceſſarium duximus, patres conſcripti, in pacificis noſtri imperii temporibus ab orbe Romano recludere: ut quod belli calamitas introduxit, hoc pacis lenitas ſopitet. *l.* 1. *C. de caduc. toll.*

neceſſary

neceſſary to lay on Impoſitions for the Subſiſtence of the Poor. And it is neceſſary alſo to make Proviſion for the paſſage and quartering of Troops, that thoſe who exerciſe this Function may take care that the Inhabitants who are ſubject to this Burden bear it every one in his turn *m*. And all theſe ſorts of extraordinary Affairs require that Perſons be appointed to have the Direction of them.

m Eos milites quibus ſupervenientibus hoſpitia præberi in civitate oportet, per vices ab omnibus quos id munus contingit, ſuſcipi oportet. *l.* 3. §. 13. *ff. de muner. & honor.*

VI.

6. Government of Hoſpitals.

We may likewiſe reckon among the Affairs of Towns, the Foundations and Government of Hoſpitals of ſeveral ſorts, thoſe for the Whole as well as the Sick, both of the one and the other Sex, and the choice of Perſons to have the Direction of them.

n 'The Foundations and Government of Hoſpitals belong equally to Religion and to the Civil Government. *See the 18th Title.*

VII.

7. Erecting of Univerſities and Colleges.

The Care of training up the Youth in Learning and Morality, is likewiſe an Affair belonging to Towns; and it is for this purpoſe they have eſtabliſhed in Towns, Univerſities, or Colleges *o*, and that in Places not able to bear the Expence of a College, they invite Preceptors and Profeſſors to ſettle among them, by granting them Privileges *p*; and the Ordinances of *France* have provided for the maintenance of a Preceptor in the Towns where there are Cathedral or Collegiate Churches, having ſet apart the Revenue of a Canonſhip for a Preceptor *q*; which gives the ſaid Towns a Right to ſee that the ſaid Ordinances be duly obſerved, and the ſaid Fund applied to the Purpoſes for which it is intended.

'a Divine to read Lectures in Divinity, let there be another Prebend for the maintenance of a Preceptor, who ſhall be obliged, in conſideration of that Allowance, to teach the young Children of the Town. *Ordinance of* Orleans, *Art.* 9.

VIII.

8. Eſtabliſhment of Phyſicians.

It is alſo for the common Good of Towns, and of other Places where there are no Phyſicians, to engage ſome of that Profeſſion to come and ſettle among them, by granting them ſeveral ſorts of Privileges, ſuch as Exemptions from paying Taxes, or collecting them, or from other Burdens of the like nature, and even by ſettling Salaries upon them, if the Place is able to be at ſuch Expence *r*.

r Medicos & maxime archiatros, vel ex archiatris Grammaticos & Profeſſores alios litterarum, Doctores legum una cum uxoribus & filiis, necnon & rebus quas in civitatibus ſuis poſſident, ab omni functione, & ab omnibus muneribus, vel civilibus vel publicis, immunes eſſe præcipimus, & neque in provinciis hoſpites recipere, nec ullo fungi munere, nec ad judicium deduci nec eximi, vel exhiberi, vel injuriam pati: ut ſi quis eos vexaverit, pœna arbitrio judicis plectatur. Mercedes etiam eis & ſalaria reddi jubemus, quo facilius liberalibus ſtudiis & memoratis artibus multos inſtituant. *l.* 6. *C. de Profeſſ. & Med.*

IX.

9. Divers Officers of Towns for the ſeveral Affairs.

It is for the direction of all theſe different ſorts of Affairs, and for all others, that they appoint in Towns Perſons to take care of them, and diſtribute thoſe Functions which are called Town-Offices, among ſeveral Perſons, who may be diſtinguiſhed by the Name of Town-Officers; and even as to ſome of them, they may appoint Perſons with the bare Name of Commiſſaries, as for Functions of a ſhort duration, ſuch as thoſe mentioned in the 5th Article; and the Diſtinctions and Functions of all the ſaid Perſons ſhall be the ſubject Matter of the enſuing Section *s*.

s Perſonalia munera. *l.* 1. §. 2. *ff. de muner. & honor.*

See Art. 1. of the following Section.

o See the Title of Univerſities.

p Sed etſi ſalarium alicui decuriones decreverint, decretum id nonnunquam ullius erit momenti: ut puta ſi ob liberalem artem fuerit conſtitutum, vel ob medicinam; ob has enim cauſas licet conſtitui ſalaria. *l.* 4. §. *ultim. ff. de decr. ab ord. fac.*

See the Text cited on the following Article.

Exceptis qui liberalium ſtudiorum antiſtites ſunt, & qui medendi cura funguntur, decurionum decreto immunitas nemini tribui poteſt. *l.* 1. *C. de decr. decur.*

q 'Beſides the Prebend for the maintenance of

SECT. II.

Of the Distinctions of Persons put into Municipal Offices, of their Functions, and of their Duties.

The CONTENTS.

1. *Two sorts of Functions for the Direction of the Affairs of Towns. Functions of the first sort.*
2. *Functions of the second sort.*
3. *Church-Wardens.*
4. *Functions of Mayors and Aldermen.*
5. *General Duties of Mayors and Aldermen.*
6. *General Duties of other Officers in Towns.*
7. *These Offices bind the several Persons imply'd in them for the Consequences of the whole.*

I.

1. Two sorts of Functions for the Direction of the Affairs of Towns. Functions of the first sort.

THE Functions of the Government of Towns and other Places, are of two sorts: The first, of those which regard in general the Care of the Affairs of the Corporation, and which are managed by the chief Officers of the Towns, the Mayor, Sheriffs, Aldermen, or others, whose Business is to represent the Corporation, to sue for its Interests in a Court of Justice, and to defend it. The second is of the particular Functions explained in the Article which follows *a*.

a Personalia, civilia sunt munera defensiocivitatis, id est, ut syndicus fiat, legatio, ad census accipiendum, vel patrimonium scribatus Καμηλάσια, id est, *camelorum agitatio, exhibitioque* annonæ ac similium, cura prædiorumque publicorum, frumenti comparandi, aquæductus, equorum Circensium spectacula, publicæ viæ munitiones, arcæ frumentariæ, calefactiones thermarum, annonæ divisio, & quæcumque aliæ curæ istis sunt similes. Ex his enim quæ retulimus cætera etiam per leges cujusque civitatis ex consuetudine longa intelligi potuerunt. *l.* 1. §. 2. *ff. de muner. & hon.*

' Altho many of the Functions mentioned in this ' Text be not in use with us, yet the Example of ' them may be applied to such as are.

See the following Article.

II.

2. Functions of the second sort.

This second sort of Functions comprehends four kinds of them, which it is necessary to distinguish, and which are exercised by four sorts of Officers of the Town. The first is of those who compose the Town-Council, or the Assembly considered as the Body of the whole Inhabitants of the Town, in which their Affairs are taken into deliberation, and in which the Persons are named who are to execute the Offices and Functions belonging to the Town: And this Assembly, which is permitted by the Ordinances *b*, is composed in the manner regulated by the different Usages of the Places. The second is of those who are named Judges of the Policy, and are to decide all Causes relating to the same, in conjunction with the Officers of Justice, the Mayors and Sheriffs *c*. The third is that of Persons employed in the distribution and collecting of the publick Taxes, such as Assessors and Collectors, or even the Sheriffs or Aldermen in the Places where they exercise the said Function *d*. And the fourth takes in all the other Functions mentioned in the preceding Section, according as the different Usages of the Places may distinguish the said Functions, and distribute them to several Persons under different Names *e*.

b See the Edict of *Cremieux* in 1536, Art. 26.
c See Art. 71, 72. of the Ordinance of *Moulins*.
d See Tit. 5. Sect. 3. Art. 9.
e See the Text cited on Art. 1.

III.

3. Church-Wardens.

Among the several Functions of this second sort, we may distinguish those which relate to the Care of the Revenues and Offices of Parish Churches, the collecting of the said Revenues, the Discharge of the said Offices, the making Reparations, the buying, keeping and preserving the Ornaments, the looking after the Affairs of the Parish, whether it be in Courts of Law or elsewhere; and the rendring an Account of what they have received, and what they have expended. And this Function, which is exercised by those who are called Church-Wardens, or by other Names, in Towns or other Places where there is only one Parish, may be reckoned a Town-Office: but in the Towns where there are more Parishes than one, the Office is limited to every Parish *f*.

f Proinde & si custodiam tabularum ædituus, vel tabularius suscepit, dicendum est teneri eum interdicto. *l.* 3. §. 3. *ff. de tab. exhib.*

Artia fideicommissum his verbis reliquit: *Quisquis mihi hæres erit, fidei ejus committo, uti det ex reditu cœnaculi mei, & horrei post obitum sacerdoti & hierophylaco & libertis, qui in illo templo erunt, denaria decem die nundinarum, quas ibi posui.*

Quæro utrum his duntaxat, qui eo tempore, quo legabatur, in rebus humanis, & in eo officio fuerint,

5. General Duties of Mayors and Aldermen.

rint, debitum ſit, an etiam his, qui in locum eorum ſucceſſerunt. Reſpondit, ſecundum ea quæ proponerentur, miniſterium nominatorum deſignatum, cæterum datum templo. *l.* 2. §. 1. *ff. de ann. leg.*

Oeconomi vaſorum ſacrorum cuſtodes. *l.* 21. *C. de ſacroſ. Eccl.*

V. Nov. 40. *c.* 1.

Cimeliarchæ. *d. c.*

IV.

4. Functions of Mayors and Aldermen.

The Functions of Mayors, Aldermen, Sheriffs, or others who are placed in the firſt Rank in Corporations of Towns, conſiſt in general in taking care of all the Affairs of the Corporation, in ſeeing that other Officers perform their Functions, and giving them all the Aſſiſtance and Encouragement they are able; in receiving and laying out the Monies which belong to their Province, and giving an Account thereof *g*; in aſſembling the Town-Councils as often as there is occaſion, whether it be to nominate Perſons to the Functions mentioned in the preceding Articles, and in the firſt Section, or to conſult about the ſeveral ſorts of Affairs; in calling to the ſaid Councils or Aſſemblies the Officers of Juſtice who ought to preſide therein according to the Ordinances *h*. And ſeeing the Mayor and Aldermen, and Common Council have the principal Direction of the Affairs of Towns, and that they repreſent the whole Body, whatever comes to their knowledge in relation to the Affairs of the Town, whether the ſame be intimated to them by order of the Prince or otherwiſe, is held to be ſufficiently known to the Inhabitants who compoſe the Towns, and who have intruſted to the ſaid Officers the Adminiſtration of their Affairs *i*.

g Proprie municipes appellantur muneris participes, recepti in civitate, ut munera nobiſcum facerent. *l.* 1. §. 1. *ff. ad municip.*

Geſtum in republica accipere debemus pecuniam publicam tractare, ſive erogandam decernere. *l.* 2. §. 1. *eod.*

Vectigalia publica locare. *d. l.* §. 4.

Rempublicam adminiſtrare. *l.* 8. *ff. de muner. & honor.*

V. Tot. tit. ff. ad munic. & ſeq.

h See the Edict of *Cremieux* in 1536. Art. 26. That of *June in* 1559. Art. 7.

i Municipes intelliguntur ſcire quod ſciant hi quibus ſumma Reipublicæ commiſſa eſt. *l.* 14. *ff. ad municip.*

V.

5. General Duties of Mayors and Aldermen.

Thoſe general Functions mentioned in the forgoing Article, oblige thoſe who are charged with them to Duties ſuitable to the ſaid Miniſtry; which implies a Vigilance in all the ſeveral Affairs, whether they relate to the Government or good Order of the Towns, to the Diſtribution or levying of the publick Taxes, or to any other ſort of Functions; Fidelity in adminiſtring Juſtice without reſpect of Perſons; Obedience to the Orders of the Prince; Execution of the Orders directed to them, as alſo of the Orders of Courts of Juſtice, where the Judges who adminiſter Juſtice may ſtand in need of the help of their Miniſtry; Fidelity in voting in the Town-Councils for the common Good; not to give their Votes in the Elections of the Magiſtrates and Officers of the Town, or of other Perſons, to the different Functions that have been explained, except to ſuch as are duly qualified for the ſame; to maintain the Intereſt of the Publick againſt all Attempts of particular Perſons, and to promote on all Occaſions the common Good: And all this without any Prevarication, either for their own private Intereſt, or that of their Relations, or other Perſons, whoſe Intereſts being oppoſite to thoſe of the Publick might any way concern them, either becauſe of Advantages accruing from thence to themſelves, or to thoſe other Perſons whoſe Intereſt they have at heart; or for fear of incurring the Diſpleaſure of others, or expoſing themſelves to Conſequences hurtful to them. But in the Caſes where this Fear may have ſome juſt Foundation, which might excuſe them from executing their Functions themſelves; their Duty would be to abſtain from them, and to leave them to thoſe to whom the Care thereof belongs in caſe of their Default *l*.

l ‘ All theſe Duties are natural and neceſſary ‘ Conſequences of the Functions of the ſaid Offices.

VI.

6. General Duties of other Officers in Towns.

The Duties of all the other Perſons mentioned in this and the foregoing Section, conſiſt in exerciſing their Functions with a View to the publick Good, and in performing every one of them according as the Laws and Rules direct, if there be any particular Laws or Orders relating to the ſaid Functions, and with the Probity and Fidelity which Duties of all kinds demand. Thus they who are charged with diſtributing and levying the publick Taxes, ought to diſcharge the ſaid Function according to the Rules explained in Tit. 5. Sect. 8. Thus thoſe who are called to the Functions of the Civil Government, ought to obſerve in the diſcharge thereof the

Rules explained in the preceding Article, and thoſe which concern in general the Duties of Judges, which ſhall be explained in the ſecond Book *m*.

m ' This is a Conſequence of the Functions of ' the ſaid Offices.

VII.

7. Theſe Offices bind the ſeveral Perſons imployed in them for the Conſequences of the whole.

When a Municipal Office, ſuch as that of Sheriff, Alderman, or other, is divided between two or more Perſons, who are to execute one and the ſame Function, ſuch as that of taking care of ſome particular Affairs, the collecting of Money, or other Buſineſs, they are all of them bound jointly and ſeverally to anſwer to the Corporation for the Care of one another in collecting the Monies, or diſcharging the other Functions, in caſe any Neglect or Male-Adminiſtration can be imputed to any one of them. For being all of them elected to anſwer to the Corporation for theſe Functions, they ought to exerciſe them together, and to anſwer for one another. And if they divide the Adminiſtration between them, and one of them acquits himſelf ill of that part he undertook, the other will nevertheleſs be anſwerable for the Male-Adminiſtration of his Collegue; for he has no body to blame but himſelf for the Confidence he put in him who has misbehaved in his Truſt. But no body can be proſecuted for the Deed of others, till the Perſon who did act has been firſt diſcuſſed, unleſs it were that without ſuch Diſcuſſion his Inſolvency were apparent, and that he became inſolvent before his Office was expired, and before the Corporation could ſue him; for if he himſelf, or his Sureties, were ſolvent at the time he went out of his Office, his Collegues would not be accountable for his Deed. Thus the Engagement of theſe Offices in the hands of many Perſons, is the ſame with that of a Tutorſhip in the hands of ſeveral Tutors *n*.

n Imperator Titus Antoninus Lentulo vero reſcripſit *magiſtratum officium individuum ac periculum eſſe commune*, quod ſic intelligi oportet, ut ita demum collegæ periculum adſcribatur, ſi neque ab ipſo qui geſſit, neque ab his qui pro eo interveneruut, res ſervari poſſit & ſolvendo non fuit, honore depoſito, alioquin ſi perſona vel cautio ſit idonea, vel ſolvendo fuit quo tempore conveniri potuit unuſquiſque in id quod adminiſtravit, tenebitur. *l.* 11. *ff. ad municip.*

Et ſi duobus ſimul cura pecuniæ civitatis non tamen ſeparatis portionibus mandetur, ſinguli non pro virili portione, ſed in ſolidum reipublicæ obligantur. Cum autem de indemnitate civitatis ejus quæritur prius ejus bona qui adminiſtravit, ac mox ſi ſatisfieri non poterit collegæ conveniuntur. *l.* 1. *C. quo quiſq. ord.*

' If the Adminiſtration of two or more Officers ' in a Town, called to the ſame Function, be not ' divided; and if it were, for example, to collect ' Monies, and that they ought to make the Collection jointly together, their Engagement ought ' undoubtedly to be for the whole, unleſs one of ' them miſtruſting the Circumſtances of his Collegue ' ſhould refuſe to act with him, and take Meaſures ' for his own Security: But if the Adminiſtration were divided, and one of them, for example, ' were to collect the Monies in one quarter of the ' Town, and the other in another, it would be but ' juſt that, ſeeing their Functions have nothing in ' common together, every one ſhould only anſwer ' for what he himſelf was charged with, as it is ' regulated in the Caſe of Tutors.

See Sect. 3. of Tutors, Art. 28, 29.

SECT. III.

Of the Rules whereby to judge of the Domicil of every Perſon.

CONTENTS.

1. *The place of the Origin is to be diſtinguiſhed from that of the Domicil.*
2. *Domicil in the place where one executes an Office.*
3. *Domicil in the place where one follows his Studies.*
4. *Principal Domicil of every one.*
5. *The Domicil is independent of the Propriety of the Houſe.*
6. *One can have only one principal Domicil.*
7. *Every one has the Liberty of chuſing his own Domicil.*
8. *Every one bears the Charges of the Place where he has his principal Domicil.*
9. *It may happen that one has no Domicil at all.*
10. *The Domicil of a Son who is under his Father's Authority, is that of his Father.*
11. *The Domicil of the Wife is that of the Husband.*
12. *The Widow retains the Domicil of her deceaſed Husband, unleſs ſhe changes it.*
13. *Spouſals do not change the Domicil of her that is eſpouſed.*
14. *Domicil of Exiles.*

I.

1. The place of the Origin is to be diſtinguiſhed from that of the Domicil.

IT is neceſſary to diſtinguiſh between the place of one's Origin and the place of one's Domicil: we call that the place of one's Origin, where the Father had his Domicil, and this Origin receives no manner of change *a*. And we call the place of one's

a Patris originem unuſquiſque ſequitur. *l.* 36. *C. de decur.*

Abode

Abode or Habitation, a Domicil. And becauſe one may for divers Reaſons, and at divers Times, have Habitations in different places, it is neceſſary to diſtinguiſh the Domicils of ſeveral ſorts, as will appear by the Articles which follow.

II.

2. Domicil in the place where one executes an Office.

Thoſe who have any Dignity, Office, or Imployment, which obliges them to a Reſidence in a certain place, have in that very place a kind of Domicil, which yet may not be the only one, if out of the times which require Reſidence they have elſewhere another Habitation *b*. Thus, for example, an Officer of a Court who is obliged to attendance only for the half of the Year, an antient Receiver who is bound to ſerve by turns with another once every other Year, or once in three Years, and who is obliged to reſide in the place of his Receipt during the Year in which he officiates, an Officer of War, or a Soldier, who are in actual Service *c*, have their Domicils, as to their Service in their Offices and Imployments, in the places where they ſerve, and they may have their ordinary Abode in another place.

b Senatores in ſacratiſſima urbe domicilium dignitatis habere videntur. *l.* 8. *C. de incol. & ubi quiſq. dom. hab. vid.*

Senatores licet in urbe domicilium habere videantur, tamen & ibi unde oriundi ſunt, habere domicilium intelliguntur : quia dignitas, domicilii adjectionem potius dediſſe quam permutaſſe videtur. *l. penult. ff. de Senat.*

c Miles ibi domicilium habere videtu r ubi meret. *l.* 23. §. 1. *ff. ad mun.*

III.

3. Domicil in the place where one follows his Studies.

Thoſe who follow their Studies in another place than that of their ordinary Abode, as in ſome Univerſity, have alſo two Habitations or Domicils. For beſides their ordinary Domicil, they have that of the place in which they follow their Studies *d*.

d Nec ipſi qui ſtudiorum cauſa aliquo loco morantur, domicilium ibi habere creduntur, niſi decem annis tranſactis eo loco ſedes ſibi conſtituerint. *l.* 2. *C. de incol.*

‘ According to the uſage in *France*, this Domi‘ cil in the place of an Univerſity during the ‘ time of one's Studies, gives the Students the Pri‘ vilege of having the Cauſes in which they are ‘ concerned tried before the Judge who is called ‘ Conſervator of the Univerſity, as it is regulated ‘ by the Ordinances; which is altogether different ‘ from what is contained in this Text of the Ro‘ man Law which we have juſt now quoted.

See the Ordinances of *Lewis* XII. of *Auguſt* 1498. and *May* 1499.

IV.

4. Principal Domicil of every one.

The principal Domicil of every one, is that which he makes the ſeat and center of his Affairs; in which he keeps his Writings, and which he does not leave but on ſome particular occaſions; from whence when he is abſent, he is ſaid to be from home, or when he returns to it, he is ſaid to be come home; where he paſſes the chief Feſtivals of the Year; where he bears the Charges of the Place, and where he enjoys the Privileges of thoſe who are Inhabitants of it *e*.

e Incolas domicilium facit. *l.* 7. *C. de incol. & ubi quiſq.*

Eam domum unicuique noſtrum debere exiſtimari (conſtitutum eſt) ubi quiſque ſedes & tabulas haberet, ſuarumque rerum conſtitutionem feciſſet. *l.* 203. *ff. de verb. ſignif.*

Si quis negotia ſua non in colonia, ſed in municipio ſemper agit, in illo vendit, emit, contrahit, eo in foro balineo ſpectaculis utitur : ibi feſtos dies celebrat, omnibus denique municipii commodis, nullis coloniarum fruitur : ibi magis habere domicilium quam ubi colendi cauſa diverſatur. *l.* 27. §. 1. *ff. ad munic.*

In eo loco ſingulos habere domicilium non ambigitur, ubi quis larem ac fortunarum ſuarum ſummam conſtituit. Unde rurſus non ſit diſceſſurus ſi nihil avocet : unde cum profectus eſt, peregrinari videtur, quo ſi rediit, peregrinari jam deſtitit. *l.* 7. *C. de incol. & ubi quiſq. dom. hab. vid.*

V.

5. The Domicil is independent of the propriety of the Houſe.

Since the Domicil is the place of one's Reſidence, it is all one as to the Domicil of a Perſon, whether he reſide or dwell in his own Houſe, or in that of another, which he hires or poſſeſſes by ſome other Title *f*. And for the ſame Reaſon that it is the Reſidence which makes the Domicil, he who has a Houſe of his own in a place where he does not reſide, has not for all that his Domicil there *g*.

f Domum accipere debemus non proprietatem domus, ſed domicilium. *l.* 5. §. 2. *ff. de injur.*

Sive in propria domo quis habitaverit, ſive in conducta vel gratis. *d.* §.

g Sola domus poſſeſſio quæ in aliena civitate comparatur, domicilium non facit. *l.* 17. §. 13. *ff. ad municip.*

VI.

6. One can have only one principal Domicil.

According to the definition of Domicil explained in Art. 4. it is difficult for a Perſon to have two Domicils; for to have two in the meaning of that Definition, it would be neceſſary that in each of the ſaid Domicils, the Seat and Center of one's Affairs ſhould be divided, ſo as it might be ſaid he reſided equally in the one and in the other, and that it could not be diſtinguiſhed by this Proof, and the other Proofs explained

plained in the ſaid 4th Article, which were the principal of the two Domicils *h*. But whether one may have two principal Domicils, or may not, yet one may have two or more Domicils, in the ſenſe of the three firſt Articles. If the queſtion were about ſubjecting to the Offices and Charges of a place, him who has or ſhould ſeem to have two Domicils, one in one place, and another in another place, he could not be made ſubject to the Offices and Charges but of one Place alone; thus, he could not be named Sheriff or Alderman, nor aſſeſſed for his Perſonal Eſtate in two ſeveral places *i*.

h Celſus libro primo Digeſtorum tractat: ſi quis inſtructus ſit duobus locis æqualiter, neque hic quam illic minus frequenter commoretur, ubi domicilium habeat, exiſtimatione animi eſſe accipiendum. Ego dubito, ſi utrobique deſtinato ſit animo, an poſſit quis duobus locis domicilium habere, licet difficile eſt. *l.* 27. §. 2. *ff. ad municip.*

Viris prudentibus placuit, duobus locis poſſe aliquem habere domicilium, ſi utrobique ita ſe inſtruxit, ut non ideo minus apud alteros ſe collocaſſe videatur. *l.* 6. §. 2. *eod.*

Labeo indicat eum, qui pluribus locis ex æquo negotietur, nuſquam domicilium habere. Quoſdam autem dicere refert, pluribus locis eum incolam eſſe, aut domicilium habere: quod verius eſt. *l.* 5. *eod.*

i ‘ The Uſage in *France* does not allow the impoſing of theſe ſorts of Perſonal Offices and ‘ Charges on one and the ſame Perſon in two different places, altho the ſaid Perſon ſhould have a ‘ Domicil in each Place; ſo that we do not obſerve the Roman Law in this matter, which ſubjects Perſons to the Offices and Charges of both ‘ Domicils.

Incola & his magiſtratibus parere debet, apud quos incola eſt: & illis, apud quos civis eſt. Nec tantum municipali juriſdictioni in utroque municipio ſubjectus eſt, verum etiam omnibus publicis muneribus fungi debet. *l.* 29. *ff. ad municip.*

Cum te Biblium origine, incolam autem apud Berytios eſſe proponas; merito apud utraſque civitates muneribus fungi compelleris. *l.* 1. *C. de municip. & orig.*

VII.

7. Every one has the liberty of chuſing his own Domicil.

Every one is at liberty to chuſe the place of his Domicil, and to change likewiſe his Habitation, as he pleaſes, unleſs he were prohibited to dwell in ſome certain place, or that he were by order of the Prince confined to a certain place *l*. But if his Change of Abode were made to avoid the Offices of the place of Domicil, or the payment of Taxes, it ought to be accompanied with two Circumſtances; one of a real Tranſlation of Domicil without deceit and fraud *m*; and the other, that this Tranſlation of Domicil had preceded the Nomination to the Office to which one is called *n*, ſuch as that of Sheriff, Alderman, or other, or the Aſſeſſment for the Tax, or other Impoſition, according as the Laws and Cuſtom of the Country may preſcribe the manner of the ſaid Change, either as to the time of making it, or the manner of publiſhing it *o*.

l Nihil eſt impedimento quominus quis ubi velit, habeat domicilium quod ei interdictum non ſit. *l.* 31. *ff. ad municip.*

m Domicilium re & facto transfertur non nuda conteſtatione, ſicut in his exigitur qui negant ſe poſſe ad munera ut incolas vocari. *l.* 20. *ff. eod.*

Incola jam muneribus publicis deſtinatus niſi perfecto munere incolatui renuntiare non poteſt. *l.* 34. *eod.*

n Non tibi obeſt ſi cum incola eſſes, aliquod munus ſuſcepiſti, modo ſi antequam ad alios honores vocareris, domicilium tranſtuliſti. *l.* 1. *C. de incol. & ubi quis domic.*

o ‘ By the Uſage in *France* there are ſeveral Regulations touching the manner of transferring one's ‘ Domicil, and the effect it ought to have, and ‘ particularly with regard to thoſe who transfer ‘ their Domicil from a place that is ſubject to ‘ Taxes, to a place that is exempt from them.

VIII.

8. Every one bears the Charges of the Place where he has his principal Domicil.

As it is by the fixing one's principal Abode in a Place, that he has there his Domicil; ſo it is by the ſaid Domicil that he is made an Inhabitant, and becomes ſubject to the Offices and Charges of the Place *p*.

p Municipes dicimus ſuæ cujuſque civitatis cives. *l.* 1. §. 1. *in f. ff. ad municip. & de incol.*

IX.

9. It may happen that one has no Domicil at all.

Altho one cannot live without being in ſome place or other, yet one may be without a Domicil; for the Domicil being a fixed Abode in a certain Place during the time it may laſt, he who ſhould leave his Domicil in order to go and ſettle another in a remote Place, might during the Voyage by Sea or Land, have no Domicil at all in any Place *q*.

q Difficile eſt ſine domicilio eſſe quemquam. Puto autem & hoc procedere poſſe, ſi quis domicilio relicto naviget, vel iter faciat, quærens quo ſe conferat, atque ubi conſtituat: nam hunc puto ſine domicilio eſſe. *l.* 27. §. 2. *ff. ad municip.*

‘ There are Vagabonds, who without travelling ‘ in queſt of a Domicil, have really and truly no ‘ certain Domicil at all, but go wandering about ‘ the Country, ſeeking for opportunities to pilfer ‘ and ſteal.

X.

10. The Domicil of a Son who is under his Father's Authority, is that of his Father.

There are Perſons who are ſo ſtrictly linked together, that the Domicil of the one is that of the other. Thus the Conjunction which Children have with their Fathers, makes the Domicil of the Children to be the ſame with that of their Fathers, until the Children be of Age

Age to ſettle themſelves in ſome other Place, which they may do, whether they be emancipated or not; for they may have good Reaſons for making ſuch a Change *r*.

r Placet etiam filios familias domicilium habere poſſe, non utique ubi pater habuit, ſed ubicunque ipſe domicilium conſtituit. *l.* 3. *&* *l.* 4. *ff. ad municip.*

See the 5th Article of the 2d Section of the Title of Perſons in the *Civil Law in its Natural Order.*

¶ Since the Domicil of the Fathers is the place of the Origin of the Children, as has been ſaid in the firſt Article, and that the Domicil of Children is alſo the ſame with that of their Fathers, if they do not change it, as is ſaid in this Article, it follows that the Children whom their Fathers at their Death leave in Minority, retain their Domicil where that of their Fathers was, and they ought conſequently to bear the burdens of that Place, ſuch as Taxes and others, if they are not exempt from them: but ſince before they attain to the Age of Majority, there may happen Changes which change the Domicil of the Children that are under Age, thoſe to whom ſuch Changes do happen, may notwithſtanding their Minority, change their Domicil, and fix it ſomewhere elſe. Thus for example, if a Minor gets an Office, or is engaged in an Imployment which he may exerciſe in his Minority, or with a Diſpenſation of Age, the Reſidence which he will be obliged to make in the Place where he is to execute his Office or Imployment, will oblige him to fix his Domicil there. Thus the ſettlement of a Minor in another place than that of his Origin by means of a Marriage, may be made under Circumſtances which demand, and which conſequently permit the Change of his Domicil.

XI.

11. *The Domicil of the Wife is that of the Husband.*

The Conjunction of the Wife with the Husband, making as it were one Perſon out of the two, the Domicil of the Husband is that of the Wife, and ſhe can have none other, becauſe ſhe is bound to cohabit with him. Thus a Wife who had her Domicil in another place than that which was the Domicil of her Husband, quits her own Domicil by her Marriage *s*.

s Item reſcripſerunt mulierem quamdiu nupta eſt, incolam ejuſdem civitatis videri, cujus maritus ejus eſt, & ibi, unde originem trahit, non cogi muneribus fungi. *l. ult.* §. 3. *ff. ad municip.*

Mulieres honore maritorum erigimus, genere nobilitamus, & forum ex eorum perſona ſtatuimus & domicilia mutamus. *l.* 13. *C. de dignit. l. ult. C. de incol.*

See the 2d Article of the firſt Section of the 7th Title of Perſons, in the *Civil Law in its Natural Order.*

XII.

12. *The Widow retains the Domicil of her deceaſed Huſband, unleſs ſhe changes it.*

Widows retain the Domicil which their Husbands had at the time of their Death, and do not take up again their firſt Domicil by the bare effect of their Husbands Death, but they may either return to their firſt Domicil, or chuſe another; and if they marry again, their Domicil will be that of the ſecond Huſband *t*.

t Vidua mulier amiſſi mariti domicilium retinet, exemplo clariſſimæ perſonæ per maritum factæ; ſed utrumque aliis intervenientibus nuptiis permutatur. *l.* 22. §. 1. *ff. ad municip.*

Sin autem minoris ordinis virum poſtea fortitæ fuerint, priore dignitate privatæ, poſterioris mariti ſequentur conditionem & domicilium. *l. ult. C. de incol.*

XIII.

13. *Spouſals do not change the Domicil of her that is eſpouſed.*

Marriage does not change the Domicil of the Wife until it be accompliſhed. Thus, during the Spouſals, the Woman that is betrothed retains ſtill her own Domicil; and if any Cauſe breaks off the intended Marriage, there is no Change in her Domicil *u*.

u Ea quæ deſponſa eſt, ante contractas nuptias ſuum non mutat domicilium. *l.* 32. *ff. ad municip.*

XIV.

14. *Domicil of Exiles.*

Thoſe who are confined to a certain Place by Order of the Prince, do not change their Domicil, and they retain that which they had before their Exile; and if they are ſubject to Taxes, they continue to pay them in the place where they did formerly reſide *x*, but they have in the place to which they are confined another kind of Domicil by the neceſſity they are under of reſiding there during the time that is preſcribed them *y*.

x Domicilium habere poteſt & relegatus eo loci unde arcetur, ut Marcellus ſcribit. *l.* 27. §. *ult. ff. ad municip.*

y Relegatus, in eo loco in quem relegatus eſt, interim neceſſarium domicilium habet. *l.* 22. §. 3. *eod.*

SECT.

SECT. IV.

Of the Nomination or Election to Municipal Offices, and of the Cauſes which exclude or exempt Perſons from them.

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I.

1. *What are Municipal Offices.*

THE Municipal Offices mentioned here, are thoſe which oblige to ſome publick Functions, ſuch as the Adminiſtration of the Affairs of the Corporation, the ſerving as Aſſeſſors or Collectors of the publick Taxes, and other Offices of the like nature, different from thoſe Charges which imply no exerciſe of a publick Function, but which oblige barely to ſome Contribution or Expence, and regard the Goods of Perſons without relation to any Service the Publick reaps from their Induſtry; ſuch as the Charges of Contribution to Taxes and other Impoſitions, thoſe of quartering Soldiers, and others of the like kind *a*.

a Munerum civilium quædam ſunt patrimonii, alia perſonarum. *l.* 1. *ff. de muner. & honor.*

II.

2. *Two ſorts of Municipal Offices.*

The Municipal Offices, which are the ſubject matter of this Section, are of two ſorts: one of thoſe which have ſome Dignity annexed to them, ſuch as that of Sheriff; or others which have the Adminiſtration of Affairs, whether they engage the Perſons who ſerve in them to any Expence, or to no Expence at all. The other is of thoſe which have only Functions without any Dignity, ſuch as that of collecting the publick Taxes, if it is ſeparated from other Functions *b*.

b Honor municipalis eſt adminiſtratio reipublicæ cum dignitatis gradu, ſive cum ſumptu, ſive ſine erogatione

erogatione contingens. *l.* 14. *ff. de mun. & honor.*

Publicum munus dicitur quod in administranda republica cum sumptu sine titulo dignitatis subimus. *d. l.* §. 1.

'One must not expect to find in these Texts, nor 'in the others of the *Roman* Law which regard the 'several sorts of Municipal Offices and their Func- 'tions an exact Conformity to our Usage; for these 'Offices and their Functions are different in our 'Usage from what they are in the *Roman Law*.

III.

3. Difference between Municipal Offices and others.

There is this Difference between the Municipal Offices and the other sorts of Offices, such as those of Judges, of Officers employed about the Revenue, and others called Officers of the Crown; that as the Functions of these are committed to them by the Prince, they have for their Title to their Offices the Patents or Commissions which the Prince gives them; whereas the Functions of Municipal Offices being committed to those who exercise them by the Corporations whom the said Functions concern, they are called to those Offices by the Election of the Persons who have a Right to nominate *c*.

c Observare oportebit Magistratus, ut decurionibus solemniter in curiam convocatis, nominationes ad certa munera faciant. *l.* 2. *C. de decur.*

IV.

4. The Manner of naming to Municipal Offices.

The Election or Nomination to Municipal Offices is made in every Town, and in every Place, not by all the Inhabitants together, for that would cause too great a Confusion, and such a Concourse of People would be unlawful *d*; but by those who according to the Regulations and Usages of the Places are named to compose the Assembly in which the Nomination ought to be made; and the Nomination ought to be by Plurality of Voices, observing therein the Formalities prescribed by the respective Usages and Regulations, whether it be as to the manner of voting, and counting the Plurality of Voices, or as to the number necessary for composing the Assembly: And if the Person named to the Office was one of the Assembly, he may be reckoned to make up the number *e*; for they might have named another Person, and it was uncertain whether he should be named, or another *f*.

d See Tit. 2. Sect. 2. Art. 14.

e Secundum locorum consuetudinem. *l.* 6. §. 1. *in f. ff. quod cujusq. un. nom.*

See the Text quoted on the preceding Article.

Plane ut duæ partes decurionum affuerint, is quoque quem decernent, numerari potest. *l.* 4. *eod.*

'By the *Roman* Law it was necessary for making up the number required to a legal Nomination, that there should be two thirds of those 'who ought to make a full Meeting.

Ordo non aliter habeatur quam duabus partibus adhibitis. *l. ff. decret. ab orb. fact. l.* 3. *ff. quod cujusq. univ. nom.*

Nominationum forma vacillare non debet, si omnes, qui albo curiæ detinentur, adesse non possunt, ne paucorum absentia, sive necessaria, sive fortuita, debilitet quod a majore parte ordinis salubriter fuerit constitutum: cum duæ partes ordinis in orbe positæ totius curiæ instar exhibeant. *l.* 46. *C. de decur.*

f 'The Number sufficient in Elections depends 'on the Usage of the Place.

V.

5. None called to these Offices but such as are capable, and Inhabitants of the Place.

Seeing the Municipal Offices oblige to Functions which regard the publick Interest of Towns and other Places, it is just to call to them only the Inhabitants of the said Places *g*, and such as are capable of them, observing a due Proportion between the Condition of the Persons, their Estates, their Industry, and the different Functions of the Offices *h*, and calling those who are qualified to serve in them, every one in their turn.

g Ejus patriæ oneribus respondere debes, cui te attributum esse commemoras. *l.* 1. *C. quemad. civ. mun. indic.*

See Art. 25.

h De honoribus sive muneribus gerendis, cum quæritur, in primis consideranda Persona est ejus cui defertur honor sive muneris administratio: item origo natalium, facultates quoque an sufficere injuncto muneri possint, item lex secundum quam muneribus quisque fungi debeat. *l.* 14. §. 3. *ff. de mun. & honor.*

Ad subeunda patriæ munera dignissimi meritis & facultatibus curiales eligantur, ne tales forte nominentur qui functiones publicas implere non possint. *l.* 46. *C. de decur.*

Civilia munera per ordinem pro modo fortunarum sustinenda sunt. *l.* 10. *C. de mun. patrim.*

VI.

6. Inhabitants of a Place called to the publick Offices by turns, if they have no Excuse.

Whether we consider in Municipal Offices the Honour and Dignity which may be in them, or the Labour and Expences which their Functions may require, it is but just that the said Inconveniences and Advantages should be divided successively among the Inhabitants, and that they be all called to them every one in their turn, according as they may be capable of them *i*, as has been said

i Vacuatis rescriptis, per quæ munerum civilium nonnullis est vacatio præstita, omnes civilibus necessitatibus aggregentur, ita ut nec consensu civium vel curiæ, præstita cuiquam immunitas valeat: sed omnes

ſaid in the foregoing Article: But we muſt except from this Rule ſome Perſons who cannot be called to the publick Offices, as ſhall be explained by the Articles following.

omnes ad munerum ſocietatem conveniantur. *l.* 19. C. *de decur.*

See Art. 20. and the Texts there cited.

VII.

7. Three Cauſes which exclude or exempt Perſons from publick Offices.

There are three ſorts of Perſons who ought not to be called to publick Offices: Thoſe who are exempt from them *l*; thoſe who are incapable of them thro Infirmities, or by reaſon of other Impediments *m*; and thoſe who are unworthy of them: as ſhall be explain'd by the following Articles.

l See Art. 8, 9, 10.
m See Art. 11, 12, 13, &c. and Art. 26.

VIII.

8. Two ſorts of Exemptions.

There are ſeveral Cauſes of Exemption from Municipal Offices, and they may be reduced to two kinds; one, of the Exemptions by Privilege *n*; and the other is that of the Excuſes which ſerve for obtaining a Diſpenſation *o*.

n See the two following Articles.
o See Art. 11, 12, &c.

IX.

9. Exemptions on account of Privilege.

Privileges are annexed either to the Perſon, or to the Quality. Thus for the Perſon, he who for ſome Merit, or ſome Service, has obtained a Favour of the Prince which may entitle him to this Exemption, either expreſly, or by a Conſequence of ſome general Privilege, cannot be called to theſe kinds of Offices. Thus for the Quality, Gentlemen are exempted from being Collectors of the Taxes *p*.

p Curialibus conſortiis conſulentes, cenſemus ut nemo ſibi blandiatur, & noncertis modis ſeſe liberum eſſe exiſtimet, ſed pro noſtra forma tantummodo ſciat poſſe libertatem ſibi curialis competere conditionis: omnibus anterioribus modis quos non comprehendit præſens ſanctio, ex præſenti die antiquandis. Si quis igitur vel ſummum patriciatus honorem fuerit conſecutus —— is gaudeat ſe hujuſmodi conditionis eſſe exſortem. *l. ult. C. de decurion.*

Eos qui cum honore comitum nomine Magiſtrorum memoriæ præfuere, vel epiſtolis, vel libellis, item eos qui ibidem peragendis ſignandiſque reſponſis noſtræ manſuetudinis obſecundant: omnium civilium munerum fieri jubemus exſortes. Igitur qui ex eo gradu palatio noſtro adhæſerint, adeſſe ſibi competentia privilegia glorientur: qui vero ſuperioribus dignitatibus creverint, nihilominus ejus loci privilegia præſto ſibi fuiſſe lætentur. *l.* 11. *C. de excuſ. mun.*

X.

10. Exemptions granted by Towns.

We may place in the number of Perſons exempt by Privilege, thoſe who have ſettled in any Town or other Place, to exerciſe their Profeſſion there; as Phyſicians, or Perſons who make Profeſſion of teaching ſome Art or Science, or of ſetting up an Academy for Riding, Fencing, or other Exerciſes; if their Settlement there was upon that condition, that they ſhould enjoy the ſaid Exemption *q*.

q See Tit. 5. Sect. 7. Art. 6. of this firſt Book. See Sect. 1. Art. 8. of this Title, and the Texts there cited.

XI.

11. Exemption becauſe of Minority.

The Excuſes which exempt from Municipal Offices, are of ſeveral ſorts; and we may ſet down as the firſt, Minority becauſe of the Weakneſs of Age, which not allowing Minors to have the Management of their own Affairs, ought with much more reaſon to exempt them from taking care of the Affairs of others, and is in them a kind of Incapacity, which does not ſuffer that the publick Intereſt be entruſted to their Management *r*. But if the Municipal Office to be diſpoſed of were ſuch as had only ſome Honour or Dignity annexed to it without any Adminiſtration, it would be ſufficient if he who is called to it was paſt the Age of four and twenty, and entred into his five and twentieth Year, at which Age he may enter upon the Exerciſe of an Office of this kind *s*.

r Ad Rempublicam adminiſtrandam ante viceſimum quintum annum, vel ad munera quæ non patrimonii ſunt vel honores, minores admitti non oportet. *l.* 8. *ff. de muner. & honor.*

s Annus viceſimus quintus cœptus pro pleno habetur. Hoc enim in honoribus favoris cauſa conſtitutum eſt, ut pro plenis inchoatos accipiamus: ſed in his honoribus in quibus Reipublicæ quid eis non committitur. Cæterum cum damno publico honorem ei committi, non eſt dicendum etiam cum ipſius pernicie minoris. *l.* 8. *ff. de mun. & hon.*

XII.

12. Exemption on account of old Age.

The ſame Cauſe of Weakneſs of Age which ought to exempt Minors from Municipal Offices, ought alſo to exempt thoſe who are paſt ſeventy Years of Age. For at that Age, bodily Weakneſs, and the Infirmities and Inconveniences which attend it, are a juſt Cauſe for being exempted from ſerving in Offices whoſe Functions do not ſuit with Perſons of that Age, which even of

of itſelf, without any other Infirmities, renders thoſe who are ſo far advanced in Years incapable of Buſineſs *t*.

t Si ultra ſeptuageſimum ætatis annum patrem tuum eſſe præſes provinciæ perſpexerit, eum perſonalium munerum vacatione perfrui providebit. *l.* 10. *C. de decur.*

Majores ſeptuaginta annis a tutelis & muneribus perſonalibus vacant, ſed qui ingreſſus eſt ſeptuageſimum annum nondum egreſſus hac vacatione non utetur, quia non videtur major eſſe ſeptuaginta annis qui annum agit ſeptuageſimum. *l.* 3. *ff. de jure immun.*

XIII.

13. *Diſeaſes that excuſe from theſe Offices.*

Thoſe who labour under habitual Diſeaſes, or other Infirmities which ſuffer them not to act even in their own proper Affairs, and who could not poſſibly beſtow that Vigilance, Application and particular Care which Municipal Offices require, are excuſed from them, and even incapable of them. Thus the Blind, the Deaf, the Dumb, the Conſumptive, and thoſe who labour under other Diſtempers of the like nature, cannot be called to theſe Offices; but the Gout is not reckoned among the Infirmities which ſerve as an Excuſe, unleſs the ſame be in ſuch a degree as to hinder one from acting as the Buſineſs would require, and that it would be reckoned inhuman not to admit of ſuch a one's Excuſe *x*.

u Si ea cœcitate pater tuus oppreſſus eſt, ut utriuſque oculi aciem prorſus amiſerit, levamentum perſonalium munerum ſentiet. *l.* 1. *C. qui morbo ſe excuſ.*

Cum auriculari morbo debilitatum te eſſe dicas, juxta juris publici authoritatem a perſonalibus muneribus vacationem habebis. *l.* 2. *eod.*

Luminibus captus, aut ſurdus, aut mutus, aut furioſus, *aut perpetua valetudine tentus*, tutelæ ſeu curæ excuſationem habet. *l.* 1. *C. qui morbo ſe excuſ.*

' Altho this laſt Text regards only an Exemption ' from a Tutorſhip, yet the ſame Equity requires that ' perpetual Infirmities ſhould be ſuſtained as a good ' Excuſe for not ſerving in Municipal Offices.

x Podagræ quidem valetudo nec ad perſonalium munerum prodeſt excuſationem: verum cum ita te valetudine pedum afflictum dicas ut rebus propriis interceſſum commodare non poſſis, rector Provinciæ ſi allegationibus tuis fidem adeſſe perſpexerit, ad perſonalia munera te vocari non patietur. *l.* 3. *C. qui morb. ſe excuſ.*

¶ We have not ſet down in the Article what is ſaid in this laſt Text in relation to the Gout, that it does not excuſe except when it is ſuch, that he who labours under it is not able to act in his own Affairs. For beſides that People are willing to undergo Inconveniences in their own proper Concerns, which it would not be juſt to expect they ſhould be willing to bear with in the Affairs of others; a Man has always a Facility and Willingneſs to act in his own Affairs, altho he be indiſpoſed: and there are many Perſons whoſe proper Affairs are leſs cumberſom than the Functions of Municipal Offices. So that it would ſeem that this Text ought to be underſtood only of thoſe who have not long and frequent Fits of the Gout, and who in their long Intervals from Pain may be able to act freely; which has induced us to think that it is by Prudence and Humanity that we ought to judge of the Effect which the Excuſe founded on this Diſtemper ought to have.

XIV.

14. *Excuſe becauſe of the number of Children.*

The Number of Children is likewiſe a Ground of Excuſe; for beſides that this domeſtick Charge may render the Exerciſe of a Municipal Office too inconvenient, it is juſt to favour thoſe who have many Children, in conſideration of the Advantage the State reaps from the Multitude of the Perſons who compoſe it. Thus, thoſe who have many Children are juſtly diſpenſed with from bearing Municipal Offices, whether we judge of the Effect which this Excuſe ought to have by the Circumſtances of the number of Children, of the Condition of the Perſons, of their Eſtates, and by other Conſiderations, according as it ſhould appear equitable to have regard to this Ground of Excuſe, altho there were no Rule that fixed the number of Children neceſſary to ſerve as an Excuſe, or that the number were fixed by ſome Rule or Uſage, as we ſee it differently regulated in divers Places, in ſome Places fixed at a greater number, and in others at a leſſer *y*; but to make up the Number of Chil-

y Eos qui cujuſcumque ſexus liberos quinque habeant impetrata ſemel vacatione potiri convenit. *l. ult. C. de his qui num. lib.*

Patribus qui filios vel filias quinque habuerint, promiſſa legibus immunitate ſervanda. *d. l.*

Cura extruendi vel reficiendi operis in civitate, munus publicum eſt, a quo quinque liberorum incolumium pater excuſetur. *l.* 4. *ff. de mun. & hon.*

Si quis decurio pater ſit duodecim liberorum, honoratiſſima munerum quiete donetur. *l.* 24. *C. de decur. & fil. eor.*

Demonſtratur varie nec abſciſſe, numerum liberorum ad excuſationem municipalium munerum prodeſſe, ex reſcriptis divi Elvii Pertinacis. Namque Sylvio Candido in hæc verba reſcripſit: Εἰ χὴ μη πασῶν λειτυργιῶν ἀφίησιν, τῦς παλέρας ὧ τῶν τέκνων ἀριθμὸς· ἀλλ' ὃν ἐπειδὴ ἑπτακαίδεκα παῖδας ἔχειν διὰ τῦ βιβλίυ ἐδήλωσας, ὐκ ἔστιν ἄλογον ὥστε συγχρήσαι σχολάζειν τῇ παιδοτροφίᾳ, χὴ ἀνεῖσθαί σε τῶν λειτυργιῶν; id eſt, *Etſi non ab omnibus muneribus dimittit patrem natorum numerus: quia ſedecim pueros habere te per libellum notificaſti, non eſt*

Children, we reckon only thoſe who are living at the time of alledging the Excuſe *z*; and thoſe who are born after the Admiſſion into the Office do not ſerve as an Excuſe.

eſt irrationabile, ut concedamus filiorum educatione remitti tibi munera. l. 5. §. 2. ff. de jure immun.

'It is none of our Buſineſs here to reconcile 'theſe different Texts about the number of Chil'dren neceſſary for procuring an Exemption 'from Municipal Offices; it would ſeem by 'this laſt Text that it was arbitrary to judge of 'it according to the Circumſtances, ſince it is 'ſaid there that the Number of Children does 'not excuſe indifferently and abſolutely from 'Municipal Offices: and Equity would ſeem to 'require that it ſhould be ſo, ſeeing there are 'Perſons to whom a ſmall number of Children 'is very burdenſom, and there are others to 'whom a much greater number is not inconve'nient. But ſince there are Uſages of Places 'which have differently regulated the number of 'Children neceſſary for this Exemption, we have 'couched the Article in Terms which may agree, 'both to the Rule of Equity we have juſt now 'taken notice of in this laſt Text, and to the ſe'veral Uſages of Places, which in all probability 'have been a Conſequence of the Diverſity of 'thoſe other Texts.

z Qui ad munera vocantur, vivorum ſe liberorum numerum habere tempore, quo propter eos excuſari deſiderant, probare debent. Numerus enim liberorum poſtea impletus ſuſceptis antea muneribus non liberat. *l.* 2. §. 3. *ff. de vacat. mun.*

Hoc circa vacationes dicendum eſt: ut ſi ante quis ad munera municipalia vocatus ſit quam negotiari inciperet, vel antequam in collegium adſumeretur, quod immunitatem pariat, vel antequam ſeptuagenarius fieret, vel antequam publice profiteretur, vel antequam liberos ſuſciperet, compellatur ad honorem gerendum. *l.* 5. §. 7. *ff. de jure immun.*

Ad excuſationem munerum defunctus filius non proſit, præterquam in bello amiſſus. *l. ult. eod.*

Sed ſi in bello amiſſi ſunt quæſitum eſt an proſint? & conſtat eos ſolos prodeſſe qui in acie amittuntur. Hi enim qui pro Republica ceciderunt, in perpetuum per gloriam vivere intelliguntur. *Inſt. de excuſ. tut.*

'Altho this laſt Text relates only to the Exemp'tion from a Tutorſhip, yet it may be applied to 'this Caſe, and would have its Equity therein, 'altho it ſeems not to ſuit with our Uſage.

XV.

15. *The Grand-Children repreſent their Fathers, to ſerve as an Excuſe.*

If there were only Grand-Children in the room of one or more Children already deceaſed, the number would be ſupplied by the ſaid Grand-Children, thoſe of every Son coming into the Place of their Father *a*.

a Nepotes loco parentum ſuccedentes vice eorum prodeſſe conſueverint, ideoque, ſi quinque numerus liberorum ex amiſſorum filiorum nepotibus ſuppletur, a muneribus perſonalibus is, quem patrem tuum eſſe dicis, juxta conſtituta excuſatur. *l.* 3. C. *de his qui num. lib.*

Quotcumque autem nepotes fuerint ex uno filio pro uno filio numerantur. *l.* 2. §. 7. *ff. de excuſ.*

XVI.

16. *Excuſe on account of actual Service in the Army.*

Thoſe who are in actual Service in the Army are likewiſe exempt from Municipal Offices, and they are diſpenſed with from ſerving in them in conſideration of that other Service they render to the Publick, and from which they would be diverted by ſerving in the Municipal Offices *b*: But he who to avoid a Municipal Office which he has been nominated to, ſhould engage himſelf in the Service of the War, would not on that ſcore be diſcharged from the ſaid Office *c*.

b His qui caſtris operam dant, nullum municipale munus injungi poteſt. *l.* 3. §. 1. *ff. de muner. & honor.*

c Qui obnoxius muneribus ſuæ civitatis fuit, nomen militiæ defugiendi oneris municipalis gratia dedit, deteriorem cauſam reipublicæ facere non potuit. *l.* 4. §. *ult. ff. de mun. & honor.*

XVII.

17. *Excuſe by reaſon of Poverty.*

We may reckon in the number of Excuſes for declining a Municipal Office that of Poverty, if it be ſuch as to render the Perſon incapable of ſerving in it *d*; for on the part of him who is in this condition, it would be juſt not to lay a Burden on him which he was not able to bear: and beſides, it would be for the Intereſt of the Corporation to put this Adminiſtration into ſurer hands, eſpecially if it were an Office which any way concerned the Receipt and Disburſement of Money; in which caſe if there ſhould happen any Loſs of the publick Money by the Inſolvency of the Perſon appointed to receive it, this Loſs would fall on the Corporation which had named him *e*.

d Quod ſi quis propter cenſum tenuiorem, vacationem meruerit, atque hoc probaverit, beneficio potiatur; ſi propter rerum anguſtias ad perſonalia vocatur obſequia. *l. ult. c. de his qui num. lib.*

Paupertas ſane dat excuſationem ſi quis imparem ſe oneri injuncto poſſit probare, idque divorum fratrum reſcripto continetur. *l.* 7. *ff. de excuſat.*

Cum facultates tuas omnes in filium tuum contuliſſe te, nec quicquam habere proponas: reſpectu patrimonii ejus quod tuum deſiit, muneribus civilibus non adſtringeris. *l.* 4. *C. de his qui num. lib.*

Paupertas, quæ operi & oneri tutelæ impar eſt, ſolet tribuere vacationem. *l.* 40. *ff. eod.*

'Altho this laſt Text concerns only Tutorſhips, 'yet it may be applied for the ſame Reaſons to the 'Rule explained in this Article.

e Juxta inveteratas leges nominatores ſuſceptorum & eorum qui ad præpoſituram horreorum & pagorum creantur, obnoxii teneantur, ſi minus idonei ſint qui ab eiſdem fuerint nominati. *l.* 2. *de ſuſcept. præpoſ. & arcar.*

'We have not ſet down in this Article, that the 'Loſs would fall upon the Perſons who nominated, 'but

‘ but that it would fall upon the Corporation ‘ which had made the Nomination; becauſe it is ‘ the Corporation that is anſwerable for the publick ‘ Money, and for thoſe who collect and receive it; ‘ and that the Perſons who compoſe the Aſſembly ‘ in which the Nominations are made, repreſent ‘ the Corporation, and are accountable in their own ‘ Names only for what they may be charged with ‘ of fraudulent Dealing and Male-Adminiſtration: ‘ and this is the Uſage in *France*; whereas by the ‘ Roman Law, the Perſons who made the Nomina- ‘ tion, were anſwerable for the Conduct of thoſe ‘ whom they named.

Exactores vel ſuſceptores in celeberrimo cœtu curiæ conſenſu & judicio omnium ſub actorum teſtificatione firmentur: provinciarumque rectores eorum nomina, qui ad publicum munus officii editi atque obligati fuerint, innoteſcant, & animadvertant quicumque nominaverint, ad diſcrimen ſuum univerſa quæ illi geſſerint, redundare. *l.* 8. *C. eod.*

‘ And there were even ſome Offices, in which ‘ the Perſons who were in actual poſſeſſion of the ‘ Office named their Succeſſors, and were anſwer- ‘ able for them.

In eum, qui ſucceſſorem ſuo periculo nominavit, ſi finito magiſtratu ſucceſſor idoneus fuit, actionem dari non oportet. *l.* 15. §. 1. *ff. ad municip.*

V. I. C. de peric. nom.

XVIII.

18. *Other grounds of Excuſe according to Equity.*

If beſides the Grounds of Excuſe we have juſt now explained, there ſhould be any other juſt Cauſe for diſcharging him who ſhould be nominated to a Municipal Office, it would be equitable to have regard to it; as if ſome extraordinary Event had occaſioned him a great Loſs, intangled him in ſome great Affair, or put him out of a Condition of being able to exerciſe ſuch Office: for in theſe Caſes Equity and Humanity ought to ſupply the want of written Rules, and indeed it is the primary and fundamental Rule in this matter, that as it is upon Equity that all the grounds of Excuſes which the Laws receive are founded, ſo the ſame Equity requires that we ſhould admit thoſe grounds of Excuſe which particular Circumſtances may render juſt *f*, altho the Laws have not foreſeen them.

f Omnis excuſatio ſua æquitate nititur. *l.* 1. *ff. de vacat. & excuſ. mun.*

See the following Article, and the Remark upon it.

XIX.

19. *Two imperfect Excuſes are not ſufficient to make a perfect one.*

Seeing old Age excuſes only thoſe who have attained ſeventy Years; and that Children excuſe only when they are of the Number regulated by the Laws, it would not be ſufficient that he who ſhould deſire to be diſpenſed with from ſerving in a Municipal Office were ſixty five Years of Age and had three Children; for each of theſe Excuſes not being ſufficient ſeparately, what is wanting to them when divided, is not ſupplied by the joining of two imperfect Excuſes together *g*.

g Quamvis ſexagima quinque annorum aliquis ſit, & tres liberos incolumes habeat, a muneribus tamen civilibus propter has cauſas non liberatur. *l.* 1. §. *ult. ff. de vacat. & excuſ. mun.*

‘ If he who has ſixty five Years of Age together ‘ with three Children, were moreover afflicted ‘ with ſome Diſeaſe, had a great deal of Buſineſs, ‘ and but a ſmall Eſtate, or that he laboured under ‘ other inconveniencies, none of which alone ‘ would be ſufficient to diſcharge him, but which ‘ being all of them joined together would be as ‘ great an Obſtacle as any ſingle Excuſe that is al- ‘ lowed to be ſufficient; it would be juſt to diſ- ‘ charge him by the Rule explained in the preceding ‘ Article.

XX.

20. *One is not called more than once to the ſame Office, but in caſe of Neceſſity.*

Since the Municipal Offices ought to be born by the Inhabitants every one in their turn ſucceſſively, thoſe who have once ſerved in one of the ſaid Offices in the places where there is a ſufficient number of Inhabitants, cannot be named again for the ſame Office *h*: but in the places where the ſmall number of Inhabitants ſhould make it neceſſary to name the ſame Perſons more than once to the ſame Offices, it might be done by obſerving the Rule that is explained in the following Article *i*.

h Civilia munera per ordinem pro modo fortunarum ſuſtinenda ſunt. *l.* 1. *C. de mun. patrim.*

Præſes provinciæ provideat munera & honores in civitatibus æqualiter per vices ſecundum ætates & dignitates, ut gradus munerum honorumque, qui antiquitus ſtatuti ſunt, injungi: ne ſine diſcrimine & frequenter iiſdem oppreſſis, ſimul viris & viribus reſpublicæ deſtituantur. *l.* 3. §. 15. *ff. de muner. & hon.*

Quis tam inveniri iniquus arbiter rerum poteſt, qui in urbibus magnifico ſtatu præditis ac votiva curialium numeroſitate locupletibus, ad iterationem quempiam tranſacti oneris compellat: ut cum alii necdum pene initiati curiæ ſacris fuerint, alios & continuatio & repetitæ ſæpe functiones afficiant. *l.* 52. *C. de decur.*

i Defenſionem reipublicæ amplius quam ſemel ſuſcipere nemo cogitur, niſi id fieri neceſſitas poſtulat. *l.* 16. §. *ult. ff. de mun. & honor.*

Cum te omnibus muneribus functum eſſe adſeveres, ad eadem munera, ſi aliorum civium copia eſt qui obſequiis civilibus fungi poſſunt, præſes Provinciæ devocari te non permittet. *l.* 3. *C. quemadm. civ. mun. indic.*

XXI.

21. *He who has ſerved in an Office, cannot be named to the ſame, nor to another Office, except after a cer-*

Honour

tain interval of time.

Honour or ſome Dignity annexed to them, as of thoſe which are only burdenſome *l*.

l Ab honoribus ad honores eoſdem quinquennii datur vacatio, triennii vero ad alios. *l.* 2. *C. de muner. & honor. non contin.*

Naviculariі, & mercatores olearii, qui magnam partem patrimonii ei rei contulerunt, intra quinquennium muneris publici vacationem habent. *l.* 5. *ff. de mun. & honor.*

XXII.

22. The Interval is voluntary for Offices that are burdenſome, but not for Dignities.

The Intervals ſpoken of in the preceding Article, are granted for burdenſome Offices to thoſe who being called to them againſt their Will would avoid them, and it is free for them to renounce the benefit of the ſaid Intervals; but as for the Offices which have only Dignity and Honour without any Burden, the Interval ought to be obſerved without regard to the Conſent of him who is called to the Office *m*.

m Divus Severus reſcripſit, intervalla temporum in continuandis oneribus invitis, non etiam volentibus conceſſa, dum ne quis continuet honorem. *l.* 18. *ff. ad municip.*

Gerendorum honorum non promiſcua facultas eſt, ſed ordo certus huic rei adhibitus eſt. Nam neque prius majorem magiſtratum quiſquam, niſi minorem ſuſceperit, gerere poteſt: neque ab omni ætate, neque continuare quiſque honores poteſt. *l.* 14. §. 5. *ff. de muner. & honor.*

XXIII.

23. The ſame Office is not continued from Father to Son, nor from Son to Father.

Thoſe Intervals are obſerved with reſpect to the Father, and to the Son living under the Father's Authority and Juriſdiction; for they being conſidered as one and the ſame Perſon, the Service of the one in an Office frees the other from it during the ſaid Intervals; and the ſame Office cannot be continued from the one to the other, nor can they be called one after another, either to the ſame Offices, or to others of a different nature, without obſerving the delays of thoſe Intervals *n*.

n Honores & munera cum pater & filius decuriones ſunt, in eadem domo continuari non oportet. *l.* 1. *C. de muner. & honor. non contin.*

XXIV.

24. It is not the ſame thing between Brothers, altho they have their Goods in common.

The Rule explained in the preceding Article, is limited to the Perſons of the Father and Son, and does not extend to Brothers who may have their Eſtates in common together, for every one of them would have his ſeparate Right therein, and they would be two Heads of Families; ſo that each of them would have no other Interval beſides that which ſhould be on account of the Offices in which he himſelf had ſerved, and the Service of the one would be of no uſe to the other *o*.

o Intervalla temporum quæ in unius perſona locum habent, fratribus (licet communia poſſideant bona) minime prodeſſe frequenter conſtitutum eſt. *l. ult. C. de muner. & honor. non contin.*

Licet indiviſa bona fratres habent, nihilominus tamen ſinguli ſuo nomine civilibus tenentur muneribus. *l.* 7. *C. de decur.*

XXV.

25. Offices are impoſed only on Inhabitants, and ſuch as have not transferred their Domicil.

Seeing Municipal Offices can be exerciſed only by the Inhabitants of the Places *p*; thoſe who have transferred their Domicil from one Place to another, cannot be called to the Offices of the Place from which they have removed; but this Exemption takes place only in the Caſe of thoſe who have transferred their Domicil before they are nominated to an Office in the Place from whence they remove, and not in the Caſe of thoſe who being named to an Office in the Place of their Domicil, would for that Reaſon change it *q*.

p Ejus patriæ oneribus reſpondere debes, cui te attributum eſſe commemoras. *l.* 1. *C. quemadm. civ. mun. indic.*

See the 5th Article.

q Incola jam muneribus publicis deſtinatus niſi perfecto munere incolatui renuntiare non poteſt. *l.* 34. *ff. ad municip.*

‘ There are Regulations and Uſages of Places as ‘ to the time and manner of the Tranſlation of the ‘ Domicil, both with reſpect to the Nomination to ‘ Municipal Offices, and to Aſſeſſments for Perſo- ‘ nal Eſtates, and eſpecially when any one tranſ- ‘ fers his Domicil from a Place that is ſubject to ‘ the Tax to a Place that is exempt from it.

See the 7th Article of the 3d Section, and the Remark that is there made upon it.

XXVI.

26. Excluſion from Offices becauſe of unworthineſs.

Beſides the Cauſes that have been juſt now explained, which exclude or excuſe from Municipal Offices, there are other Cauſes which render Perſons unworthy of them. Thus they who have been judicially condemned to ſome Puniſhment for ſome Crime or Offence, cannot be called to theſe ſorts of Offices, eſpecially to ſuch as have ſome Dignity annexed to them *r*. But this incapacity or unworthineſs ought to be Perſonal, and the Son whoſe Father had incurred the ſaid incapacity becauſe of ſome Crime which he had been convicted of, could not for this Reaſon be excluded from ſerving in theſe ſorts of Offices, and even in ſuch as have ſome Dignity annexed to them *s*.

r Qui ad tempus relegatus eſt, ſi decurio ſit, deſinet eſſe decurio. *l.* 2. *ff. de decur.*

s Nullum patris delictum innocenti filio pœnæ eſt. Ideoque nec ordine decurionum, aut cæteris honoribus

honoribus propter ejuſmodi cauſam prohibetur. *l.* 2. §. 7. *ff. de decur.*

Crimen vel pœna paterna nullam maculam filio infligere poteſt, namque unuſquiſque ex ſuo admiſſo ſorti ſubjicitur: nec alieni criminis ſucceſſor conſtituitur. *l.* 26. *ff. de pœnis.*

Sancimus ibi eſſe pœnam ubi & noxia eſt. Propinquos, notos, familiares procul a calumnia ſubmovemus, quos reos ſceleris ſocietas non facit. Nec enim adfinitas vel amicitia nefarium crimen admittunt. Peccata igitur ſuos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum. *l.* 22, *C. de pœnis.*

Quod pater in reatu criminis alicujus eſt, filiis impedimento ad honores eſſe non debet. *l.* 3. §. 9. *ff. de muner. & honor.*

XXVII.

27. *The ſcarcity of Inhabitants makes the Excuſes and the Intervals to ceaſe.*

All the Excuſes, and all the Intervals have their effect in Places where there is a ſufficient number of Inhabitants to fill the Offices: but if the ſcarcity of Inhabitants ſhould make it neceſſary to name the ſame Perſons again without obſerving the uſual Intervals of time, or to name thoſe who have a lawful Excuſe; it is equitable, according to the Circumſtances, to diſpenſe in that Caſe with the ſaid Rules; obſerving nevertheleſs an equitable Temperament in granting always ſome eaſe to thoſe whoſe Excuſes are moſt favourable, and who ought to be leaſt burdened *t*.

t Si alii non ſint qui honores gerant, eoſdem compellendos qui geſſerint, complurimis conſtitutionibus cavetur. Divus etiam Hadrianus de iterandis muneribus reſcripſit in hæc verba: illud conſentio, ut ſi alii non erunt idonei qui hoc munere ſungantur ex his qui jam functi ſunt, creentur. *l.* 14. §. *ult. ff. de muner. & honor.*

XXVIII.

28. *Offices that are compatible.*

Offices that are burdenſome cannot be impoſed on thoſe who have already others, even altho thoſe other Offices in which they actually ſerve, ſhould oblige them only to the performance of ſome Function which were only Honorary without any Burden. But an Office of Dignity may be conferred on him who ſerves in an Office that is burdenſome *u*.

u Honorem ſuſtinenti munus imponi non poteſt: munus ſuſtinenti honor deferri poteſt. *l.* 10. *ff. de muner. & honor.*

XXIX.

29. *Perſons are called to the higheſt Offices by degrees.*

The natural Order of calling Perſons to Offices which have ſome Dignity annexed to them, is to obſerve the degrees of their Differences, and to call to the higheſt Offices only thoſe who have firſt ſerved in the loweſt, unleſs there be ſome juſt Cauſe for varying from this Order *x*.

x Ut gradatim honores deferantur, Edicto, & ut a minoribus ad majores perveniatur Epiſtola Divi Pii ad Titianum exprimitur. *l.* 11. *ff. de muner. & honor.*

Gerendorum honorum non promiſcua facultas eſt, ſed ordo certus huic rei adhibitus eſt: nam neque prius majorem magiſtratum quiſquam, niſi minorem ſuſceperit, gerere poteſt. *l.* 14. §. *penult. eod.*

‘ Altho this Rule be equitable, yet it is not al-
‘ ways ſtrictly obſerved; for there may be juſt
‘ Reaſons why this Order ſhould not always be fol-
‘ lowed.

XXX.

30. *The Nomination to Offices ought to be made ſome time before the Perſons nominated are to enter to the exerciſe of them.*

Since after the Nomination to Municipal Offices, the Perſons who have been named may be diſcharged, if they have juſt Reaſons to offer why they ſhould be diſcharged; and that before a ſecond Nomination be made, the time for which the Officers who are in actual Service were elected may expire, and the Functions of the ſaid Offices come to ceaſe; it is therefore for the Intereſt of the Publick, that in order to prevent this Inconvenience, the Nomination ſhould be made ſome time before the Perſons who are named are to enter upon the Exerciſe of their Offices; and that their Nomination be intimated to them, that there may be a time ſufficient to examine the validity of their Excuſes, if they alledge any, and to name other Perſons, in caſe upon their Appeal from their Nomination they ſhould be diſcharged *y*.

y Decuriones ad magiſtratum vel exactionem annonarum ante tres menſes vel amplius nominari debent. Ut ſi querimonia eorum videatur juſta, ſine impedimento, in abſolvendi locum alius ſubrogetur. *l.* 1. *C. de magiſtr. municip.*

Obſervare oportebit magiſtratus, ut decurionibus ſolemniter in curiam convocatis, nominationem ad certa munera faciant, eamque ſtatim in notitiam ejus qui fuerit nominatus, per officialem publicum perferri curent. Habituro appellandi, ſi voluerit, atque agendi facultatem apud præſidem cauſam ſuam jure conſueto. Quem ſi conſtiterit nominari minime debuiſſe, ſumptum litis eidem a nominatore reſtitui oportebit. *l.* 2. *C. de decurion.*

XXXI.

31. *Perſons named to Offices are compelled to ſerve in them, if they are not excuſed.*

If the Perſons who have been named, having no lawful Excuſe, ſhould refuſe to ſerve the Office, they would be conſtrained to do it by the Courſe of Juſtice, according to the Circumſtances *z*.

z Si quis magiſtratus in municipio creatus munere injuncto fungi detrectet, per præſides munus agnoſcere cogendus eſt remediis quibus tutores quoque ſolent cogi ad munus quod injunctum eſt, agnoſcendum. *l.* 9. *ff. de muner. & honor.*

Si ad magiſtratum nominati aufugerint, requirantur. Et ſi pertinaci (eos) animo latere patuerit, his ipſorum bona permittantur, qui præſenti tempore in locum eorum ad duumviratus munera vocabuntur: ita ut ſi poſtea reperti fuerint, biennio integro onera duumviratus cogantur agnoſcere. Omnes enim qui obſequia publicorum munerum tentaverint

verint declinare, ſimili conditione teneri oportet. *l.* 18. *C. de decur.*

XXXII.

32. *He who does not inſiſt on his Exemption, does not loſe his right in another Caſe.*

If he who having an Exemption might have got himſelf diſcharged from a Municipal Office, did accept of it, whether it were with a View to ſerve his Country, or for ſome other Cauſe, he would not by that have loſt his Exemption: and if he were called to another Office, he might inſiſt on his Privilege *a*.

a Qui publici muneris vacationem habet, ſi aliquem honorem, excepto decurionatu, ſponte ſuſceperit, ob id quod patriæ ſuæ utilitatibus ceſſerit, vel gloriæ cupiditate pauliſper jus publicum relaxaverit, competens privilegium non amittit. *l.* 2. *C. de iis qui ſponte mun. ſuſcep.*
V. l. 2. *ff. de jur. immun.*

XXXIII.

33. *The Office does not go to the Heir of him who dies before he enters upon the exerciſe of it.*

If he who was called to a Municipal Office happens to die before he entred on the exerciſe of it, he tranſmits no Engagement on that ſcore to his Heirs; for the Engagement to the Functions of the Office was perſonal *b*.

b Si ante diem ſubeundi honoris atque muneris pater tuus defunctus eſt, conveniri eo nomine hæredes ejus non oportere Præſes Provinciæ minime ambiget. *l.* 1. *C. ſi poſt creat. quis deceſſ.*

TIT. XVII.

Of Univerſities, Colleges and Academies, and of the Uſe of Sciences and Liberal Arts, with reſpect to the Publick.

THE erecting of Univerſities has been a Conſequence of the Neceſſity of the ſeveral Sciences that are there taught; and this Neceſſity of Sciences in a State, is a Conſequence of the Order of the Society of Mankind, which requires the Uſe of them for the Publick Good. So that to judge of the End that has been propoſed by the erecting of Univerſities, of Colleges, of Academies, and of the Advantage that is to be reaped from them, it is neceſſary to conſider in thoſe Sciences, the relation which they may have to the Order of Society, and to the Publick Good.

All the Sciences have in the firſt place this Uſefulneſs in general, that they convey to the Mind of Man the Knowledge of Truths of ſeveral Natures, which adds to the natural Lights of Reaſon, a Facility and a Habit of judging better of all Things than it is poſſible for Perſons to do who have only the bare uſe of Reaſon without that Knowledge, and to reaſon and explain their Thoughts concerning them in a better Order, with greater Clearneſs, greater Exactneſs, greater Steddineſs, and greater Politeneſs: and altho this Advantage of being verſed in the Sciences be not always ſuch in all Perſons as that every one attains by his Study this ſoundneſs of Reaſon, which the Principles and the detail of Truths which are contained in the Sciences ought naturally to produce; yet the Study of the Sciences has nevertheleſs its uſefulneſs by the good Uſe that many People make of it: and if it often happens that becauſe the Liberty of Study is free and open to all ſorts of Perſons without diſtinction, and that there are many whoſe Genius is of ſo narrow Bounds, and ſo little Penetration, of ſo little Exactneſs, and of ſo little Judgment, that they acquire by their Study only an imperfect confuſed Knowledge of Things, and mixed with falſe Ideas, and in whom inſtead of Light and Order, which ought to be the fruit of Study, we ſee on the contrary only Darkneſs and Confuſion; yet this inconvenience does not take away the Neceſſity and the Uſefulneſs of teaching the Sciences.

But beſides this general Advantage which we have juſt now remarked, the Sciences have other Advantages of much greater Importance, and more eſſential to the Publick Order, whether it be in what relates to Religion, or in what concerns the Temporal Affairs; and both the one and the other of theſe two Matters demand the Uſe of ſeveral Sciences. So that it is of infinite Conſequence to the Publick, that the Sciences which relate to Religion be preſerved in their Purity, with all the Precautions that are poſſible for maintaining in all Places, and to future Ages, the true and uncorrupted Knowledge of their Principles and of their Detail: and it is likewiſe of a very great Importance to cultivate, as much as is poſſible, the other Sciences which concern the Temporal Affairs; and the rather becauſe they are all of them of ſome Uſe in Religion, as will appear hereafter.

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As to the Sciences, the Uſe whereof tends directly to the Service of Religion, ſeeing they conſiſt in diſpoſing Men to the Worſhip of God, and to the Obſervance of the Law which he has given them: The firſt Science which Religion demands, is that which ought to teach us the Worſhip of God; and the ſecond is that which teaches us the Divine Law.

The Science of the Worſhip of God implies the Knowledge we ought to have of the God to whom we owe this Worſhip; and it implies likewiſe the Manner in which it is his Pleaſure that this Worſhip ſhould be paid him: And the Science of the Precepts of his Law comprehends the Knowledge of the Letter of thoſe Precepts, and that of the Spirit which ought to animate the Works thereof.

The Knowledge of God cannot be acquired by any of the Senſes in the manner that ſenſible Objects are known; for his Nature is of an Order that is infinitely above their Capacity, and beyond their reach. It is true, the Knowledge of ſenſible Objects may lead Man to diſcover in them the Workmanſhip of an infinite Artificer, the Author of ſo many Wonders; and it does not ſeem even to be poſſible to open the Eyes, and to ſee and conſider the Univerſe, enlightned with the Light of the Sun, the Heavens, the Stars, the regular Order of the Days, the Nights, the Months and the Years, the vaſt extent of the Earth, and of the Seas that environ it, the multitude and infinite variety of Plants, Trees, Minerals and Animals; and, laſtly, Man, compoſed of a Body of a divine Structure, animated with an intellectual Faculty, without being at the ſame time raiſed into the higheſt Admiration of thoſe great Works, the leaſt of which by its bare Exiſtence proves a Cauſe which produces it, and every one of which by its Structure proves alone the infinite Power and Wiſdom of that Cauſe; which is ſtill more clearly and evidently proved by the Diſpoſition of that innumerable multitude of Beings of all kinds in ſo great order. But this Proof, how natural and how certain ſoever it appears, has never led any Perſon to the true Knowledge which Man ought to have of God, and to the true Worſhip which he ought to render him; and it does not even make the leaſt Impreſſion on the Minds of many Perſons, ſince we have ſeen ſome that have not believed in a Deity; ſo that this natural Ignorance in which Men are born of Religion, and of the Worſhip which they owe to their Creator, and the contrary Bent which carries them to what he forbids by his Law, is an undeniable Proof, that Man is fallen into a State, which could not be natural to a Creature capable of knowing and loving his God, if he had continued ſuch as he came out of the hands of his Creator. This Truth, which is ſufficiently proved by this Ignorance, and this Propenſity to Evil, is ſtill more confirmed by the infinite multitude of Miſeries which are the Conſequences thereof.

Since therefore it is true, that the Knowledge of God, and of the Worſhip which we owe him, cannot be acquired either by the Senſes or by Reaſon, without other Helps; it is by ſome other way that we are to be led to it: and the only way is that which God has made uſe of for that purpoſe, he having been willing to teach us himſelf what he thought proper for us to know of his Nature, and the Manner in which it is his Pleaſure we ſhould ſerve him; and this way is ſo different from the manner of knowing God in his Creatures by the uſe of the Senſes and of Reaſon, that he has counted this way for nothing. For beſides that this way would furniſh even to the moſt diſcerning Perſons only Proofs to convince them that there is a God, but which would not lead them to the Knowledge of his Nature, nor of the Duties he requires from a reaſonable Creature; it is not only to the Wiſe and the Learned that God is willing to manifeſt himſelf, he communicates himſelf to all ſorts of Perſons, without any regard to their Capacity or Incapacity, and to all the other natural Qualities. And this is what he has done by the great train of Miracles and Prodigies with which he has accompanied the Knowledge he has been pleaſed to give to Men of the Myſteries and Truths of the Religion in which he deſires to be ſerved, and where he teaches Men the ſublime Science which diſcovers to us the Cauſe of our Fall, of our Ignorance, of our Inclination to Evil, and of all the Miſeries which are the Conſequences thereof, and the Remedies which he has made uſe of, to draw us out of them, and to bring us back to know him and to ſerve him. But as for this manner of knowing him naturally in his Creatures, he

he has taught us by the Miniſters, who are the Diſpenſers of the Knowledge of the Truths and Myſteries of Religion, that it has ſerved only to thoſe who have had ſome Knowledge of the Deity by the Creatures, to make them guilty of making a bad uſe of the ſaid Knowledge, and of Ingratitude towards him whom they have by the help of the ſaid Knowledge diſcovered to be the Creator and Author of all things; they not having paid him the Honour and Worſhip which they owed him, and having on the contrary put into his place Creatures whom they have adored *a*.

It is therefore only by the Truths which God himſelf has been pleaſed to teach unto Men, that they are able to know him, and to ſerve him in the Religion which he has eſtabliſhed; and conſequently it is the Science of that Religion which is the firſt of all the Sciences, and which is infinitely above all the others. And it was likewiſe principally on account of this firſt Science, that Univerſities have been founded, in order to preſerve the ſame, and to teach it in its Purity.

This Science of Religion comprehends three Parts: The Firſt is of the Myſteries and of the Truths of the Faith which God has revealed to his Church; as that which concerns his divine Nature, the Diſtinction of the three Perſons in one God, their Attributes, the Creation of Angels, the Fall of one part of them, the Creation of Man, his Fall into the Bondage of Satan and of Sin, his Redemption by the Myſtery of the Incarnation, the Sacraments, the Unity of the Church, the Extent thereof unto all Nations, its Perpetuity, the Miſſion of the Apoſtles, and of their Succeſſors the Paſtors and Miniſters of the Church, their Functions for the ſaid Miniſtry, and the other Truths of the like nature.

The ſecond part of this Science is the Doctrine of Manners, which is compoſed of the Precepts of the Divine Law that were taught unto Men under the firſt Covenant by the Miniſtry of *Moſes*, and under the ſecond by Jeſus Chriſt, who inſtead of the Letter of this Law, which the firſt Covenant gave only, has taught the Spirit, and given the Accompliſhment of it by his Goſpel.

a Becauſe that when they knew God, they glorified him not as God, neither were thankful, but became vain in their Imaginations, and their fooliſh Heart was darken'd. Rom. 1. 21.
See the 2d of the *Wiſdom of* Solomon, ch. 13.

The third is the Eccleſiaſtical Diſcipline, which is as it were the Policy of the Church for all things which are not eſſential, either to Faith or to Manners; ſuch as the Ceremonies of the Divine Worſhip, thoſe of the Adminiſtration of the Sacraments, the Manners of aſſembling Councils, and of holding them, the Ways of filling Biſhopricks, Cures, and other Benefices, the Eſtabliſhment of Chapters, and the other Matters of the like nature, of which ſome Rules may be different in divers Places, and ſubject to Changes.

It was in order to preſerve in the Church the Rules of this Science of Religion in theſe three Parts, of Faith, Manners and Diſcipline, that after the firſt Miſſion of the Apoſtles they and their Succeſſors held Councils as there was occaſion, to purge the Church of Abuſes, of Errors, and of Hereſies *b*; and the Popes made likewiſe many Decrees and Conſtitutions. So that the infinite multitude of Hereſies, of Errors and Abuſes which have ſprung up in all Ages and in divers Places, having made it neceſſary to have a great number of Deciſions and Rules, in order to preſerve the Purity of the Faith and of Manners, and to maintain the good Order of Diſcipline, the ſaid Deciſions and Rules have furniſhed matter for compoſing a Science, the Importance and Extent of which has made it neceſſary to have the Aſſiſtance of able Perſons who are thoroughly verſed in the ſaid Rules in their Purity, and who may be faithful in teaching and expounding them to others.

It was for this purpoſe, that beſides the antient Councils, in the firſt Ages of Chriſtianity, God gave to his Church holy Men to be Doctors and Teachers, who have merited the Name of its Fathers by their Doctrine and Holineſs of Life; and it is for the ſame end, that in all the Ages ever ſince God has preſided over the ſeveral Councils which it has been neceſſary to aſſemble on account of the new Hereſies, new Errors, and new Abuſes that crept into the Church by degrees. So that all theſe things relating to the Church have furniſhed Matter for a Science which comprehends the Doctrine of Faith, and of Manners, and the Rule of Diſcipline; all which are depoſited with the Church in the Books of the Holy Scripture, in the Councils, in the Writings of the

b Acts 15.

Fathers,

Fathers, and in the ſacred Canons which are compoſed of the ſaid Doctrines, gather'd from the Holy Scripture, from the Councils, from the Writings of the Fathers, and the Conſtitutions of the Popes. And it is for the Study of this Science that Univerſities have been eſtabliſhed, the Profeſſors of which are bound to have the Character of a publick Teſtimony of their Capacity, and a Title which gives them a Right to profeſs and to teach the Parts of this Science which are committed to them; ſuch as are the Matters of that part which is called Theology or Divinity, the Interpretation of the Holy Scriptures, and the others which are differently diſtinguiſhed according to the ſeveral Uſages of Places.

Next unto this Science of Religion among all the others which are called Human Sciences, to diſtinguiſh them from this firſt, that which is moſt neceſſary and of greateſt Importance in the Order of the Society of Mankind, and which likewiſe is of greateſt Dignity, is the Science of the Laws, which regulate the Juſtice Men owe to one another in all the ſorts of Affairs, which the Ties, the Engagements, and the other Conſequences of their Society may produce; and this comprehends the Rules of the Adminiſtration of that Juſtice, and the Rules of the Functions and Duties of thoſe who partake in the ſaid Adminiſtration. It is theſe Laws which are called the Civil Law, and which conſiſts chiefly of the Rules of Natural Equity, of which the Books of the *Roman* Law contain an ample Detail; concerning which the Reader may ſee what has been ſaid on this Subject in the Preface to the *Civil Law in its Natural Order*, and in the Treatiſe of Laws which follows the ſaid Preface. It is for the teaching of this Science that Profeſſors of Civil Law are eſtabliſhed in the Univerſities; and there being a great Affinity between the Canon and the Civil Law, both the one and the other being compoſed of Laws, and in ſuch a manner as that many of the ſaid Laws are common both to the one and to the other, the ſame Profeſſors teach both.

Altho theſe firſt Sciences of which we have juſt now ſpoken, regard in ſeveral reſpects the Advantage of the particular Perſons who compoſe the Society, yet they have moreover a relation to the general Order of that Society, ſome of them for the ſpiritual Affairs, and others for the temporal; and they contain many Rules which relate to the ſaid Order, and which contribute to form and to maintain it. They teach alſo in the Univerſities other Sciences which have not the ſame relation to that general Order, and which do not contain any Rule whereof the Uſe has any direct tendency to the ſaid Order. But ſeeing the ſaid Sciences are uſeful to the particular Perſons who ſtudy them, and that the common Good of the particular Perſons who are Members of the Body of the Society, ought to be conſidered as a publick Good, it is for the Intereſt and general Order of the Society that the ſaid Sciences be cultivated in it.

Of all theſe Sciences that which has the Object of the greateſt Importance is Phyſick, invented for the greateſt of all temporal Bleſſings, which is Health. It is by the Principles of this Science that Men endeavour to diſcover the Nature, the Cauſes, and the Remedies of the different ſorts of Diſeaſes: which implies the Neceſſity of knowing the Structure of the human Body, the Uſe of the ſeveral Parts which compoſe it, the Blood and the other Humours, in order to diſcover the divers Effects of Diſtempers on the Parts of the Body which are affected by them, and on the whole Body. This Science comprehends the Knowledge of the Remedies which Experience has diſcover'd by the Uſe of Plants, of Minerals, and of the other ſimple Remedies, and of thoſe which are compounded; including alſo the Knowledge of the Diet that is ſuitable to the different Diſtempers; the Uſe of Surgery for an infinite number of different Operations according to the ſeveral ſorts of Evils, and eſpecially for Wounds, Fractures, Luxations or Diſlocations, and other the like Evils. It is theſe two Parts of the Art of curing Diſeaſes which are called Pharmacy and Surgery, which comprehend all ſorts of Remedies and Helps for the preſervation and reſtoration of Health, and of which the Science of Phyſick teaches the Principles, and regulates the Uſe; ſo that it has been neceſſary to eſtabliſh in the Univerſities Profeſſors of this Science.

None of the Sciences, of which we have juſt now given theſe general Ideas, can be acquired, neither ought any one to engage in the Study of them, till he has firſt acquired the Knowledge of other Matters preparatory to the Study of the ſaid Sciences, and which con-

contain as it were the Principles and the Elements of them. And it is for this reaſon that the ſaid Principles and Elements are taught in the Univerſities under the Name of Arts, to diſtinguiſh them from thoſe firſt Sciences to which the ſaid Rank is given becauſe of their Dignity; altho ſome of the ſaid Arts have always had, and ſtill have, the Name of Sciences given them.

Thoſe kinds of Arts called Liberal Arts, Grammar, the Knowledge of the Claſſick Authors, Rhetorick, Logick, Phyſick, Metaphyſicks, are the Parts of Philoſophy, which are and may juſtly be placed in the number of Sciences, ſince they conſiſt in the Theory of many Principles and of many Truths, which have their Certainty, and the other Character of Sciences, altho there be joined with them, eſpecially in Phyſick, things which have not that degree of Certainty.

All thoſe ſeveral Arts have their Order with reſpect to one another, and they have all of them together their relation to thoſe firſt Sciences which have been mentioned: Grammar hath its Uſe in teaching the Languages, and eſpecially the antient ones, which are the Languages of the Authors of the Books in which is preſerved the Depoſit both of Sciences and of Arts; among which Languages the moſt neceſſary are the *Greek* and the *Latin*, which are the original Languages of thoſe Authors, and which have theſe Advantages, that the *Greek* is the original Language of the Holy Scriptures, and of all the moſt antient Authors of Sciences, including under this Name that alſo of Liberal Arts; which is the reaſon that the greateſt part of the Words of thoſe Sciences are of the *Greek* Language. And as for the *Latin*, it is at this day the Language of the Church of *Rome*, and it has been alſo that of the greateſt part of all ſorts of good Authors; and we have likewiſe tranſlated into this Language all the antient Books of the other Languages.

Beſides this firſt Uſefulneſs of Grammar in teaching the antient Languages, it has alſo that of containing the Elements and Principles of all the Languages. For it is by Grammar that we learn to diſtinguiſh in all Languages the ſeveral ſorts of Words, the Uſe whereof is neceſſary for compoſing them; ſuch as the Names of Perſons and Things which are called Subſtantive Names, thoſe which are termed Adjectives which diſtinguiſh the Qualities, and every thing that diverſifies both the Perſons and the Things; the Verbs, which mark the Diſpoſitions, the Actions, the Motions, and every thing that one would expreſs relating to the Condition in which one conſiders all things animate or inanimate; and the reſt which one learns by Grammar, which takes in the Elements and the Foundations of all manners of Expreſſion, and the firſt Principles of the Art of Speaking, and of the Propriety of Speech. So that Grammar is of uſe in Languages, even in the vulgar Languages which every one ſpeaks; ſince it is by the help of theſe Principles of Grammar that we diſpoſe for uſe the Words and the Expreſſions: which is common to all the Languages in general.

Seeing the Precepts of Grammar are not ſufficient for acquiring the Knowledge of all Books, we ought to join therewith the Study of ſuch *Greek* and *Latin* Authors as have writ beſt in theſe two Languages, in order to obtain a Habit of underſtanding them well, and of explaining all ſorts of Books; and becauſe the Authors which are moſt proper to be read for getting a true Knowledge of the *Greek* and *Latin* Tongues, are almoſt all of them Pagans, who have writ in a manner altogether human, without any Knowledge of Religion, and on different ſorts of Matters, but all of them within the Bounds of human Learning, the Study of the ſaid Books is called the Study of human or claſſical Learning, which, beſides the Agreeableneſs thereof, has alſo its Uſefulneſs by the Politeneſs and Elegancy of the Style of thoſe Authors, by many Sentences, witty Expreſſions, and other Ornaments and Matters of Learning which are very uſeful, whether it be in writing or ſpeaking, or even in bare Converſation, and for other Uſes. So that this Study of the human or claſſick Learning, and the reading of thoſe Heathen Authors is allowed, as well becauſe of the Neceſſity of learning from them the antient Languages, as becauſe of the other Benefits which may be gathered from them: but Religion and good Manners require that we ſhould not put into the hands of the Youth ſuch Paſſages of the ſaid Books as may ſeduce them to Profaneneſs and Irreligion.

Since among thoſe Authors that are read in the Study of the human or claſſical Learning, there are many of them

them which are Hiſtorians and Coſmographers, others that are Poets, ſome *Greek* and ſome *Latin*; we learn in the ſaid Books the antient Hiſtories, ſome Principles of Geometry and Coſmography, and alſo the Rules of the *Greek* and *Latin* Poetry: all which Studies have their Uſefulneſs, which ſhall be explained hereafter.

After having ſtudied Grammar and ſome of the claſſick Authors, the next Study is that of Rhetorick, which is likewiſe accompanied with the Study of the claſſick Authors: and there one learns the Elements and the Precepts of the Art of Eloquence; which conſiſts in ſome Rules drawn from Remarks which have been made by ſome Authors on the natural ways of ſpeaking agreeably and with efficacy ſo as to perſuade, mixing ſometimes in Diſcourſe figurative Expreſſions of ſeveral ſorts, according to the different Subjects, and the Uſe which the Diſcourſe is deſigned to have, whether it be to ſet ſome Truth in its true Light, or to excite ſome Paſſion, or for other ends. But ſince all thoſe Figures and all the other Ornaments of Diſcourſe are uſeful only in ſo far as they are eſſential to the reſpective Subjects, and agreeable only in ſo far as they are natural, and that many of thoſe who have ſtudied this Rhetorick do not know how to adapt it to its proper Uſe, but ſearch for Ornaments where none ought to be uſed, and do not give to thoſe which may be neceſſary, the natural Air which ought to make their whole Beauty; the ſervile Uſe which they make of thoſe Ornaments after having ſtudied Rhetorick, and which they employ without diſtinguiſhing the Matters to which they are applicable, and the Manners of placing and turning them, has had this Effect, that the ſaid Abuſe, which is ſo common, hath brought into diſcredit the Name of Rhetorick, from whence thoſe Figures and Ornaments are drawn. For whereas the Art of ſpeaking well ought to raiſe the Mind to a ſolid and judicious Eloquence, ſuited to the ſeveral Subjects, and of which the Ornaments ſhould have all their Grace and all their Beauty placed in the lively and natural ways of enlightning, of touching, of moving the Mind and the Heart; the bad uſe of the Figures and other Ornaments of Rhetorick, deviating from the natural Turns of Expreſſion, and ſubſtituting in their Place that affected Air of perverting the Rules, produces an Effect wholly contrary to Eloquence, which ought to draw all its Beauty from Nature it ſelf. And altho it be true that by Nature, without any uſe of Art, one cannot ſpeak ſo well as by the help of Art, yet this Help ought not to appear, and the Art conſiſts in hiding it, and in diſplaying only the natural Graces in the ſame manner as if Nature herſelf, were ſhe in her Perfection, would diſplay them; for it is ſhe that is the Source of them. Thus the more that Art is concerned in giving to Nature its Perfection, the leſs it ought to appear; and the more there appears any thing of a ſervile Study and Labour of Art, the leſs it appears beautiful, according as Nature appears to have the leſs Share in it.

We make here this Remark on the Abuſe which may be made of Rhetorick, becauſe it is for the publick Intereſt that thoſe whoſe Profeſſions demand the Uſe of Eloquence, ſhould abſtain from that falſe Rhetorick, and make uſe of an Eloquence ſuited to their Subjects; and that they ſhould retain with the Grace of the Ornaments which the Matters may demand, that Force and that Dignity that are proper for their Ends, whether it be for ſpeaking in publick, or for compoſing Works which deſerve to be writ in an elegant Style. For the publick Order renders it neceſſary to the Miniſterial Function of ſeveral Profeſſions, every one of which has occaſion for its Eloquence to touch the Mind or the Heart. Some ſtand in need of it for ſetting Truths, whether they be Facts or others, in their proper light, and eſtabliſhing the Proofs of them by the Strength of Reaſon, and by Reflections on every thing that may contribute towards it, and by a methodical Order, and the other Characters proper to this kind of perſuading, and enlightening the Mind with the Light of Truth. Others have occaſion for it, to excite the Paſſions or Sentiments of Eſteem, Averſion, Tenderneſs, Indignation, Zeal, Generoſity, and the other Sentiments which the ſeveral Subjects and Occaſions may demand, according to the different ſorts of Impreſſions which the different Characters of the ſeveral Objects ought to make; whether it be by their Charms, as Juſtice, Virtue, Truth; or by their oppoſite Qualities, as Injuſtice, Error, Vice. Thus, the Preſidents or Chiefs of a Court of Juſtice have occaſion to ſpeak

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in publick, to make Remonſtrances or Harangues of another nature, either in favour of ſome uſeful Eſtabliſhment, or for the Reformation of ſome Abuſes; and their Dignity, and the Matters about which they are to ſpeak demand an Eloquence that is grave and worthy of their Rank. Thus the King's Council in the ſaid Courts of Juſtice have occaſion to make Harangues, Remonſtrances, and other Diſcourſes of different kinds, which have their different Characters, and which require an Eloquence ſuitable to their Function: and altho their Pleadings on thoſe Occaſions may ſeem to be of the ſame kind with thoſe of the Council for the Parties, having for their Subject the Defence of Juſtice and of Equity in behalf of the Parties who have the good Cauſe; yet they ought to be diſtinguiſhed from thoſe of the Council for the Parties by the manner of the Defence. For whereas the Advocates for the contending Parties having only the Intereſt of one of the Parties to defend, they may reſtrain themſelves to what concerns the Intereſt for which they are of Counſel, and aim only at touching the Minds and Hearts of the Judges with the Sentiments and Paſſions which the Quality of their Cauſes may render neceſſary; ſo that the Exaggerations, and the other Figures of Expreſſion adapted to the State of the Cauſes, may in their Mouths be natural to the Eloquence of their Profeſſion: whereas the Duty of defending Juſtice being joined in the Mouth of the King's Council to the Dignity and Authority of their Offices, whoſe Functions are to bear Teſtimony to the Truth of the Facts, and to protect the Party who has Juſtice on his ſide, they ought to weigh the Intereſts and the Arguments on both ſides, and to defend the juſt Cauſe in ſuch a manner as to embrace only the Cauſe of Truth and of Juſtice; which baniſhes from their Eloquence the Figures and Ornaments which might give occaſion to People to ſuſpect they favoured the Intereſt of one Party more than the other, upon ſome other Conſideration beſides that of Equity which demands their Protection, and in defence of which alone they ought to employ the Force and Dignity of their Eloquence, which is conſecrated to Truth and to Juſtice.

We may likewiſe place in the number of the Perſons whoſe Profeſſions or Imployments may require the Uſe of Eloquence, thoſe who preſide in Aſſemblies, whether Eccleſiaſtical or Secular, Ambaſſadors, Generals of Armies, and others who may have occaſions of ſpeaking in publick; and every one of the ſaid Profeſſions or Imployments hath its peculiar manner of Eloquence. But of all the ſorts of Eloquence, there is none of ſo great Importance to the Publick as that of the Perſons whoſe Buſineſs it is to preach the Word of God to the People, Biſhops, Paſtors, and others who have the honour to be called to this Function; the Miniſtry whereof demands a ſort of Eloquence proportioned to it by ſingular Characters, and ſuch as may diſtinguiſh it from all other ſorts of Eloquence, according as its End and its Uſe is different from theirs. For whereas all the other Uſes of Eloquence are to perſuade the Mind of ſome Truths, or to ſtir up in the Heart ſome Sentiments which may naturally become agreeable both to the Mind and to the Heart of the Perſons whom we are deſirous to move and to perſuade, whether it be that they have no Intereſt at all of their own in the Matter, or whether their Intereſt be any way concerned; the Uſe of the Eloquence which ought to accompany the Word of God, is to enlighten the Mind with Truths, and to touch the Hearts with Sentiments and Motions, which tho eſſential to their greateſt Intereſt, yet being far from being naturally agreeable to them, meet with nothing in the greateſt part of Mankind but Oppoſition, and a Reſiſtance which God alone can vanquiſh. The Perſons to whom the Word of God is to be preached, are blind Men whoſe Eyes are to be open'd, deaf Men who muſt be made to hear, Perſons afflicted with the Palſy who are to be put in motion, Lovers of their Pleaſures, of their Intereſts, and Slaves to their Paſſions, who are to be taught and perſuaded to abandon what they love, and to ſet their Affections on Objects which they deſpiſe, and whoſe Charms muſt render inſipid and even horrible to them all the Objects of their Paſſions. So that this Work, which is next to a Miracle, cannot be effected but by virtue of an Eloquence which has the divine Character of the Truths which it teaches, and of the Sentiments which it ought to produce; and this Character is nothing elſe but the Light which ſhows thoſe Truths in their true Colours, in order to perſuade the Mind of them, and the Charm which inſpires the Love of them into the Heart.

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It is eaſy to judge that an Eloquence deſtined to ſuch an uſe, ought to have for its primary Rule, that it be the Spirit of God which rules and actuates every thing that goes towards the forming of it: and altho God permits that the Miniſters of his Word, who preach it with another Spirit do nevertheleſs inſtruct and move ſome of their Hearers, either becauſe of the good Diſpoſitions of thoſe who go to hear them, or by the Effect of a particular Providence of God over them; yet it remains always true, that he who preaches the Word of God being bound to endeavour to elevate the Minds of his Hearers towards God, ought to have for his Principle that Spirit of God which ought to animate his Spirit, and to paſs from his Mouth and from his Heart to the Ears and to the Hearts of his Hearers.

According to this Principle, which we may ſuppoſe to be well eſtabliſhed, and of which we need not bring here any more ample Proofs, every thing which thoſe who preach the Word of God mix of their own that does not agree with the Spirit of God, cannot be proper for their Eloquence; and it will have on the contrary its Perfection by having the Characters of the Divine Spirit, ſince it is God that is to ſpeak by their Mouth. Thus the Scriptures being God's own proper Language, it is chiefly from that Fountain that the Preachers of the Word of God ought to draw the Foundations and the Ornaments of their Eloquence; neither can they propoſe to themſelves for a Pattern any Eloquence which comes up to that of the Holy Scriptures, not only in their own kind, but even in any other. So that it is ſomewhat ſtrange that ſome pious Authors have been of opinion, that we ought not to ſearch for Eloquence in the Scriptures, having been perſuaded that their Character of Simplicity is quite oppoſite to it; whereas the Heatheniſh Authors themſelves have diſcovered in this Simplicity of the Scriptures, Beauties and Nobleneſs of Expreſſion which they have given as an Example of that kind of Eloquence which is called the Sublime. And we ſee alſo in all the Books of Scripture, that this Character of Simplicity is nothing elſe but an Effect of its being the Holy Ghoſt himſelf who expreſſes himſelf there, and who alone is able to inſpire Expreſſions ſuitable to the Truths which he alone teaches, and of which he alone can give juſt Ideas; which is the reaſon that we ſee in many Places of the Scripture Strokes of ſuch an Eloquence as that the Character of it marks clearly that it is God who ſpeaks, and ſuch as no Man could ever have been able to attain to: For what Man, for example, could have ever thought of ſaying, *He is that He is*, if God himſelf had not taught *Moſes* that Expreſſion, defining himſelf by theſe Words, *I am that I am? d* What Man could have been able to expreſs the manner in which God created all things, if this divine Hiſtorian of the Origin of the World, who has had the Atteſtation of God himſelf, had not learned of him what he teaches us by a divine Expreſſion, which marks that it was one bare Word of the Will of God which produced out of nothing all that he created? This is what is meant by theſe Words of *Moſes*, *Let there be Light and there was Light e*, and by this Expreſſion of another Prophet, *He commanded and they were made f.*

We might give Inſtances here of many Expreſſions of this divine Eloquence of the Holy Scriptures, both in the Old and New Teſtament, whether it be for ſpeaking to the Mind, or for touching the Heart. For in the Old Teſtament one may more eſpecially admire the Eloquence of the Books of *Moſes*, and of the other Prophets, who all of them preached the Word of God to the People; and alſo the Eloquence of the Book of *Pſalms*. And it may be ſaid of the New Teſtament, that nothing is comparable to the Eloquence of the Words of Jeſus Chriſt, who in a Simplicity of Expreſſion, and in a wonderful Juſtneſs of Parables, and in all his other Ways of inſtructing Men, diſplays ſuch a Grandeur and Comprehenſion of Truths, that none but God alone was capable of teaching after that manner, and which made even thoſe whom his Enemies had ſent to lay hold of him, ſay, that never Man ſpake as he did *g*.

May we not add as a Stroke of his divine Eloquence, that which ſhines in his Silence before *Pilate*, who was much more ſurprized and touched with the Meaning of the Silence of ſuch a Man in thoſe Circumſtances *h*, than one could be with any Words whatſoever: So that this very

d Exod. 3. 14.
e Gen. 1. 3, 6, 14.
f Pſal. 148. 5.
g *Never Man ſpake like this Man.* John 7. 46.
h Mat. 27. 14.

Silence

Silence was an Expreſſion which had the Character of an Eloquence that was truly Divine. We ſhall only add concerning this Eloquence of the Holy Scriptures, that altho the Works of St. *Paul* have not that Regularity in the Compoſition, which may ſeem to be the firſt and moſt neceſſary part of Eloquence, yet however he takes in all the Grandeur, all the Dignity, and all the Efficacy of the moſt ſublime Eloquence, by the ſhort and lively manner in which he heaps together the Treaſures of the moſt important Truths, thoſe which are the moſt capital and the moſt eſſential to Religion, which he ſcatters out of his Fulneſs, as if it were a Torrent of Jewels which he gives to be ranged and ſet in order by thoſe who read him, and who ſtudy him with that Application which one ought to have in reading Works endited by the Holy Ghoſt.

It is true, that the Simplicity and the Brevity of the Expreſſions of Scripture in explaining all the things which it teaches us of the higheſt and moſt exalted Nature, containing in a few Words Truths and Inſtructions which are eſſential, capital and fundamental, and which are the Principles and the copious Sources of that infinite Detail of every thing that concerns our Conduct and all our Duties; it is neither poſſible for the Preacher to imitate the Character of that divine Eloquence, nor eaſy for the Hearer to comprehend by the bare Pronunciation all the Subſtance, all the Extent, all the Grandeur, and all the Beauty of it; ſo that the uſe of this Sublimity of Eloquence in the Holy Scriptures is rather the Matter and the Object of a long and profound Meditation on the Truths which it teaches, and on the different Inſtructions which its Fruitfulneſs does contain, than an Example of Style to be imitated.

It is on the Reading and Study of thoſe divine Writings, that the Perſons whoſe buſineſs it is to inſtruct the People, ought to found all their Knowledge and all their Eloquence; for it is in this Treaſure alone that are contained the inexhauſtible Sources of all the Truths with which they are to enlighten and inſtruct the Minds of thoſe who hear them, and of all the Sentiments with which they are to touch their Hearts. And we ſee likewiſe this Grandeur, this Beauty, this Fruitfulneſs of the Eloquence of the Holy Scriptures, by two Effects which are two ſenſible Proofs of it; one of the conſtant Uſe of the Word of God in the Service of the Church, where thoſe who have the Taſte of this Eloquence diſcover infinite new Beauties in the ſame Words; and the other of the Diſtinction of thoſe Preachers who make the Scriptures their chief Study, and who fill their Minds and their Hearts with them, and of the Difference between the Succeſs of their Sermons and that of the Diſcourſes of others; which is an Effect of their being perſuaded themſelves of the Truths, and penetrated with the Sentiments which they endeavour to teach and to inſpire into others. For if it is true, that in human Eloquence he who would raiſe any Paſſion or Sentiment in his Hearer ought to be touched with it himſelf, as a Heathen Author has obſerved *i*. This Rule is more eſſential to thoſe who ſpeaking on the part and in the Name of God, ought to ſpeak only for the Uſe of their Miſſion, which conſiſts in enlightning the Minds with the Light, and enflaming the Hearts with the Heat of that Fire which he who ſends them has ſaid he was come to kindle in the World *l*: and ſeeing it is only Fire that can kindle Fire, and that they are the firſt who ought to be enflamed themſelves with that Fire with which they are to enflame others, their firſt Rule without doubt is, that they ought to have firſt of all in their own Minds and Hearts that Fire which they are to kindle in the Minds and Hearts of their Hearers. It was to denote the Character which their Eloquence ought to have of this Celeſtial Fire, that when God ſent the Holy Ghoſt to the Apoſtles and to the other Diſciples, to fill them with the Gifts of their Miniſtry, and eſpecially with that of preaching his Word, the Holy Ghoſt which was to animate them appeared on them in the ſhape of Tongues of Fire *m*; and the firſt Effect of the Light and of the Ardour of that Fire in their Words was to kindle it in the Hearts of their Hearers *n*, as he who ſent them had a few days before enlightned and enflamed by his Words the Minds and the

i Si vis me flere, dolendum eſt primum ipſi tibi. *Horat. de art. poet.*

l Luke 12. 49.

m Acts 2. 3.

n When they heard this, they were pricked in the Heart. Acts 2. 37.

Hearts

Hearts of two of his Diſciples, to confirm them in the Truths of his Myſteries *o*.

Thoſe are moſt certainly the Models which Preachers ought to imitate, thoſe are the Examples which they are to follow, and thoſe Truths are the eſſential Principles of the Eloquence which they owe to the Publick. If they imitate thoſe Models, if they are perſuaded of thoſe Principles, and if they endeavour to make them their Rules, they will be eloquent without the Pomp and Show of the Rules of Rhetorick: and if on the contrary they confine themſelves to pleaſe the Mind by the Uſe of this Human Eloquence, they render themſelves unworthy of the Sacred Miniſtry which they profane; by preferring to the eſſential Character of natural Eloquence, to this Divine Miniſtry which is to elevate the Minds of Men to God, the oppoſite Character of the Art of pleaſing them in order to draw them to themſelves. This we do not ſay with any View to condemn in the Miniſtry of the Word of God, the Uſe of all Ornaments: for all that we have juſt now ſaid excludes from this Miniſtry only ſuch Ornaments as do not ſuit with its Dignity and with its Spirit, and which are more proper to divert the Auditors, and to beget in them an Eſteem of the Preacher, than to elevate them to the Love of God. But there is an infinite Number of Ornaments which are both delightful and have a Nobleneſs and a Dignity in them, and which it is very uſeful to make uſe of in preaching the Word of God, altho they be ſtrokes of natural Eloquence, and even of that from whence the Rules of the Beauty of Diſcourſe have been drawn. For ſince the ſaid Rules are gathered from what has been obſerved in Nature to be proper for pleaſing the Mind and for touching the Heart, and that Nature is the Work of God, whatever the natural ways of ſpeaking in Publick, or of Writing, may have in them that is beautiful, noble, ſolid, and proper to inſinuate into the Minds and into the Hearts of People an Eſteem and a Love of the Truths of Religion, will be proper for the Eloquence of Preachers; and they are only to reject ſuch of thoſe natural Ornaments as would fall into the Vice of pleaſing bare Curioſity, or into other Faults which the Corruption of Nature might mix with what it has retained of good; but they may wiſely and prudently imploy in their Sermons the Ornaments which may be proper and adapted to pleaſe the Mind, not for the Mind it ſelf, which would ſerve only to ſatisfy Curioſity, but to make way thro the Mind into the bottom of the Heart, for the Charms of the Truths that are worthy to be preached on the part of God, and by his Word.

It is not a difficult thing to diſcover by theſe Principles the manner in which thoſe who are called to the auguſt Miniſtry of preaching the Word of God ought to prepare themſelves, and out of what Ornaments they ought to form an Eloquence, into the Compoſition of which nothing is worthy to enter that is not a Light and a Charm of the Spirit of God; ſo that an Eloquence which has the eſſential Parts of this Character with ever ſo little a ſhare of the Art of pleaſing, will be able to perſuade more efficaciouſly than any other Eloquence whatſoever that ſhould be without this Character, that is ſo eſſentially neceſſary for perſuading and convincing.

Beſides this Neceſſity of Grammar, of Claſſical Learning, and of Eloquence, for the ſeveral purpoſes which we have juſt now explained, one has occaſion in ſeveral Profeſſions for the Study of Philoſophy, and eſpecially in the Profeſſions of Divines, Lawyers, Magiſtrates, Phyſicians, and others who may require the Uſe of ſome Science. It is this Philoſophy which in the Univerſities is ranked among the Arts, and which is diſtinguiſhed into four different Parts, which are Logick, Phyſick, Metaphyſicks, and Moral Philoſophy.

Altho theſe four parts of Philoſophy ſeem not to have all of them a relation to all thoſe Profeſſions, and that for example, Phyſick ſeems to be but little neceſſary for the Uſe of Law, it is however certain that they have all of them this double Uſefulneſs for the Study of all ſorts of Sciences, That every one of them may have by ſome of its Matters and Rules ſome relation or other to ſome part of each Science, and that all of them together have in general the Effect of forming the Mind, and accuſtoming it to the underſtanding of all ſorts of Matters, of inuring

o Did not our Heart burn within us, while he talked with us by the way, and while he opened to us the Scriptures? Luk. 24. 32.

Thy Word is very pure; therefore thy Servant loveth it. Pſal. 119. 140.

Every Word of God is pure; he is a Shield unto them that put their Truſt in him. Prov. 30. 5.

it to form exact and precise Ideas of all sorts of Objects, and especially of those which do not fall under the Senses, and of confirming it in the just ways of apprehending and reasoning: for the Objects of Logick, of Metaphysicks, of Moral Philosophy, and many Objects likewise of Physick, are matters which the Mind apprehends independently of the Senses, which accustoms it to think likewise, and to reason without the help of the Senses, and to be able to discover in all matters that which they have that is most spiritual and most proper to be the Object of the Mind, as will appear by the general Ideas which shall be given here of the Use of every one of these parts of Philosophy.

Logick is the first which opens the way not only to the other Parts of Philosophy, but also to all the other Sciences, as to Divinity, to Law, to Physick, and to the others: for besides this general Use, which we have just now remarked, of accustoming the Mind to Objects that are purely Spiritual, which the other parts of Philosophy have in common with Logick, it is properly the Art of guiding and directing the Mind to form just and precise Ideas of all Things, especially of those which are only the object of the Understanding, and in which the Senses have no share. It is for this Use that this Science considers in all things independently of the Senses, that which is common to them all, such as their Being; or common only to many and not to all, as the Animal Life, which is common to Men and to all sorts of Animals; and that which is common only to a few sorts and kinds of Things, such as the Understanding, that is common to Angels and to Men: and at the same time Logick considers what the different Kinds have peculiar to them, that distinguishes the one from the other. Thus among the Things which have the Animal Life common to them, the Understanding distinguishes Man from the Animals which have this Life in common with him. It is by these Views of what is general and common, either to all sorts of Things, or to many sorts, or to some, and of what each sort has peculiar to it self, that we distinguish that which is called Kinds and Species, which have more or less extent according as the Characters which distinguish them are more or less general, and agree to more or fewer sorts of Things; and it is by the means of those Characters which make the Kinds and the Species, that Logick gives the Method of distinguishing, of dividing, of defining, that is to say, of conceiving the Order of the Things which have between them some affinity by reason of Characters that are common to them, of ranging every one with those that belong to its Rank, and of separating the one from the others; of giving the precise Ideas of their Natures, which consist in those Characters which they have in common with others, and in those which distinguish them. And for the more exact observance of this justness, this Science teaches Persons to give the definition of the Names of Things before they proceed to define their Natures, the better to avoid Obscurities and Ambiguities in the Expression.

Logick considers the several Qualities which naturally follow the relation that every thing may have to others, such as a Cause to its Effect, a greater thing to a lesser, a Sign to that which it signifies; and it is by these Views, and others of the like nature, of what the Mind is able to distinguish both in the Substance and in the Qualities of all things, that it uses and accustoms it self to apprehend aright and to reason justly, receiving nothing for Truth but Principles that are certain, or Consequences justly drawn from the said Principles. It is also to prevent the drawing from good Principles any other Consequences than what naturally and most certainly follow from them, that Logick gives the Method which it has invented to place the Reasonings in such a regular Order, that the Rules of this Method being observed, it is impossible that the Conclusion of the Reasoning should not convince unanswerably, if the Propositions from whence it is drawn be allowed to be true: and this Certainty is the bare effect of placing those Propositions in a right Order, which makes that the Consequence drawn from them is necessarily linked to them, when those Rules are duly observed.

Of the other three parts of Philosophy, that which has the greatest affinity to Logick, is the Metaphysicks, because they consider Things independently of the Senses, and those very things which are corporeal and sensible. Thus Metaphysicks consider in all things their Subsistence, their Existence, the essential Properties which God has given to all Beings, and which are in every one its

its Unity, its Verity, its Goodneſs: for theſe three Characters are neceſſarily in every Thing, and every Being is one in its Nature, altho it may be compoſed of many different Parts, as a Plant or an Animal: Every Being is true by its Exiſtence, which renders it conformable to the Principle of its Nature; and every Being is good by the bare Effect of its being the Work of God *p*.

It is likewiſe this Science that conſiders the different Kinds of Cauſes and of Principles, and the ſeveral manners in which one Thing may be the Cauſe or Principle of another; that diſtinguiſhes alſo the Spiritual Principles of the ſeveral Sciences which lead us to the Knowledge of Truth, ſuch as thoſe of Geometry, of which we ſhall ſpeak hereafter, which are called Axioms; thoſe of the Moral Philoſophy, which are termed Maxims, and thoſe of the other Sciences: and the Science of Metaphyſicks has alſo its own Principles, ſuch as this for example, that it is impoſſible that the ſame Thing ſhould be and not be at the ſame time, and other Principles of the like nature. Thus we diſtinguiſh in the Metaphyſicks the Cauſes which produce the Effects, as the Sun which produces Heat, which is called the efficient Cauſe; the Principles which make us to act, as the End which we propoſe to our ſelves, which is termed the final Cauſe; the Example which we imitate, and the others.

It is alſo this Science which raiſes it ſelf to the Knowledge of the Nature of Angels, and of God, and of the Divine Attributes, not in the manner reſerved to the Science of Theology or Divinity, which joins to the natural Reaſoning the Principles of Faith, but by the bare Lights of Nature, which furniſh ſeveral Proofs of the Being of a God, and which imply the Neceſſity of his Exiſtence, of his Independency, of his Unchangeableneſs, of his Omnipotence, of his Providence, and of his other Attributes.

Phyſick differs from Logick and Metaphyſicks, not only by the diſtinction of its Object, but alſo by the manner in which it treats of it: for it has for its Object only Bodies, and it conſiders in them principally what they have that is material and ſenſible; their Qualities, their Generation, their Corruption, their Conſtruction, that is, the manner in which they are compoſed, that which makes and diſtinguiſhes the different ſorts of Matters, the Conjunction of the little Particles of which all Bodies are compoſed, the nature of its Parts, that of the ſeveral Qualities of Bodies, Colours and others, and of the Light which makes them viſible, the Cauſes of the Motions which is made in Bodies by that which is called Weight, and of thoſe Motions made by the Impreſſion that one Body may receive from another, what that Weight is, what that Impreſſion is, what it is that produces that other ſort of Motion; of the Dilatation of liquid Bodies that are heated, which is called Rarefaction; the divers Cauſes and Effects of that which is named Fermentation, and the other matters of the like nature, which have all of them almoſt a Character of Obſcurity, which makes that they are rather the object of a Labour of the Mind and of a fruitleſs Study, than of a Science that attains to a clear and certain Knowledge of Things. For it may be ſaid of this kind of Phyſick, that hitherto it has diſcovered almoſt nothing, and that in all appearance it will diſcover but a very few Things, which will give perfect Satisfaction to a reaſonable Mind touching all the matters that it treats of; ſuch as thoſe which have been juſt now taken Notice of, and others of the like nature. Concerning which it may be ſaid, that as God has given to Men the uſe of Sciences only for their Wants, he has imparted to them only the Knowledge which they may acquire by Reaſon and Experience of what may be neceſſary for the ſupplying of theſe Wants; and has hidden from them, as has been ſaid in another place *q*, what would only be the Object of Curioſity; rendring himſelf equally admirable, both by the Order and Beauty of that which we know of his Works, and by the impenetrability of that which it is not his pleaſure that we ſhould know.

Phyſick has nevertheleſs its Uſe; for beſides that it teaches ſome certain Truths, as for example, that which it

p *And God ſaw every thing that he had made, and behold it was very good.* Gen. 1. 31.

q See the Treatiſe of Laws, *Chap.* 1. *Art.* 3.

He hath made every thing beautiful in his time; alſo he hath ſet the World in their Heart, ſo that no Man can find out the Work that God maketh from the beginning to the end. Eccleſ. 3. 11.

As thou knoweſt not what is the way of the Spirit, nor how the Bones do grow in the Womb of her that is with Child, even ſo thou knoweſt not the Works of God who maketh all. Eccleſ. 11. 5.

borrows from Geometry, concerning the impoſſibility of coming to a final Diviſion of the leaſt Particles of every Body; that which it takes from Aſtronomy, for the Sphere, and the Motions either of the Heavens or of the Earth, which make the Days and the Years, and that in ſome other Matters it diſcovers ſeveral Truths: The Study even of the obſcureſt Matters in Phyſick, hath its uſefulneſs in exerciſing the Minds of the Students by divers Reaſonings. This very Phyſick hath alſo its Uſefulneſs, in that it leads to another Phyſick, the Uſe of which is of great Neceſſity and Advantage to the Publick, and which hath for its Object the Diſcovery, by Reaſoning and by Experiments on the ſeveral Kinds of Bodies and of Matters of all ſorts, Animals, Trees, Plants, Minerals and others, of what Qualities they may have that may ſerve for the Uſe of Remedies for the ſeveral Diſtempers, and for an infinite number of other Uſes in all the Arts: for their great Extent requires that there ſhould be imployed in them an infinite number of divers matters which are neceſſary, either by their bare natural Qualities, or by the ſeveral Preparations which the Study of Experience for many Ages has diſcovered, and which may always be multiplied and brought to greater Perfection by cultivating this Study in the manner as it now is in *France*.

The fourth and laſt part of Philoſophy, which is the Moral Philoſophy, hath that in common with Logick and Metaphyſicks, that its Object and its Principles are independent of the Senſes: for it hath for its Object every thing that relates to Manners, the Nature and the Characters of human Actions, that is to ſay, of thoſe of a free Will which acts for ſome End, and which are capable of Good or of Evil, the Nature and the Characters of this Liberty, the ſeveral Paſſions of Man, his Affections, his Habits, the Ends which he propoſes to himſelf, his Inclination to Good and to Happineſs either real or apparent; the Virtues which are called Moral, Prudence, Juſtice, Fortitude, Temperance; the Laws and other the like Matters, which are explained in this Science, in the manner that the Metaphyſicks explain what relates to God and to his Attributes, that is, by Reaſonings drawn from natural Lights. And we ſee likewiſe that many Heathen Authors have treated of this Science. As to which, it is neceſſary to remark the Conſequence of the good Uſe of its Principles and of the particular Doctrines taught in it, that the Principles of Human Philoſophy may not be extended ſo far as to deſtroy thoſe of Religion, but that the Principles of Religion may always ſtand as the prime and fundamental Rules; and that all the Moral Philoſophy may have its Spirit, its Source, and its Foundation in the Spirit of Religion, and in the Doctrines of Faith which ought to reign in every thing that we learn there.

Since the Conſequence of the Integrity and Purity of Manners, and of all the Rules which relate to the matters that are taught in this Human Science of Moral Philoſophy, has obliged us to make this laſt Remark, that no Uſe ought to be made of it to deſtroy the Principles of Religion, and the Doctrines of Faith; we may obſerve alſo on the three other Parts of Philoſophy, Logick, Metaphyſicks and Phyſick, that it is of importance not only that nothing be mixed with them, and that none of their Principles be turned to the ſubverſion of the Doctrines of Faith, but that care ought alſo to be taken to avoid in all ſorts of Reaſonings, upon any matter whatſoever, not only the Subtilties and the uſeleſs Curioſities which ſome mix with what is neceſſary and uſeful in thoſe Sciences, but alſo the bad Uſe even of their Principles and of their Rules: for altho their Principles and their Rules have their Foundation in Nature, and that therefore a ſolid Judgment may make an Uſe of them which may appear to be without Art and wholly natural, yet ſome Perſons uſe them in their Diſcourſes and Writings in ſuch a manner as ſhews the Method and Air of the Schools, as it happens to thoſe who make the like bad uſe of Rhetorick; whereas the good uſe of all the Principles and of all the Rules of Rhetorick, of Logick, and of Metaphyſicks, being drawn from Nature, ought to be the Effect of conceiving and of reaſoning naturally. So that we ought to uſe the Principles and the Rules of theſe Parts of Philoſophy, only after the ſame manner that we uſe thoſe of Grammar, which we obſerve naturally without making Reflection, either on the different Nature of the Nouns, the Verbs, the Participles, and the other Words which compoſe all the Lan-

Languages, or on the Moods and Tenſes of Verbs; which muſt be underſtood in proportion to the different Uſes of all theſe ſeveral Arts, and to the different Manners in which the Habits of them may be acquired.

Before we proceed to the other Arts or Sciences that are taught in the publick Schools, and the chief of which is Geometry, it is neceſſary to call to mind here the Reflection which has been already made on Phyſick; That altho that Science hath for its object Bodies and ſenſible Matters, the Nature of the Parts which compoſe them, that of their Qualities, and the other Things of the like nature which it conſiders; yet it gives us but a very little Knowledge of them that has any thing of certainty in it: whereas Geometry, which hath alſo for its object Bodies and ſenſible Matters, but which it conſiders under other Views, teaches nothing about them, which not only is not moſt certain, but which does not carry with it ſuch an Evidence as that every Mind that is capable of this Science is convinced of every thing which it advances, in the ſame manner as every one is aſſured that the Whole is greater than its Part.

This difference between Geometry and Phyſick, is a natural Effect of the difference of the ways in which the one and the other conſider Bodies, and the Matters which are their Object: for whereas Phyſick ought to conſider in Bodies their Cauſes, their Qualities, in order to diſcover what is their Nature, which is inviſible to the Senſes; Geometry does not conſider either their Cauſes, or their Qualities, but only their Quantity, which it conſiders independently of the Nature of the ſeveral ſorts of Bodies and of all their Qualities, reſtraining it ſelf to the bare Conſideration of that which enters into the Idea of Quantity. It diſtinguiſhes Quantity into two Kinds; one of the Extent of that which is contained, and which conſiſts either barely in length, as Lines, the Points of which make the Extremities; or in length and breadth together, which make the extremities of the Bodies, and which is called their Surface; or in length, breadth and depth, which make ſolid Bodies: the other Kind is of Numbers, which make the quantity of diſtinct Things. And becauſe the Duration of Time and the Motions of Bodies make alſo a kind of Quantity, Geometry has likewiſe its Uſe in them, according as the ſaid Duration, and the ſaid Motions are conſidered under this Idea of Quantity. Thus Geometry conſiders the ſeveral ſorts of Lines, ſtrait, crooked, ſpiral Lines, and others; the ſeveral ſorts of Angles which thoſe Lines make when they meet in a Point; the Figures of Triangles, of Circles, of Squares and other Surfaces, Pyramids, Cubes, Globes, and other ſolid Bodies; the Parts of Duration and of Motion: and in every one of all theſe different Objects, Geometry conſiders their Nature, their Properties, the Relation that one of them has to others of the ſame Kind, and their Differences, as whether one is greater than the other; the manner in which one is contained within the other, which is called Reaſon; the Compariſon of the Reaſon of one to the other, and of another Reaſon of another Object to another, which is called Proportion; and beginning with the Definitions of the Terms and of the Things which they ſignify, with the Rules which eſtabliſh indiſputable Principles, ſuch as theſe, *That two Things equal to a third, are equal among themſelves*; that *if to every one of two equal Quantities other equal Quantities are added, the whole will be equal*; and others of the like Nature; with demands or *poſtulata* which cannot be refuſed, ſuch as *that leave be given to draw a Line from one Point to another*; they diſcover by this Progreſſion an infinite ſequel of Truths, the firſt of which are evident by their neceſſary Connexion with the Definitions, the Principles and the Suppoſitions which have preceded. And from theſe firſt Truths which become of themſelves Principles by reaſon of their Evidence, one proceeds to others ſucceſſively, in ſuch a manner as that nothing be advanced which has not the Evidence of a Definition or of a Principle, or which is not demonſtrated with the ſame certainty as Principles have.

It is by this Chain of Definitions, of Principles and of Demonſtrations which depend one upon another, that we diſcover in Geometry an infinite number of Truths which ſeem to be impenetrable, and ſome of them which even paſs the bounds of all imagination; as for example, that there are Lines, Surfaces and ſolid Bodies, which compared with other Bodies of the ſame Kind, can have no common Meaſure, how little ſoever it be: and theſe are called incommenſurable Quantities, which

which cannot be compared with one another, as one Number may be with another Number; for all Numbers have for their common Meaſure at leaſt Unity. But ſhould we divide thoſe Quantities into Particles even to an infinite Number, we could never come at a Particle ſmall enough to ſerve as a common Meaſure to thoſe Quantities, as Unity is a Meaſure common to all Numbers; and all the ſmalleſt Particles that one can ever come at, by dividing always, will be all of them too great to meaſure exactly thoſe two ſorts of Quantities; in the ſame manner as the number two is too great to be a common Meaſure of three and of four, or of ten and eleven.

It is not proper to enlarge any more here, either on the matters which are the Object of Geometry, or on the ſeveral Manners that are there uſed to form the moſt difficult Demonſtrations, as in that part of Geometry called Algebra; but it was neceſſary to make theſe few Remarks, in order to explain in general the Order of the Method which Geometry takes to prove that which ſhe teaches. And as in Logick we have explained in general its Uſe for rightly apprehending all ſorts of Objects and Reaſoning about them; ſo we ought likewiſe to remark in the Method of Geometry the Order which it obſerves for the ſame uſe, and to conſider at the ſame time the difference between the Object and Method of Geometry, and the Object and Method of Logick.

This difference conſiſts, as to the Object, in this, that the matters of which Logick treats are of a Kind of which the Truth is not ſo ſenſible as the Truths of the Matters treated of in Geometry, and that the Ideas of them are more abſtracted. And as for the Method, the difference is this, that the Method of Logick, which is the Art of Syllogiſm, is ſuſceptible of thoſe falſe Reaſonings called Paralogiſms, by which one impoſes on thoſe who do not know ſufficiently the Rules, or who are not clear-ſighted enough to perceive the falſe Reaſoning: but one can never abuſe the Method of Geometry, to lead into Error, or to ſurprize at any time Perſons of the ſhalloweſt Underſtanding, if they are at all capable of this Science; ſince they need only to examine at every ſtep whether every thing is ſo clear and certain, that there remains no doubt nor obſcurity in it; and whether the Truth of it be evident, either of it ſelf, or by its Connexion with thoſe that have been proved.

It is by this Method of Geometry, that thoſe who have the Knowledge of it ought to form their Reaſonings upon all matters, in ſo far as it is capable of being applied to them: for this manner of Reaſoning is more ſimple, more natural, and more eaſy than that of Logick, which comprehends many more Rules, the moſt of which are abſtruſe, and of which all Underſtandings are not capable. So that this Method of Geometry is more within the reach of all Capacities, and it is likewiſe more proper to ſet every thing that ought to enter into a Diſcourſe of Reaſoning in its proper Order, in its true Light, and in its full Force, and to diſcover all the defects of juſtneſs in the Reaſoning. This Method may be reduced to two ſimple Rules; one, not to admit any thing for true which is not either evident of it ſelf, or demonſtrated; and the other is to range all the particular Truths which one intends to prove, according as they follow the one from the other. And it is in obſervance of theſe two Rules, that the Geometricians begin with defining the Words and the Things of which they intend to ſpeak, with eſtabliſhing the Principles on which depend the Truths which they are going to prove, and with drawing from thoſe Definitions and from thoſe Principles the Conſequences of the Propoſitions which they ſhall advance; laying down always in the firſt place thoſe Propoſitions that are moſt nearly linked to the ſaid Definitions and Principles, and then laying down afterwards thoſe Propoſitions which depend on the firſt.

And altho it be true, that all ſorts of Matters about which one may reaſon or diſcourſe, do not conſiſt in Truths that are capable of the evidence or Certainty of thoſe of Geometry, yet its Method is nevertheleſs uſeful in them: for it is natural to all ſorts of Reaſonings, of Proofs and of Diſcourſes of what nature ſoever, whether they be intended for teaching or for other Uſes, to begin with that which is cleareſt, eaſieſt, and moſt certain; and to obſerve the natural Order of the Coheſion and Connexion which the Things of which one intends to ſpeak have among themſelves.

It is upon the account of this Method, which is ſo natural and ſo proper

per to lead the Mind to the knowledge of Truths, and becauſe of the certainty of the Truths that are taught in Geometry, that thoſe who invented this Science, gave it the name of Mathematicks, which ſignifies Science; diſtinguiſhing it from all the other Sciences by its Characters of Order and of Certainty: for which Reaſon they taught it at the firſt entring upon the Study of the other Sciences, the better to diſpoſe the Mind for them by this Method. But our Uſage has extended this word of Mathematicks, not only to Geometry and to its Parts, ſuch as Arithmetick and Algebra, which conſiſt only in Theory, but alſo to the Arts which in their practice uſe the Principles and Rules of Geometry, ſuch as that which is called Mechanicks, the Art of Fortification, and ſuch like practiſed by Engineers.

This great Uſefulneſs of Geometry is not the only one; it hath another Advantage of very great Importance to the Publick: for it is from this Science that are drawn the Principles and many Rules of other Sciences and of ſeveral Arts, which are not only very uſeful, but all of them moſt neceſſary; for beſides Arithmetick, the Principles of which are a part of Geometry, it is likewiſe from this Science that are drawn the Principles of Coſmography, of Aſtronomy, of Chronology, of the Computation of Times, of Geography, of Mechanicks, of the Uſe of moving Force for an infinity of Machines and Inſtruments neceſſary in all ſorts of Arts, of Architecture, of Sculpture, of Fortification, of Opticks, of Perſpective, and of the Art of repreſenting in a Plan the ſeveral Objects of ſight, which is the foundation of Painting.

It is alſo in Geometry, that we have the Theoretick Principles of Muſick, whether it be that of Human Voices or of Inſtruments. For it is an Art which conſiſts in dividing the degrees of the elevation and falling of the Voice, which make the different Sounds, in regulating their Order and the Duration of every one of them, which is called Meaſure; and likewiſe the Extent of the Intervals when it is neceſſary to have any between two Sounds, and in diſtinguiſhing the Voices or the Inſtruments which are to bear a part in the Muſick into different Parts ſuited to the Nature of the Voices and of the Inſtruments; in order to form by the variety of the Voices, and of the divers Sounds of each Voice, and by the different Meaſures of thoſe Sounds and of thoſe Intervals, the ſeveral Combinations which may make an agreeable Harmony, and which may anſwer to the ſenſe of the Words that are to be ſung, conveying to the Heart the Impreſſions of Tenderneſs, of Joy, or of other Sentiments and Motions which one deſires to raiſe.

And ſeeing the Church hath eſtabliſhed the Uſe of Muſick in Divine Service, in order to move the Hearts, and to elevate them to the Sentiment which the holy Words which it directs to be ſung ought to inſpire; and that the ſaid Words require ſuch a Muſick as is both grave, moving and eaſy; that the Uſe of it may be common to all the faithful, it has ordained in all the Churches where the faithful aſſemble together for the Worſhip of God, the Uſe of a certain manner of Singing compoſed of Sounds of the ſame Duration, and of Combinations leſs figured than thoſe of ordinary Muſick. This manner of Singing is for this Reaſon wholly conſecrated to the Church, as being proper by its Gravity to inſpire the Spirit of the Words which compoſe the ſaid Divine Office, and eſpecially of the Pſalms, which are the chief and principal Part thereof, and which have been compoſed in order to be ſung. But this Church-Muſick loſes its Uſe which was intended by the Church, if thoſe who celebrate and ſing the Divine Service, do not obſerve in it that Gravity, that Modeſty, that proper Slowneſs and Attention that is becoming the Dignity of that Muſick which is to expreſs Words inſpired by the Spirit of God, and which are addreſſed to him, either to praiſe him, or to pray to him, and of Muſick which is to make a part of the Divine Worſhip, in which every thing ought to be ſolemn and auguſt.

Beſides this ordinary Uſe of Muſick in the ſinging of Pſalms which the Church has eſtabliſhed for the Celebration of Divine Service, it hath alſo received the Uſe of other Muſick, and of Inſtruments. But the vaſt Liberty of Ornaments in Muſick, makes that thoſe who compoſe Hymns for the Church, not having always the View of proportioning them to its Uſe according to the Holineſs and Dignity of the Words which are to be ſung, and of the Sentiments which ought to be inſpired, they mix often in their Compoſitions Ornaments of a

Muſick

Muſick that is but little ſuited to this Dignity, and to the Gravity which the Spirit of the Church requires; and this would ſeem to deſerve ſome Reformation, there being ſome very antient Churches which have intirely laid aſide the Uſe of this ſort of Muſick in the Divine Office.

The Uſe of Muſick brings to mind here that of Poetry, the Principles of which are taught with the Claſſick Learning, as has been already remarked: this Uſe of Poetry is ſuch, that it hath not only its Uſefulneſs but alſo its Dignity even in the Church, and we ſee Examples of it in the Holy Writings, where we have Poems inſpired by the Holy Ghoſt, and eſpecially the Pſalms which are a kind of Poetry; and the Church approves alſo of the Uſe of it for other ſorts of Poems, which are the Hymns compoſed at ſeveral Times. For, as has been ſaid of Muſick in Divine Worſhip, that it is of great Uſefulneſs therein by the Effect of the Motions and of the Sentiments which are raiſed in the Heart by a Muſick proportioned to ſo Holy an Uſe; ſo Poetry hath its Beauty and its Dignity by the Elevation of its lively, ſublime and rhetorical Expreſſions, and by their being ranged in ſuch a Meaſure and Cadency as makes upon the Mind the ſame Impreſſions as Muſick does on the Heart. It is for this Reaſon that we give to the figured Language of Poetry the name of Song, which has this double Uſefulneſs, that the politeneſs and elegancy of its Expreſſions, and its other Beauties, make an agreeable Diverſion and Entertainment, and that we gather from the Works of the antient and modern Poets many different Inſtructions, by Sentences of all kinds, by divers Truths of ſome Sciences, and even by having from thence Rules of ſpeaking and writing well, by the Facility of acquiring a habit of getting things by heart, and by other ways. But care ought to be taken not to put into the hands of unguarded Youth ſuch Paſſages of any of the ſaid Poets as contain any thing which may tend to ſeduce unthinking Minds to Irreligion and Immorality, as has been already obſerved.

It has been neceſſary to give theſe general Ideas of the Sciences and of the Liberal Arts, that are taught in the Univerſities, Colleges and Schools, to ſhew, by the relation which theſe Sciences and Liberal Arts have to the publick good of the Society, what is the Neceſſity and Uſefulneſs of them, and by conſequence what is the Neceſſity and Uſefulneſs of having an Eſtabliſhment of Profeſſors to teach them.

This firſt Uſe of Univerſities, to teach Human Learning, the Sciences and Liberal Arts, which we have been now ſpeaking of, has been followed by a ſecond Uſe, which is that of giving a kind of Title, which is called a Degree, to thoſe who after having ſpent a certain limited time in their Studies, have given Proofs of their Capacity by authentick and publick Acts. And the ſaid Degrees are diſtinguiſhed in two manners; one, from whence this word Degree has been derived, and which conſiſts in this, that they are given one after another in proportion to the length of time that has been ſpent in Study, and to the greatneſs of Capacity; the firſt which is called Maſter of Arts, the ſecond Batchelor, the third Licentiate, and the fourth that of Doctor.

The other diſtinction of Degrees is taken from the ſeveral ſorts of Studies of the Sciences of Divinity, of the Canon and Civil Law, or of Phyſick. The Degree of Maſter of Arts, is given after the Study of Philoſophy, and is neceſſary only to thoſe who are willing to reſt at that Degree, or to proceed further to the Study of Divinity, to take therein the Degrees of Batchelor and others, if they incline to it, and render themſelves fit for it. The Degrees of Batchelor, Licentiate and Doctor are given in Divinity, in the Canon and Civil Law, and in Phyſick; that is to ſay, for one of theſe three Studies; ſo that there are in the Univerſities four ſorts of Studies, which are called Faculties. The firſt of Divinity; the ſecond of the Canon and Civil Law, both which make only one Faculty, for one cannot take the Degree in one without the other; the third, is of Phyſick: and in every one of the ſaid three Faculties there are the three Degrees of Batchelor, Licentiate and Doctor. The fourth is the Faculty of Arts, in which in the Univerſities of *France* there is only one ſingle Degree, which is that of Maſter of Arts.

The Uſe of the ſaid Degrees is to give to thoſe who have them, the right of exerciſing Functions, which require a Capacity in ſome one of thoſe Faculties, or of filling places, whether it be in the Church, or in the Temporal

Order

Order of the Society, such as the Offices of Judicature, and the Professions of an Advocate, or Physician.

Seeing our View of treating here of Universities is only with respect to the Publick Law, to show what the Use of them is in a Kingdom, and with respect to what concerns in general the Policy or Government of the said Societies, and the Duties of those who are Members of them; it was not proper to explain here at large the Origin of Universities, the Progress of their Establishment, and other Historical Facts relating to this Subject; for these would be Digressions very remote from the design of this Book. We shall only observe in a few words, the resemblance there is between our Universities, Colleges and publick Schools, in which there are several Professors, and those publick Schools *a* which were kept at *Rome* in the Capitol *b*, and likewise at *Constantinople*, where they taught Grammar, Rhetorick or Eloquence, Philosophy, and the Laws *c*.

Since all Towns cannot have Universities, there are established in most of them Colleges and publick Schools, as is to be seen in many of the Towns of *France*: and it is even ordained by the 24th Article of the Ordinance of *Blois*, that the Archbishops and Bishops shall establish within their Dioceses Seminaries and Colleges for the Instruction of the Youth, both in matters of Learning *d*, and the Service of God. But in all the said Colleges, there is only the bare assistance in Studies, without any right to confer any Degrees.

Besides the Universities and Colleges for the teaching of Sciences and Liberal Arts, there are likewise Academies for teaching the Exercises of Riding and Fencing, and likewise those Parts of Mathematicks which relate to Fortification, to Encampments, the ranging of an Army in Battel-Array, and other matters necessary to be known in the Profession of Arms. There are likewise other sorts of Academies for the Study of Arts, such as those of Painting, Sculpture, Architecture and others. But all these sorts of Academies, altho composed of divers Masters for the several Studies and Exercises, are not of the number of Corporations and Communities, unless they be established as such by the Authority of the Prince. And as for the Colleges, they are a part of the Body of the University to which they belong; as in the Towns where there are Universities composed of several Colleges; and the other Colleges which are separated from the Universities, may form Communities, if they be established as such by Letters Patent of the Prince.

All the Rules which concern Universities, Colleges and Academies, are of two sorts; one of those which relate to the Government or Discipline of those Houses, and which may regard their Rights, their Affairs, their Privileges; and the other of those which concern the Duties of the Persons who compose them, in so far as their Functions have relation to the Publick: and these two sorts of Rules shall be the subject Matter of the two following Sections.

a In publicis Magistrationibus. *l. un. C. de stud. liberal. urb. Rom. & Constantinop.*

b Intra Capitolii auditorium constituti. *d. l.*

c Grammaticos tam Græcos quam Latinos, Sophistas, & Jurisperitos in hac regia urbe professionem suam exercentes, & inter statutos commemoratos. *l. 1. C. de profess. qui in urb. Constant. doc. ex ex. leg. mer. comit.*

Habeat igitur auditorium specialiter nostrum in his primum, quos Romanæ eloquentiæ doctrina commendat, oratores quidem tres numero, Grammaticos vero decem, in his etiam qui facundia gravitatis pollere noscuntur, quinque numero sicut Sophistæ, & Grammatici æque decem. Et quoniam non his artibus tantum adolescentiam gloriosam optamus institui; profundioris quoque scientiæ atque doctrinæ memoratis magistris sociamus auctores. Unum igitur adjungi cæteris volumus qui Philosophiæ arcana rimetur, duos quoque qui juris ac legum voluntates pandant. *d. l. un. in f. Cod. de stud. liberal. urb. Rom. & Const.*

d Magistros studiorum Doctoresque excellere oportet moribus primum, deinde facundia. Sed quia singulis civitatibus adesse ipse non possum, jubeo, quisque docere vult, non repente nec temere prosiliat ad hoc munus, sed judicio ordinis probatus, &c. *C. Theod. de med. & profess.*

Avoiding profane and vain Bablings, and Oppositions of Science, falsly so called. 1 Tim. 6. 20.

Be not carried about with divers and strange Doctrines. Heb. 13. 9.

There is one that sheweth Wisdom in Words, and is hated; he shall be destitute of all Food. For Grace is not given him from the Lord: because he is deprived of all Wisdom. Eccluſ. 37. 23, 24.

See the 2d Article of the 2d Section, and the Articles that are there cited.

SECT. I.

Of the Rules which relate to the Government and Diſcipline of Univerſities and Colleges.

The CONTENTS.

1. *Univerſities are partly Eccleſiaſtical and partly Secular.*
2. *Two ſorts of Rules for the Government of Univerſities, Colleges and Schools.*
3. *Rules which relate to the Adminiſtration of theſe Communities.*
4. *Rules concerning the Duties of thoſe who are Members of the Univerſities.*

I.

1. Univerſities are partly Eccleſiaſtical and partly Secular.

UNiverſities are mixed Bodies, partly Eccleſiaſtical, and partly Secular; for the Profeſſion of the Faculty of Divinity is an Eccleſiaſtical Miniſtry, and that of Law and Phyſick is a Secular Miniſtry: Thus, the Body of the Univerſity is compoſed of other diſtinct Bodies, each Faculty forming its own Body, and having its peculiar Rights and Functions ſeparated from the others; and they have all of them together Rights and Affairs which are common to them all, and which out of the ſaid different Bodies form one which comprehends them all *a*.

a 'The Faculty of Divinity hath its Functions 'which relate to the Church, and it can be com-'poſed only of Eccleſiaſticks; and the Faculties 'of Law and of Phyſick reſpect the Temporal State, 'and may be exerciſed by Lay-men. But it may 'be obſerved as to the Faculty of Law, that altho 'the Canon Law, which is a part of it, contains 'many Matters that are purely Eccleſiaſtical and 'Spiritual, the Profeſſion of teaching them may 'be exerciſed by Lay-men: which has been eſta-'bliſhed moſt probably on this account, becauſe 'the Eccleſiaſtical and Spiritual matters of the 'Canon Law are there mixed with an infinite 'number of Temporal Matters which belong to 'the Civil Law.

II.

2. Two ſorts of Rules for the Government of Univerſities, Colleges and Schools.

The Government of Univerſities, of Colleges, of Schools, in the ſame manner as that of the Corporations of Towns, hath its Order proportioned to the Uſe and to the Functions peculiar to thoſe Kinds of Communities; which comprehends two ſorts of Regulations neceſſary for forming the ſaid Order: the firſt is of thoſe which relate to the Adminiſtration and the Preſervation of the Goods, the Rights and the Privileges *b* by which the ſaid Bodies ſubſiſt, and the Diſcipline that is neceſſary to be obſerved in them for keeping them in Order; and the ſecond, which regards the Duty of thoſe who compoſe theſe ſorts of Bodies.

b Hac lege decernimus, ut qui in ſingulis ſcholis militant, quique poſt emenſa ſtipendiorum curricula ad primiceriorum gradum perveniunt, & adorata noſtræ divinitatis purpura, virorum clariſſimorum comitum meruerint dignitatem: tam cingulo quam privilegiis omnibus ſibimet competentibus perfruantur: ac deinceps uſque ad finem vitæ foro tuæ celſitudinis tantummodo ſubjaceant: nec ex alterius cujuſlibet ſententia civile ſubire litigium compellantur. In criminalibus ſane controverſiis & in publicis tributis ita etiam adverſus tales viros provincias moderantium congruam juriſdictionem volumus obſervari, ne ſub prætextu conceſſi privilegii, vel flagitiorum creſcat authoritas, vel publica vacillet utilitas. *l.* 2. *C. de privil. Schol.*

See the following Article, and the Text there quoted on it.

III.

3. Rules which relate to the Adminiſtration of theſe Communities.

As to what concerns the Adminiſtration and the Preſervation of the Goods, the Rights and the Privileges of Univerſities, Colleges *c* and Schools, and the other Intereſts of theſe ſorts of Communities, and the Diſcipline which is to maintain Order in them,

c Habita quidem ſuper hoc diligenti inquiſitione Epiſcoporum, Abbatum, Ducum, omnium judicum & aliorum procerum ſacri noſtri palatii examinatione, omnibus, qui cauſa ſtudiorum peregrinantur, ſcholaribus, & maxime divinarum atque ſacrarum legum profeſſoribus, hoc noſtræ pietatis beneficium indulgemus, ut ad loca, in quibus literarum exercentur ſtudia, tam ipſi quam eorum nuntii veniant, & in eis ſecure habitent. Dignum namque exiſtimamus, ut cum omnes bona facientes, noſtram laudem & protectionem omnimodo mereantur, quorum ſcientia totius illuminatur mundus, & ad obediendum Deo & nobis ejus miniſtris vita ſubjectorum informatur: quadam ſpeciali dilectione eos ab omni injuria defendamus. Quis enim eorum non miſereatur, qui amore ſcientiæ exules, facti de divitibus pauperes, ſemetipſos exinaniunt, vitam ſuam multis periculis exponunt, & a viliſſimis ſæpe hominibus (quod graviter ferendum eſt) corporales injurias ſine cauſa perferunt? hac igitur generali & in perpetuum valitura lege decernimus, ut nullus de cætero tam audax inveniatur, qui aliquam ſcholaribus injuriam inferre præſumat, nec ob alterius cujuſcumque provinciæ delictum ſive debitum (quod aliquando ex perverſa conſuetudine factum audivimus) aliquod damnum eis inferat; ſcituris hujuſmodi ſacræ conſtitutionis temeratoribus, & etiam ipſis locorum rectoribus, qui hoc vindicare neglexerint, reſtitutione rerum ablatarum ab omnibus exigendam in quadruplum: notaque infamiæ eis ipſo jure irroganda, dignitate ſua ſe carituros in perpetuum. Verumtamen ſi litem eis quiſpiam ſuper aliquo negotio movere voluerit, hujus rei optione data ſcholaribus, eos coram domino vel magiſtro ſuo vel ipſius civitatis epiſcopo, quibus hanc juriſdictionem dedimus conveniat. Qui vero ad alium judicem eos trahere tentaverit, etiamſi cauſa juſtiſſima fuerit, a tali conamine cadat. *Auth. habita C. ne filius pro patr.*

they

they have their Rules eſtabliſhed or approved by the Ordinances of the Kingdom, and by their own peculiar Statutes; whether it be in relation to the manner of electing the Perſons who are to look to the Obſervance of the ſaid Diſcipline, and who are to take care of their Affairs, and of the Preſervation of their Privileges; or of appointing thoſe who are to exerciſe the ſeveral Functions of the Community, in every thing that relates to the Adminiſtration, the Diſcipline, and the Order of the ſaid Houſes: and beſides the Rules which are peculiar to thoſe Houſes, they have in general the Rules which have been explained in the 2d Section of the Title of Communities.

IV.

4. Rules concerning the Duties of thoſe who are Members of the Univerſities.

As to the Duties of thoſe who compoſe the Univerſities, the Colleges and Schools, every one of the ſaid Bodies hath its peculiar Rules, which are of two ſorts; one is of thoſe which concern the Duties of the Perſons who have the Direction of the Government and Diſcipline of the ſaid Houſes, in ſo far as they relate to that Function; and the other is of the Rules of the Manners and Duties of the Governours and Profeſſors, in what concerns their Functions which have a relation to the Publick. Thus in the Univerſities they have Statutes which regulate the Order and Adminiſtration of them, and the Duties of the Perſons who are appointed to take care of the ſaid Order and Adminiſtration: the Statutes contain likewiſe the Rules peculiar to each Faculty, as to the time required for finiſhing the Studies thereof, the manner of examining the Students, and that of conferring Degrees; they contain alſo the Rules of the Manners and particular Duties of thoſe who have Offices, and of thoſe who are Profeſſors. And ſeeing theſe ſorts of Rules are almoſt all of them arbitrary, and that they are to be met with in the Statutes of the Univerſities, and in the Ordinances which confirm them, it is not proper to ſet them down here; but we ſhall explain ſuch of thoſe Rules as are of natural Equity, immutable and indiſpenſible; and they ſhall be the ſubject matter of the following Section *d*.

d See the particular Statutes of the Univerſities, and the following Section.

SECT. II.

Of the Duties of thoſe who are Members of Univerſities, Colleges, Academies; and of all Profeſſors of Sciences and Liberal Arts.

BY the Duties treated of here, we are to underſtand thoſe which relate to the Functions in which the Publick is concerned; and according to this View it is neceſſary to diſtinguiſh two ſorts of Perſons in the Univerſities, Colleges and Schools: the firſt is of thoſe who are ſet over the ſaid Societies as Heads or Governors, to ſee that the Order and Diſcipline thereof be duly obſerved; and the ſecond is of thoſe who under thoſe Governors profeſs the Sciences and Arts of which the Studies are there eſtabliſhed. Thus the Univerſities and Colleges are under the direction of thoſe who exerciſe the different Offices under different Names, according to the ſeveral Uſages, whether it be that of Rectors, Deans, Syndicks, Principals, Proviſors, or others. Thus there are in thoſe Societies Profeſſors of Arts and Sciences; and we may take in under this name of Profeſſors, as to what concerns the Rules of their Duties, thoſe who inſtruct Youth *a*, and who teach them out of the Univerſities and Colleges, either ſome Art or ſome Science, at a publick School; and even thoſe who teach the Exerciſes belonging to the Profeſſion of Arms.

a Ut pueri juveneſque in divino cultu ab idoneis & piis magiſtris & ſacerdotibus recte inſtituantur, & ſingulis diebus, horis conſuetis pro more inſtitutoque majorum res divina peragatur, eique non ſolum diebus dominicis & feſtis, ſed etiam aliis interſint Scholaſtici. *Art.* 2. *of the Statutes of the Faculty of Arts.*

Videant magiſtri, ne vitiis ſcholaſticorum, ſive in moribus, ſive in diſciplina, indulgeant: ſed in eos pro delicti ratione animadvertant. *Art.* 9. *ibid.*

My Son, gather Inſtruction from thy Youth up; ſo ſhalt thou find Wiſdom till thine old Age. Eccluſ. 6. 18.

My Son, deſpiſe not the chaſtening of the Lord; neither be weary of his Correction. For whom the Lord loveth, he correcteth, even as a Father the Son, in whom he delighteth. Prov. 3. 11, 12.

How have I hated Inſtruction, and my Heart deſpiſed Reproof? and have not obeyed the Voice of my Teachers, nor inclined mine Ear to them that inſtructed me? Prov. 5. 12, 13.

He that refuſeth Inſtruction, deſpiſeth his own Soul: but he that heareth Reproof, getteth Underſtanding. Prov. 15. 32.

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I.

1. *The first Duty, to observe the Statutes.*

SINCE the Universities, Colleges and Schools have their Statutes and their Regulations established or approved by the Ordinances of the Kingdom, and that the said Statutes are the Foundations of the Order and Discipline of those Houses, and regulate the Duties of the Persons who compose them; we may set down for the first of the said Duties, that of observing the Statutes and the Regulations *a*.

a ‘ The Edicts and Ordinances of the Kings our ‘ Predecessors in relation to Universities, shall be ‘ kept and observed, together with the Statutes, ‘ Regulations and Decrees, made concerning the ‘ same. *Ordinance of* Lewis XIII. *in* 1614.

See the Ordinances relating to this matter. It is by the observance of these Regulations that the said Bodies are to be kept in Order.

See the Texts quoted in the Preamble of the said Section.

II.

2. *The Duty of those who are the Heads and Governours of those Societies.*

As to the Duties of those to whom the Care and Direction of Universities and Colleges is committed, the most important of those which concern more directly the publick Good, is that of watching over the Conduct, the Manners and the Doctrine of the Professors; and taking care that the Professors of Divinity do not advance or teach any thing which may impugn any Doctrine of the Church, whether it be in matter of Faith, or of Manners, or of the Church Discipline; and that the same Professors and others also teach nothing contrary to Law and to good Manners; but that on the contrary they inspire into their Disciples, both by their Example and by their Doctrine, good Principles of Morality, and of the several Duties incumbent on them, even those of good Subjects, such as the Duty of Obedience to the Prince, and to the Orders of the Courts of Justice *b*.

b Pueri juvenesque qui instituuntur, imprimis Regi Christianissimo bene precari & obedire, & magistratibus parere doceantur. *Art. 6. of the Statutes of the Faculty of Arts.*

Ad docendam & regendam juventutem magistros probatæ vitæ & doctrinæ recipiant, qui suo munere recte fungi noverint: quorum mores imprimis spectandi, ut pueri ab his & litteras simul discant & bonis moribus imbuantur. *Art.* 1. *ibid.*

Lustrent cubicula & libros Scholasticorum, ut certiores fiant an apud illos sint libri improbatæ doctrinæ, &c. *Art.* 20. *ibid.*

I opened my Mouth, and said, Buy her for your selves without Money. Put your Neck under the Yoke, and let your Soul receive Instruction, she is hard at hand to find. Eccluſ. 51. 25, 26.

The Rod and Reproof give Wisdom. Prov. 29. 15.

Bow down his Neck while he is young, and beat him on the sides while he is a Child, lest he wax stubborn, and be disobedient unto thee, and so bring sorrow to thine Heart. Chastise thy Son, and hold him to Labour. Eccluſ. 30. 12, 13.

‘ Altho these Texts have not all of them a pre- ‘ cise relation to the Rule, yet they may be applied ‘ to it, since they naturally agree to the Functions ‘ of those who have the Government and Direc- ‘ tion of Universities, Colleges and Schools.

III.

3. *The first Duty of Professors, is Capacity.*

As for the Professors of Sciences and Liberal Arts, their first Duty is to know them well, and to have the Gift of teaching them well, by the Facility of expressing themselves clearly and in proper terms, by observing the Order and the Method which agree to each Art and each Science, by setting things that are obscure in a clear Light, by discerning and picking out all that is essential, useful and necessary, and by cutting

cutting off what is useless and superfluous. And if the Persons who offer themselves to this Imployment should fail in their Duty to do Justice to themselves, by offering to engage in this Function without the necessary Capacity, it is the Duty of those whose business it is to elect or to admit them, to judge of their Qualifications *c*.

c Cum omnium regnorum, & populorum felicitas, tum maxime reipublicæ Christianæ salus a recta juventutis institutione pendeat: quæ quidem rudes adhuc animos ad humanitatem flectit; steriles alioquin & infructuosos, reipublicæ muniis idoneos & utiles reddit, Dei cultum in parentes & patriam pietatem erga magistratus reverentiam & obedientiam promovet. *Art.* 32. *of the Statutes of the Faculty of Arts.*

Grammaticos tam Græcos quam Latinos, Sophistas, Jurisperitos in hac regia urbe professionem suam exercentes, & inter statutos connumeratos, *si laudabilem in se probis moribus vitam esse monstraverint, si docendi peritiam, facundiam dicendi, interpretandi subtilitatem, copiamque differendi se habere patefecerent, & cœtu amplissimo judicante digni fuerint æstimati?* Cum ad viginti annos observatione jugi ac sedulo docendi labore pervenerint, placuit honorari, & his qui sunt ex vicaria dignitate connumerari. *l. un. de profess. qui in urb. Const.*

Sed quia singulis civitatibus adesse ipse non possum, jubeo, quisquis docere vult, non repente nec temere prosiliat ad hoc munus, sed judicio ordinis probatus decretum curialium mereatur, optimorum conspirante consensu. *l.* 7. *C. de profess. & med.*

'Altho the last words of this Text have not an 'exact relation to our Usage, yet it was not proper 'to leave them out, because of the sense which 'they contain, and also because this long Service 'deserves some Recompence, or some Consideration, particularly with regard to Manners.

See the following Article.

IV.

4. *Another Duty, Purity of Doctrine, and a good Life and Conversation.*

The first Duty of Capacity implies that of not mixing in their Writings and in their Lectures any Principle, or any Doctrine which may be contrary either to Religion, or to the Civil Government, to the Laws, or to good Manners; and that of joining to the Purity of their Doctrine, and to the Art of teaching well, a Probity without blemish, and a good Example of Life and Conversation, that they may imprint on the Minds and Hearts of their Disciples the Principles and the Sentiments of all their Duties, with as much or rather more Care than what they take to teach them the Principles and Maxims of Arts and Sciences *d*.

d Magistros studiorum Doctoresque excellere oportet moribus primum, deinde facundia. *l.* 7. *C. de profess. & med.*

Qui ad Theologiæ studium accedit, prius Deum invocet, ut illi tribuat animi submissionem nihil suo judicio tribuat. *Art.* 1. *of the Statutes of the Faculty of Divinity.*

Doctores morum integritate, vitæ probitate, & exemplo præ cæteris perluceant, ut suæ professionis expectationem sustineant. *Ibid. Art.* 38.

Nihil a doctrina Christiana alienum, nihil contra Patrum orthodoxorum decreta, nihil contra regis, regnique Gallici jura, & dignitatem disputetur aut proponatur: si secus fecerint, & Syndicus & præses & respondens extra ordinem puniantur. *ibid. Art.* 23.

Quoniam interest nostra animum liberorum nostrorum non corrumpi. *l.* 14. §. 1. *in f. ff. de servo corrupto.*

'Strictly enjoining and prohibiting all Batchelors, 'Licentiates, Doctors and other Persons, of what 'Quality and Condition soever, to defend and 'maintain, read and teach, directly or indirectly, 'either in the publick Schools, or elsewhere, any 'Propositions contrary to that of the Declaration 'of the said Faculty of Divinity, or to compose 'any Writing contrary thereto, upon pain of 'exemplary Punishment; and to the Syndicks of the 'Universities, and to the Doctors who shall preside 'at the Acts, to suffer any thing contrary thereto 'to be inserted in any Thesis, upon pain of answering for it in their own Names, and to be 'prosecuted for the same in an extraordinary way. 'King's Edict of Aug. 4. 1663.

V.

5. *Another Duty, not to confer Degrees on Persons that are incapable of them.*

Seeing the Duties proper to each Profession are Consequences of the Functions that are exercised in it, and ought to be proportioned to them, and that one of the principal Functions of the Universities is to confer the Degrees in each Faculty on those who have acquired a Capacity to deserve them; it is a capital Duty of the Professors and of those who are appointed to be Examiners and Judges of the Capacity of the Students who apply for Degrees in any one of the Faculties, not to grant them except to those who are worthy of them, and to refuse them to such as are unworthy. For the easiness of granting Degrees to those who want Capacity for them, destroys the intention of the Laws which require a Capacity in the Persons, and which intrust to those Professors and Examiners the Right to judge of the Capacity of the Person, and to bear witness of it; which Testimony of theirs, by reason of too great a facility, becomes Perjury against the Laws and Statutes which they have sworn to observe; and by this means they let into the Church and into the State unfit Persons, who by reason of their Degrees are admitted into Posts of great importance, of which they are altogether unworthy. This Abuse is still greater, if they join to the Testimony of Capacity in those who have it not, the Testimony also of their having finished the time required

required for the Study, in favour of those who neither have Capacity, nor are of sufficient standing to take their Degrees: for one cannot give this Testimony of having finished the time appointed for the Study, not even in favour of those who in a less time than is required by the Statutes shall have render'd themselves capable of the Degree, seeing it is lawful in no case to bear witness against the Truth *e*.

e ‘ Doctores, qui jus habebunt ferendi suffragii, solemni jurejurando se obstringant, se nihil gratiæ, nihil favori daturos, sed veritati fidele testimonium laturos. *Art.* 32. *of the Statutes of the Faculty of Divinity.*

Neither lye one to another. Lev. 19. 11.

He that speaketh Truth sheweth forth Righteousness; but a false Witness Deceit. Prov. 12. 17.

Wherefore putting away lying, speak every Man Truth to his Neighbour: for we are Members one of another. Eph. 4. 25.

‘ It is in order to prove the Capacity of the Persons, that Laws demand the Testimony of the Universities by the Degrees which they confer: so that the Injustice of conferring them on Persons who are incapable, is a manifest Disobedience to the Laws, and has the same Character that a Declaration would have which should be made by those who give Degrees to Persons incapable of them, that altho they know them to be such, yet they think they ought to be admitted to Places whereof their Incapacity would render them unworthy. And tho by the 75th Article of the Ordinance of *Moulins*, the Bishops are impower'd to examine Graduates, as in the Case of Law-Suits touching the Possession of Benefices, yet the Bishops Examinations are not decisive; and the said Ordinance does not discharge those who have the Power of conferring Degrees, from the Obligation they are under of a faithful discharge of their Duty, from which nothing can exempt them. And it is the same with respect to the Degrees necessary for being admitted to Offices of Judicature, tho in order to their Admission they are to undergo another previous Examination by the Judges who are to admit them. For all those Persons, Bishops, Magistrates and Professors have their distinct Duties, which are independent one of another, so that every one is to render an account of his own Duty.

‘ To which Degrees no Person shall be received, unless he shall have studied for the space of three Years in the said University, or in some other, for some part of the said time, or in the said University for the Surplus, of which he shall bring a sufficient Certificate, and unless he has performed a publick Exercise, upon pain of forfeiture of the Salaries of the said Doctors, and of Nullity of the said Letters. And we likewise prohibit the said Doctors and others to grant or deliver any Letters of Degrees except to Persons who are present, and have given the aforesaid Proof of their Capacity in their Presence, and publickly in the said University. *Ordinance of* Lewis XIII. *in* 1614. *Art.* 46.

VI.

6. *Duty in giving Opinions about matters of Faith and Discipline.*

It is also one of the Functions of Universities, peculiar to the Faculty of Divinity, to give Opinions touching Doctrines relating to Matters of Faith or Manners, or to the Discipline of the Church, on such occasions as the interposing of their Authority may be of use; and this Function makes it a Duty incumbent on them to give their Opinions agreeable to the Purity of the Laws of the Church *f*.

f And what cause scever shall come to you of your Brethren that dwell in their Cities, between Blood and Blood, between Law and Commandment, Statutes and Judgments, ye shall even warn them that they trespass not against the Lord, and so Wrath come upon you, and upon your Brethren: This do, and ye shall not trespass. 2 Chron. 19. 10.

And my Speech and my Preaching was not with enticing Words of Man's Wisdom, but in Demonstration of the Spirit and of Power. 1 Cor. 2. 4, 5.

Take heed unto thyself, and unto thy Doctrine. 1 Tim. 4. 16.

See 2 *Pet.* 1. 20, 21.

Be stedfast in thy Understanding, and let thy Word be the same. Be swift to hear, and let thy Life be sincere, and with Patience give answer. If thou hast understanding, answer thy Neighbour; if not, lay thy Hand upon thy Mouth. Honour and Shame is in Talk, and the Tongue of Man is his Fall. Eccluf. 5. 10, 11, *&c.*

Wisdom that is hid, and Treasure that is hoarded up, what Profit is in them both? Eccluf. 20. 30.

He that worketh Mischief, it shall fall upon him, and he shall not know whence it cometh. Eccluf. 27. 27.

‘ The Doctors who give Opinions in Matters of Faith and Discipline, exercise a kind of Function of Witnesses, by the Testimony which they ought to render of the Doctrine of the Church; and they exercise also a kind of Function of Judges; for their Opinions are as it were Decisions. So that we may consider them under both these Views, as Testimonies and as Judgments; and altho the Function of a Witness be different from that of a Judge, yet the bearing Testimony to Truths of this nature, which are not Facts but Doctrines, is not so much a bare Testimony as a Judgment, to which recourse ought be had in Cases that may deserve it.

Stand in the multitude of the Elders, and cleave unto him that is wise. Be willing to hear every godly Discourse, and let not the Parables of Understanding escape thee. Eccluf. 6. 34, 35.

Counsel in the Heart of Man is like deep Water, but a Man of Understanding will draw it out. Prov. 20. 5.

Without Counsel Purposes are disappointed; but in the multitude of Counsellors they are established. Prov. 15. 22.

See the Texts cited on the 8th Article of this Section, which may be applied to this Rule.

VII.

7. *Duty of those who are appointed to license the printing of Books.*

Since it is of infinite Consequence not to suffer Books to be printed which concern either the Faith, or the Rules of Christian Piety, or the Discipline of the Church, without an Examination, and an Approbation which may assure the Publick of the Purity of the Doctrines of the said Books, and that they

8. *Duty of these who are consulted about Cases of Conscience.*

they contain neither Hereſy, nor Errors, nor any thing that may inſtil into the Minds of thoſe that read them falſe Principles; it is a Duty incumbent on thoſe Doctors of Divinity who are appointed in the Univerſities to licenſe Books, to examine, and to approve, reject, correct or cenſure thoſe ſorts of Books: and this Duty obliges the Cenſors or Licenſers to read over the Books carefully, that they may be able to give a true Judgment, ſuch as the Conſequence of the Approbation, which they are to give, demands *g*.

g Nullus magiſtrorum, inconſulta facultate, libros approbet, ſub pœna privationis a juribus & honoribus Facultatis. *Art.* 1. *of the Statutes of the Faculty of Divinity.*

Quod de cætero perpetuis futuris temporibus nullus librum aliquem, ſeu aliam quamcumque ſcripturam, tam in urbe noſtra quam in aliis quibuſvis civitatibus & diœceſibus, imprimere ſeu imprimi facere præſumat, niſi prius in urbe per vicarium noſtrum & ſacri palatii magiſtrum, in aliis vero civitatibus & diœceſibus, per Epiſcopum, vel alium habentem peritiam ſcientiæ libri ſeu ſcripturæ hujuſmodi imprimendæ, ab eodem Epiſcopo ad id deputandum: ac inquiſitorem hæreticæ pravitatis, in quibus librorum impreſſio hujuſmodi fieret, diligenter examinentur, & per eorum manus proprie ſubſcriptionem, ſub excommunicationis ſententia gratis & ſine dilatione imponendam, approbentur. Qui autem ſecus facere præſumpſerit, ultra librorum impreſſorum amiſſionem, & illorum publicam combuſtionem, ac centum ducentorum fabricæ baſilicæ primorum Apoſtolorum de urbe, ſine ſpe remiſſionis, ſolutionem, ac omnis exercitii impreſſionis ſuſpenſionem excommunicationis ſententia innodatus exiſtat. *Concil. Baſ. ſeſſ.* 4. *ſub Leone* X. *ann.* 1515.

Quoniam vero pervenit ad pias noſtras aures, quod quidam doctrinas quaſdam conſcripſerunt & ediderunt ambiguas, & non per omnia ac preciſe congruentes expoſitæ orthodoxæ fidei noſtræ a ſancta Synodo eorum ſanctorum Patrum qui Nicææ & Epheſi convenerunt, & a Cyrillo piæ memoriæ qui fuerat magnæ Alexandriæ civitatis Epiſcopus; jubemus, facta hujuſmodi ſcripta ſive antea, ſive nunc (potiſſimum autem ea quæ Neſtorii ſunt) comburi & perfectiſſimo interitui mancipari, ita ut in nullius cognitionem venire poſſint. His, qui talia ſcripta aut tales libros habere aut legere ſuſtinuerint, ultimum ſupplicium experturis de cætero nulli patente licentia, præter expoſitam fidem (ut diximus) tam Nicææ quam Epheſi, aliud quid vel dicere vel docere tranſgreſſoribus nimirum hujus noſtri divini præcepti, ei pœnæ quæ continetur lata adverſus impiam Neſtorii fidem lege ſubjiciendis. *l.* 3. §. 3. *C. de ſum. Trinit.*

See the Ordinance of *Hen.* II. of *December* 11. 1547.

VIII.

8. Duty of thoſe who are conſulted about Caſes of Conſcience.

The Difficulties which happen to all ſorts of Perſons in their Conduct and in their Affairs, for ſteering a right Courſe between their Duties and their Intereſt, which very often are oppoſite one to the other, oblige thoſe who happen to be in this Condition, and who are deſirous to do juſt and equitable things, to have recourſe to a faithful Counſel for a Solution of thoſe Difficulties; and the way is to chuſe Perſons who by their Learning, their Underſtanding, their Experience and Probity, may be able to decide thoſe ſorts of Doubts which are called Caſes of Conſcience; and it is for this end that People naturally addreſs themſelves to thoſe Doctors, who ought to have that Knowledge which is called in the Style of the Goſpel the Knowledge of the Kingdom of Heaven. So that this Function makes it a Duty incumbent on them to know exactly the divine and human Laws, and the other Rules on which the Deciſions of the Difficulties about which they are conſulted may depend, to apply themſelves with diligence to underſtand thorowly the Facts and the Queſtions, and to give their Opinion out of a ſincere love of Truth and Juſtice, without complying with the Intereſts and Paſſions of thoſe who conſult them, and without uſing any Severity or other Rigour than that which is indiſpenſible in the Eye of Juſtice. For it is Juſtice herſelf which ought to decide by the Spirit of her Rules, which being made not for any one Perſon in particular, but for all Men in general, ought to be applied according to their genuine Uſe, without any regard to Favour, or reſpect of Perſons, and without diſtinguiſhing the Intereſt of the Perſon who conſults from the oppoſite Intereſt of the other Party; becauſe it is as it were a Judgment that is render'd between them, and in which it is neceſſary to maintain the Right both of the one and of the other *h*.

h Every Scribe which is inſtructed unto the Kingdom of Heaven. Mat. 13. 52.

To give Knowledge of Salvation unto his People. Luke 1. 77.

Becauſe they have ſeduced my People, ſaying, Peace, and there was no Peace. Ezek. 13. 10.

Moreover this was not enough for them, that they erred in the Knowledge of God, but whereas they lived in the great War of Ignorance, thoſe ſo great Plagues called they Peace. Wiſdom of Solomon, 14. 22.

Wo unto them who call Evil Good, and Good Evil; who put Darkneſs for Light, and Light for Darkneſs. Iſaiah 5. 20.

He that ſaith unto the wicked thou art righteous, him ſhall the People curſe, Nations ſhall abhor him. But to them that rebuke him ſhall be Delight, and a good Bleſſing ſhall come upon them. Every Man ſhall kiſs his Lips that giveth a right Anſwer. Prov. 24. 24, 25, 26.

'The Deciſions of thoſe who ſolve Caſes of 'Conſcience ought to have nothing in them con'trary to the Spirit of Religion, nor any thing that 'may be inconſiſtent with the Dignity and the Re'ſpect that is due to the Prince.

¶ The

¶ The Doctors who reſolve Caſes of Conſcience, and thoſe who give Opinions in Matters of Faith, of Manners, and of Church-Diſcipline, of whom mention has been made in the ſixth Article, are obliged, in order to acquit themſelves worthily of this Duty towards the Publick, to draw the Knowledge of theſe Matters from the Fountains themſelves, that they may be the better able to reſolve the Difficulties that ſhall be propoſed to them. Thoſe Fountains are the Truths diſperſed in the Holy Scriptures; ſo that the Doctors and others who are conſulted in Caſes of Conſcience, and who give Opinions in Matters of Doctrine, ought to have recourſe to thoſe Books inſpir'd by the Holy Ghoſt, where they will perceive in the Truths which are there expreſſed in a plain Style, the Grandure and the Majeſty of the Divine Wiſdom which reveals them unto us, and his Goodneſs in laying them before us in a manner ſuited to our Weakneſs: and they will there diſcover the Light of thoſe Truths whereby to enlighten the Underſtanding, and a Charm wherewithal to move the Heart. Thus they ought to look upon the Books of the Holy Scripture as a *Depoſitum* in which the Spirit of Jeſus Chriſt reſides. The Doctors exerciſe in the ſaid Functions the Office of Paſtors of Souls; and Jeſus Chriſt being the true Paſtor, it is of him that they ought to learn the Rules by which they may be able to acquit themſelves worthily of ſo great a Miniſtry *a*, and which may alſo be of very great uſe to the Publick, ſeeing on thoſe occaſions they exerciſe a kind of Function of Judges, and may by this way, which is ſo holy and ſo natural, terminate by the Prudence of their Counſel, and the Equity of their Deciſions, the Differences which may ariſe between particular Perſons.

a *The Spirit of the Lord God is upon me, becauſe the Lord hath anointed me to preach good Tidings unto the Meek; he hath ſent me to bind up the Broken-hearted, to proclaim Liberty to the Captives, and the opening of the Priſons to them that are bound; to proclaim the acceptable Year of the Lord, and the Day of Vengeance of our God, to comfort all that mourn.* Iſa. 61. 1, 2.

For in his Hand are both we and our Words; all Wiſdom alſo and Knowledge of Workmanſhip. For he hath given me certain Knowledge of the things that are, &c. Wiſdom of Solomon 7. *ver.* 16, 17.

For as the Rain cometh down, and the Snow from Heaven, and returneth not thither, but watereth the Earth, and maketh it bring forth and bud, that it may give Seed to the Sower, and Bread to the Eater: So ſhall my Word be that goeth forth out of my Mouth; it ſhall not return unto me void, but it ſhall accompliſh that which I pleaſe, and it ſhall proſper the thing whereto I ſent it. Iſa. 55. 10, 11.

IX.

9. *The ſubject matter of the following Articles.*

Of the Rules which have been already explained in this Section, thoſe of the five firſt Articles belong to all the four Faculties, and the Rules of the three laſt Articles concern only the Faculty of Divinity; but there are other Rules peculiar to thoſe who having received Degrees in the Faculties of Law and Phyſick, exerciſe the Profeſſion of them; and theſe Duties are to be diſtinguiſhed from thoſe which we have juſt now explained, as ſhall be ſaid in the Article which follows *i*.

i See the Article which immediately follows, and alſo the others which come after.

X.

10. *Profeſſors whoſe Functions have no relation to Temporal Affairs.*

There is this difference between the Faculties of which there are Profeſſors in the Univerſities, that thoſe who are barely Graduates in the Faculty of Divinity and in that of Arts, do not exerciſe their Profeſſion in publick in any Matter which has a direct tendency or relation to temporal Concerns, for the uſe of any Perſons in particular, to whom the ſaid Exerciſe of their Profeſſion may be uſeful or hurtful; whereas thoſe who are Graduates in the Faculties of Law or Phyſick, may exerciſe their Profeſſions in Matters relating to the temporal Intereſt of particular Perſons, and in which they may be either uſeful or hurtful to them. Thus Judges and Advocates exerciſe a Profeſſion, of which the good or bad Uſe affects the temporal Intereſt of the particular Perſons whoſe Affairs are in their hands. Thus Phyſicians exerciſe a Profeſſion, upon the good or bad Uſe of which depends the Health, nay the very Life of the particular Perſons who call for their Aſſiſtance. So that the Perſons who exerciſe the ſaid Profeſſions, are engaged to other Duties than thoſe who teach them; and thoſe Duties have their Rules, which it is neceſſary to explain, as being a Part of the Publick Law: And as the Rules of the Duties of Judges, and of Advocates, are to be explained in their proper place, in the ſecond Book; thoſe concerning the Duties of Phyſicians have their Place here, and ſhall be the ſubject

11. *Phyſicians and Surgeons ought to finiſh the Cures they have begun.*

ject Matter of the following Articles; pre-ſuppoſing for the firſt of their Duties, that they have render'd themſelves fit for the exerciſe of their Profeſſion, and that they have deſerved the Degrees they have received, after having finiſhed their Studies in the ſaid Faculty *l.*

l ‘ By the *Roman* Law thoſe who executed the ‘ Municipal Offices in Towns, choſe a certain num- ‘ ber of Phyſicians, and were obliged to inform them- ‘ ſelves of their Manners, and of their Capacity.

Medicorum intra numerum præfinitum conſtituendorum arbitrium non Præſidi Provinciæ commiſſum eſt, ſed ordini et poſſeſſoribus cujuſque civitatis: ut certi de probitate morum, et peritia artis eligant ipſi, quibus ſe liberoſque ſuos in ægritudine corporum committant. *l.* 1. *ff. de decret. ab ord. fac.*

Si quis in Archiatri defuncti locum eſt promotionis meritis aggregandus, non ante eorum particeps fiat, quam primis qui in ordine reperiuntur ſeptem, vel eo amplius judicantibus idoneus adprobetur. *l.* 10. *C. de Profeſſ. & Med.*

‘ But altho the Phyſicians had been approved of, ‘ they were nevertheleſs to anſwer for the Faults ‘ which they might commit againſt the Rules of ‘ their Profeſſions: for altho it be true, that we ‘ ought not to impute to Phyſicians the Death of ‘ their Patients, yet they ought to be made anſwe- ‘ rable for the Evil which they occaſion by their Ig- ‘ norance; and the Pretext of human Infirmity ‘ ought not to skreen thoſe from Puniſhment who ‘ cheat and impoſe upon Mankind in a danger of ‘ ſo great Conſequence as is that of Life.

Sicuti medico imputari eventus mortalitatis non debet, ita quod per imperitiam commiſit imputari ei debet, prætextu humanæ fragilitatis delictum decipientis in periculo homines innoxium eſſe non debet. *l.* 6. §. 7. *ff. de off. præſ.*

Imperitia quoque culpæ adnumeratur, veluti ſi medicus ideo ſervum tuum occiderit, quia male eum ſecuerit, aut perperam ei medicamentum dederit. §. 7. *inſt. de lege Aquil.*

Si medicus ſervum imperite ſecuerit, vel ex locato, vel ex lege Aquilia competere actionem. *l.* 7. §. *ult. ff. eod.*

‘ It appears by this laſt Text, that in thoſe Days ‘ the Phyſicians practiſed Surgery. According to ‘ the Uſage in *France*, the Capacity of Phyſicians ‘ is proved by the Degree of Doctor, which they ‘ ought to have before they can regularly practiſe ‘ Phyſick, as it has been regulated by the 87th ‘ Article of the Ordinance of *Blois*.

‘ It had been before ordained by an Ordinance ‘ of *Charles* VI. of *Auguſt* 7. 1390. that Infor- ‘ mation ſhould be given againſt Phyſicians and ‘ Surgeons who had not Knowledge and Capacity ‘ ſufficient for the Exerciſe of their Profeſſion; ‘ and they were forbid to practiſe, until they ſhould ‘ be found capable by the Perſons whoſe Buſineſs ‘ it was to judge thereof. *See the Ordinance of* Lewis XIII. *at* Paris 1616. *in relation to the diſferent Examinations they are obliged to undergo.*

XI.

11. *Phyſicians and Surgeons ought to finiſh the Cures they have begun.*

It is the Duty of a Phyſician who has begun to cure one of a Diſtemper, to continue his Attendance on him while the Diſtemper laſts, eſpecially in Caſes where there is any Danger, unleſs he have ſome juſt Excuſe for not doing it; and it is with much more reaſon that Surgeons are bound to continue to dreſs the Wounds, and the other Sores which require the Uſe of Surgery *m.*

m Qui bene ſecuerit & dereliquit curationem, ſecurus non erit, ſed culpæ reus intelligitur. *l.* 8. *ff. ad leg. Aquil.*

Præterea ſi medicus qui ſervum tuum ſecuit, & dereliquerit curationem ejus, & ob id mortuus fuerit ſervus, culpæ reus erit, imperitia quoque culpæ adnumeratur: veluti ſi medicus ideo ſervum tuum occiderit, quia male eum ſecuerit aut perperam ei medicamentum dederit. §. 6. & 7. *eod.*

XII.

12. *Thoſe who have Perſons under Cure, ought not to exact any Compoſition for their Payment.*

If any one not having the Probity and the Honour that ought to accompany the Profeſſion of Phyſick, exerciſing Functions or Operations of Surgery, ſhould demand from the Patient himſelf, or his Relations, ſome Compoſition of a Reward, which the Danger would oblige them to promiſe him; he might be juſtly condemned, not only to make reſtitution of what he had exacted in this manner, but likewiſe to undergo other Puniſhments which the Quality of the Fact and the Circumſtances may deſerve; and much more ſo, if he himſelf had made the Wound or the Sore worſe, on purpoſe to oblige the Patient to promiſe him this Reward *n.*

n Si medicus, cui curandos ſuos oculos qui eis laborabat commiſerat, periculum amittendorum eorum per adverſa medicamenta inferendo compulit, ut ei poſſeſſiones ſuas contra fidem bonam æger venderet, incivile factum præſes Provinciæ coerceat, remque reſtitui jubeat. *l.* 3. *ff. de var. & extraord. cognit.*

Ea patimur (*Archiatros*) accipere, quæ ſani offerunt pro obſequiis, non ea quæ periclitantes pro ſalute promittunt. *l.* 9. *C. de Profeſſ. & Med.*

XIII.

13. *They ought to keep the Secrets of their Patients.*

Since Phyſicians, Surgeons and Apothecaries have frequent Occaſions in which the Secrets of ſick Perſons themſelves, or of their Families, are diſcovered to them, whether it be out of a Confidence that they place in them, or becauſe of the Conjunctures which render their Preſence neceſſary at the time that they are ſpeaking of Affairs, or doing other things which require Secrecy; it is one of their Duties not to abuſe the Confidence that is put in them, and to keep exactly and faithfully the Secret of things that are come to their Knowledge, and which ought to be kept ſecret *o.*

o See on the 16th Article the End of *Hippocrates*'s Oath.

‘ This Secrecy is enjoined by an Article of the ‘ Statutes of the Faculty of Phyſick: *Ægrorum arcana,*

‹ *cana, viſa, audita, intellecta, nemo eliminet.*
‹ Art. 19. Appendicis ad reformationem Facultatis
‹ Medicinæ.

XIV.

14. Phyſicians ought to be united among themſelves in the Cure of their Patients.

Union among Perſons of all ſorts of Profeſſions is a Duty incumbent on them: and altho in ſome Profeſſions their Diviſion may be uſeful to the Publick by the Advantages that may be drawn from the Diſcoveries and Improvements made in the Science by thoſe who ſet up in oppoſition to one another, and from the Light which may be had by comparing different Sentiments; yet Diſunion among Phyſicians who have the ſame Patients under their Care, or who are conſulted about their Diſtempers, cannot but be of prejudice to the ſick Perſons, and is a breach of one of the moſt eſſential Duties of thoſe who practiſe Phyſick; ſince it may lead them to be of oppoſite Sentiments merely out of a Spirit of Contradiction: and therefore it is, that to prevent this Inconvenience, and to oblige them to communicate reciprocally to one another their Skill and Knowledge, the Rules of their Profeſſion enjoin them not only not to fall out among themſelves, but even to be in ſtrict Friendſhip with one another *p*.

p Scholæ Medicæ Doctores amicitiam inter ſe colant. *Art.* 13. *appendicis ad reformationem Facultatis Medicinæ.*

Speak not evil one of another, Brethren. He that ſpeaketh evil of his Brother, and judgeth his Brother, ſpeaketh evil of the Law, and judgeth the Law. James 4. 11.

Withhold not Good from them to whom it is due, when it is in the power of thine hand to do it. Prov. 3. 27.

And let none of you imagine Evil in your Hearts againſt his Neighbour. Zech. 8. 17.

XV.

15. They ought to acquaint their Patients, or Relations, with the Danger of their Diſtemper.

The Conſequence of making known, either to the ſick Perſons themſelves, or to the Paſtors who have the Care of their Souls, the Danger in which they are, that they may give order about what is neceſſary to be done in that Condition for ſettling their ſpiritual and temporal Concerns, makes it alſo a Duty on Phyſicians and others who have ſick Perſons under Cure, to give notice of the Danger they may be in to the Perſons who are the moſt proper to acquaint the ſick Perſon himſelf with it *q*. And the ſame Reaſon which obliges Phyſicians to this Duty, obliges them alſo to preſcribe no Remedy, the Uſe whereof may be contrary to the Spirit of Religion, and to good Manners.

tuimus, & deſtricte præcipimus medicis corporum, ut cum eos ad infirmos vocari contigerit, ipſos ante omnia moneant, & inducant, ut medicos advocent animarum: ut poſtquam fuerit infirmo de ſpirituali ſalute proviſum, ad corporalis medicinæ remedium ſalubrius procedatur: cum cauſa ceſſante, ceſſet effectus. Hoc quidem inter alia huic cauſam dedit edicto, quod quidam in ægritudinis lecto jacentes cum eis a medicis ſuadetur, ut de animarum ſalute diſponant, in deſperationis articulum incidunt: unde facilius mortis periculum incurrunt.

Si quis autem medicorum hujus noſtræ conſtitutionis, poſtquam per Prælatos locorum fuerit publicata, tranſgreſſor extiterit, tamdiu ab ingreſſu Eccleſiæ arceatur, donec pro tranſgreſſione hujuſmodi ſatisfecerit competenter.

Cæterum cum anima ſit multo pretioſior corpore, ſub interminatione anathematis prohibemus, ne quis medicorum pro corporali ſalute aliquid ægroto ſuadeat, quod in periculum animæ convertatur. *Cap.* 13. *de pœnit. & remiſſ.*

XVI.

16. They ought to be faithful in the Reports which they make in a Court of Juſtice touching the Condition of ſick Perſons.

Seeing it often happens to be neceſſary for Courts of Juſtice to have Information of the Condition of Perſons, either ſick or wounded, and of the Cauſes of their Diſtempers, or of their Wounds; they therefore oblige Phyſicians and Surgeons to make a Report to them of what they know of the Matter, and to make Oath that they will ſpeak the Truth. This therefore is another of their Duties, to make faithful Reports on ſuch occaſions; as for example, if any one being obliged to appear in a Court of Juſtice happens to be under an Indiſpoſition which hinders him from making his Appearance; if Information is given againſt Perſons who have wounded or cruelly beaten him that complains; in theſe Caſes, and others of the like nature, the Court directs the Phyſicians or Surgeons, or both together, who have already viſited the ſick Perſon, or who ſhall go and viſit him by order of the Judge, to make their Report of the Condition of the Perſon, and of the Cauſes of his Illneſs *r*.

r Semel cauſaria miſſis militibus, inſtauratio non ſolet concedi obtentu recuperatæ valetudinis melioris quando non temerè dimittantur, niſi quos conſtet medicis denuntiantibus, & judice competente diligenter examinante, vitium contraxiſſe. *l. 6. c. de re milit.*

Juramento affirmo, teſte Apolline, medicorum præſide, & Æſculapio, Hygea ac Panacea, deabus diiſque omnibus me, quantum viribus & judicio aſſequi poſſum, inviolatum hoc jusjurandum hancque ſtipulationem præſtiturum.

Sancte

q Cum infirmitas corporalis nonnunquam ex peccato proveniat, dicente domino languido quem ſanaverat; Vale, & amplius noli peccare, ne deterius aliquid tibi contingat. Præſenti decreto ſta-

Sancte itaque promitto, me loco parentum habiturum hunc, qui me hanc artem docuit, nutriciumque me ei præſtiturum, & quibus eget benigne impertiturum, progeniem ejus germanorum loco reputaturum: & hanc artem ſi diſcere ejus poſteri voluerint, ſine mercede & abſque ſtipulatione me illos docturum. Præceptorum & narrationum, & reliquæ univerſæ artis benigne & fideliter participes facturum meos, & præceptoris mei liberos, imo & reliquos qui ſcripto ſtipulati fuere, ac ex lege medica jusjurandum interpoſuere: alium præter hos nullum. Cæterum in tractandis ægris, dicæta, quantum viribus & ingenio aſſequar, ex ægrorum commodo utar: a veneno autem imbuta, & ſanitati injuria illos arcebo. Nec unquam, aut prece aut præmio victus, pharmacum calamitoſum propinabo cuiquam; nec nefarii hujus conſilii auctor ero unquam. Ita nuſquam ingravidatæ mulieri peſſum abortiferum porrigam. Vitam artemque meam caſte & ſancte ducam. Nec unquam ex calculo laborantes ipſe ſecabo: ſed his qui ſe totos huic operi dicarunt, hoc officium permittam. Quaſcumque ingrediar ædes, in his ægrorum commodis ſtudebo; ſtudioſeque ulla injuria a me ne prudenter eveniat cavebo; & ab omni corruptela, cum alia, tum maxime venerea me continebo, ſive corporibus fœmineis, maſculis, liberis aut ſervilibus medicinam fecero. Quæ autem inter curandum viſu aut auditu notavero, vel extra medendi arenam in communi hominum vita percepero, quæ non decet enuntiare, ſilentio involvam, & tanquam arcana illa æſtimabo. Itaque inviolata integritate, ſancte ſi hoc jusjurandum præſtitero, nec fallo, eveniat mihi feliciter vita & hæc ars, atque perpetuo gloria mea toto ſplendeat orbe: ſin perjurus fefellero fidem, his votis adverſa eveniant omnia. *Jusjur. Hippocr.*

XVII.

17. *They ought to ſerve the Poor* gratis.

Of all the Profeſſions that have relation to the Publick Order of the Society, and to the Service of particular Perſons, there is none whoſe Functions are of a more univerſal Neceſſity for all ſorts of Perſons without exception, than that of Phyſicians and Surgeons, for Diſeaſes, Wounds, Diſlocations, and all the other different Diſtempers; which obliges them to aſſiſt in the way of their Profeſſion, as Occaſion offers, as far as they are able, and for nothing *s*, thoſe who ſtanding in need of their Help have not wherewithal to recompenſe them: And this Duty is more indiſpenſibly incumbent on thoſe who are ſettled where they are allowed Salaries, and other Advantages, to engage them to exerciſe their Profeſſion there *t*. For the Laws require that thoſe Men ſhould prefer their Duty of attending the Poor to the Profit they might make by ſerving the Rich.

s And he gave every Man Commandment concerning his Neighbour. Eccluſ. 17. 12.

Archiatri ſcientes annonaria ſibi commoda a populi commodis (miniſtrari) honeſte obſequi tenuioribus malint, quam turpiter ſervire divitibus. *l.* 9. *C. de Profeſſ. & Med.*

Honour a Phyſician with the Honour due unto him, for the Uſes which you may have of him; for the Lord hath created him. For of the moſt High cometh Healing, and he ſhall receive Honour of the King. The Skill of the Phyſician ſhall lift up his Head, and in the ſight of great Men he ſhall be in admiration. The Lord hath created Medicines out of the Earth, and he that is wiſe will not abhor them. Was not the Water made ſweet with Wood, that the Virtue thereof might be known? And he hath given Men Skill, that he might be honoured in his marvellous Works. With ſuch doth he heal Men, and take away their Pains. Of ſuch doth the Apothecary make a Confection, and of his Works there is no end, and from him is Peace over all the Earth. Eccluſ. 38. 1, 2, *&c.*

t Medicos, grammaticos & profeſſores alios literarum immunes eſſe, cum rebus quas in civitatibus ſuis poſſident, præcipimus, & honoribus fungi, in jus etiam vocari eos, vel pati injuriam prohibemus: ita ut ſi quis eos vexaverit, centum millium nummorum ærario inferat a magiſtratibus——mercedes etiam eorum & ſalaria reddi præcipimus. Quoniam graviſſimis dignitatibus, vel parentes, vel domini, vel tutores eſſe non debent, fungi eos honoribus volentes permittimus, invitos non cogimus. *l.* 1. *C. Theod. de Med. & Profeſſ.*

XVIII.

18. *The Duty of private Tutors and Preceptors.*

Seeing we explain in this Section the Duties not only of the Profeſſors in the Univerſities, Colleges and Academies; but likewiſe of thoſe who teach in private, which takes in the Maſters of private Schools, and all thoſe who are any way concerned in the Inſtruction of Youth, both of the one and the other Sex; we may add here as to the ſaid Perſons, that their Duties are the ſame with thoſe of Profeſſors in the Univerſities, in ſo far as they are applicable to them in their Stations, and eſpecially in what concerns the Care of the Manners of thoſe whom they inſtruct; as has been explained in the fourth Article *u*.

u Ad docendam & regendam juventutem magiſtros probatæ vitæ & doctrinæ recipiant, qui ſuo munere recte fungi noverint: quorum mores in primis ſpectandi, ut pueri ab his, & litteras ſimul diſcant, & bonis moribus imbuantur. *Statutes of the Faculty, Art.* 1.

Fooliſhneſs is bound in the Heart of a Child; but the Rod of Correction ſhall drive it far from him. Prov. 22. 15.

Withhold not Correction from the Child; for if thou beateſt him with the Rod, he ſhall not die. Thou ſhalt beat him with the Rod, and ſhalt deliver his Soul from Hell. Prov. 23. 13, 14.

My Son, gather Inſtruction from thy Youth up; ſo ſhalt thou find Wiſdom in thine old Age. Eccluſ. 6. 18.

My Son, hearken unto me, and learn Knowledge, and mark my Words with thy Heart. I will ſhew forth Doctrine in Weight, and declare his Knowledge exactly. The Works of the Lord are done in Judgment from the beginning; and from the time he made them, he diſpoſed the Parts thereof. He garniſhed his Works forever, and in his hand are the chief of them unto all Generations; they neither labour, nor are weary, nor ceaſe from their Works. Eccluſ. 16. 24, 25, *&c.*

Bring them up in the Nurture and Admonition of the Lord. Epheſ. 6. 4.

See Deuter. 11. 19. *and* Pſal. 24. 4, 5.

Cum omnium regnorum & populorum felicitas, tum maxime reipublicæ chriſtianæ ſalus, a recta juventutis inſtitutione pendeat, quæ quidem rudes adhuc animos ad humanitatem flectit; ſteriles alioquin & infructuoſos, reipublicæ muniis idoneos & utiles reddit; Dei cultum, in parentes & patriam pietatem, erga magiſtratus reverentiam & obedientiam promovet. *Art.* 1. *of the Statutes of the Faculty of Arts.*

TIT. XVIII.

Of Hoſpitals.

THE erecting of Hoſpitals is equally agreeable to the Spirit of Religion, and to the Order of Temporal Government; for they are uſeful with reſpect to the one and to the other.

Religion obliges us to exerciſe towards the Poor the double Charity of relieving them in their Wants, and of reſcuing them out of the Temptations to Vice, which is the Conſequence of Poverty; and this Duty, which is common to all Perſons who are in a condition to aſſiſt the Poor, is more eſpecially natural unto Princes: But with reſpect to Princes, this Duty is not limited to the Relief of thoſe poor Perſons in particular whoſe Neceſſities they may chance to hear of; for there are but few who are able to approach them: but their Charity ought to extend to all Perſons, and make proviſion in general for the Relief of their Neceſſities by all poſſible ways, in proportion to the means they have of doing it by their Sovereign Authority, and the Greatneſs of their Revenue *a*. It is owing to this pious Uſe which the great St. *Lewis* made of thoſe two Appennages of the Sovereigns, that there are in the Kingdom of *France* divers Hoſpitals of his Foundation; and many other Kings, both before and ſince him, have made many ſuch like Eſtabliſhments.

It is eaſy to judge of the Uſefulneſs of Hoſpitals in what concerns Religion; ſeeing thoſe Houſes are Sanctuaries, in which the Poor being provided with the Neceſſaries of Life, and with Chriſtian Inſtruction, are not only out of the Temptations to Vice, but in a condition to apply themſelves wholly to the great Concern of all Men, which is the Salvation of their Souls.

The Temporal Government hath alſo its Advantage in the erecting of Hoſpitals, in that they are a Receptacle for thoſe who are reduced to the Neceſſity of wandering about to beg their Bread, and who for want of Imployment are obliged to ſpend their time in Idleneſs, which multiplies Thefts, Robberies, and Murders. And Hoſpitals, eſpecially thoſe which are called general Hoſpitals, have further this Uſefulneſs both with reſpect to Religion and to the Civil Government, that the Alms are more uſefully employ'd, that the Poor are better looked after than they can be in any other Places in which their Poverty may allow them to take Retreat; and that being by this means prevented from wandering about the Country, they are much leſs burdenſom to the Publick *b*.

We may add to theſe ſeveral Conſi-

a Provinciales egeſtate victus atque alimoniæ inopia laborantes liberos ſuos vendere vel obpignorare cognovimus. Quiſquis igitur hujuſmodi reperietur qui nulla rei familiaris ſubſtantia fultus eſt, quique liberos ſuos ægre ac difficile ſuſtentet: per fiſcum noſtrum antequam fiat calamitati obnoxius, adjuvetur: ita, ut proconſules, præſideſque & rationales per univerſam Africam habeant poteſtatem, & univerſis quos adverterint, in egeſtate miſerabili conſtitutos, ſtipem neceſſariam largiantur: atque ex horreis ſubſtantiam protinus tribuant competentem. Abhorret enim noſtris moribus, ut quemquam fame confici vel ad indignum facinus prorumpere concedamus. *Cod. Theod. de alimentis quæ in op. par. de publ. pet. deb.*

b Cunctis quos in publicum quæſtum incerta mendicitas vocaverit, inſpectis, exploretur in ſingulis & integritas corporum, & robur annorum: atque inertibus & abſque ulla debilitate miſerandis neceſſitas inferatur, ut eorum quidem quos retinet conditio ſervilis proditor ſtudioſus & diligens dominium conſequatur: eorum vero quos natalium ſola libertas perſequitur, colonatu perpetuo fulciatur quiſquis hujuſmodi lenitudinem prodiderit ac probaverit. *l. un. c. de mend. val.*

Si vero hujus terræ fuerint, & corporibus quidem validis utantur, vitæ autem eis decens non eſt occaſio: hos non fruſtra eſſe terræ onus permittere, ſed tradere citius eos operum publicorum attinet artificibus, ad miniſterium, & præpoſitis panificantium ſtationum, & hortos operantibus, aliiſque diverſis artibus, aut operibus in quibus valet ſimul quidem laborare, ſimul autem ali: & ſegnem ita ad meliorem mutare vitam. Si vero aliqui noluerint obſervire operibus quibus traditi ſunt, hos ſectari hac regia civitate. Parcentes enim eis, hoc ſancimus, ut non ſegnitie eos ad illicitos actus impellente, leges eos abripiant ad pœnas, noſtris tradentes judicibus. Læſos autem aut læſas corpore, aut canitie graves, hos ſine moleſtia eſſe jubemus in hac noſtra civitate, aut pie agere volentibus adſcribendos: & aliorum ſingulos interrogare qua venerint gratia: & inquiſitis, quæ digna ſunt ſuper eis agere, ut non pigri hic ſedeant, ſed competentia agentes, ad proprias revertantur provincias. *Nov.* 80. *c.* 5. *V. cap.* 4. *eod.*

derations

derations touching the Uſefulneſs of Hoſpitals, bothto Religion and to Civil Government, that they have been neceſſary on the account of another Advantage which is common to the one and to the other.

Every Body knows that God hath placed all Men in a Society which makes a Body, of which every one is a Member; from whence it follows, that all the Goods being deſtined by his Providence to ſupply their Wants, it is for the good of Religion and of the Temporal Government of every State, that each Member thereof ſhould have what is neceſſary for his Subſiſtence. For altho all the Goods be not common to all Men, and that a Community of Goods among all Men be neither juſt nor poſſible, as has been obſerved in the Preface to the Second Part of the *Civil Law in its Natural Order*; yet it is always juſt and neceſſary that every one ſhould have ſome ſhare in Goods which are deſtined for the Uſe of all, and that no body ſhould be excluded from having out of them at leaſt what is neceſſary for Habitation, Food and Raiment; that all Perſons may be in the Condition of Members of the Body of the Society, and that they may be able to ſubſiſt under the Ties which Society demands, and which are more eſpecially neceſſary for the different Duties of Religion.

But ſince Poverty puts thoſe who are reduced to it under an Incapacity of thoſe Ties and Engagements, and renders it impracticable for them to perform thoſe Duties, if others do not help them out of that State; there are only two Ways to provide againſt it: one is to take the Poor into Hoſpitals; and the other is the Aſſiſtance which all the particular Perſons who are in a condition to relieve their Wants ought to give them.

By the Eſtabliſhment of Hoſpitals we put thoſe who are received into them into a Capacity of thoſe Ties and Engagements which Religion demands, and in a Condition of performing the Duties of it to which they are bound. But becauſe it is not poſſible that all the Poor ſhould be received into Hoſpitals, either becauſe there are not Hoſpitals ſufficient to contain them all, or becauſe many are excluded out of them by reaſon of ſeveral Obſtacles; the ſame divine Providence, which hath formed the Society of Mankind, and which hath laid the natural Foundation of it in the Union which Religion ought to eſtabliſh among them, makes that they being all of them Members of one and the ſame Body, are by conſequence Members one of another *c*; and that therefore every Man is to every other Man his Neighbour *d*. So that as every Member of the Body hath its Uſe for every one of the other Members, according as its Functions may have relation to them; ſo is every Man engaged towards every other Man in Duties which the Conjunctures may demand: and this Engagement having for its Principle an Union among all Men, like to that of the Members of one Body; every Man has for the Rule of his Duties towards others, that which he owes unto himſelf, as every Member of the Body exerciſes its Functions in behalf of the other Members, in the ſame manner as it exerciſes them for its own Uſe; and if the Good of the Body requires that one Member ſhould expoſe it ſelf to ſave another, nothing reſtrains it, nothing hinders it from performing that Function: ſo in the ſame manner Men owe reciprocally to one another mutual Aſſiſtance in all their Wants, as far as they are able; and they ought, even as occaſion offers, to prefer the eſſential Good of others to their own proper Good, which is of another nature, and of leſs importance, according to the Rules of Religion, of which it is not neceſſary to ſpeak here. But we could not omit mentioning here that which is ſtill wanting in the Eſtabliſhment of Hoſpitals for the Relief of the Poor; for ſince thoſe Houſes cannot poſſibly contain all the Poor, and that even the greateſt part of Hoſpitals have not a ſufficient Fund of Revenue by their Foundation, the Duty of contributing to the Relief of the Poor, whether it be of thoſe who are in the Hoſpitals, or of all the other Poor, will never ceaſe, according to the Word of God, which teaches us, that we have always the Poor with us. So that all the Relief which the Poor can receive in Hoſpitals, does not diſcharge any Perſon from the Duty of aſſiſting them *e*.

It

c For as we have many Members in one Body, and all Members have not the ſame Office, ſo we being many are one Body in Chriſt, and every one Members one of another. Rom. 12. 4, 5.

For we are Members one of another. Eph. 4. 25.

d See *Luke* 10. 29.

e For ye have the Poor always with you. Mat. 26. 11.

Beware

It follows from these Principles, that those who are in want of things absolutely necessary for Life, and who are out of a condition of acquiring them by their Labour, have a Title and a natural Right which appropriates to them such a Share as is necessary for their Wants out of the Goods which God has given unto others; and seeing it is not lawful for them to take this Share unless it is given them, it is an indispensable Obligation on those who are able to relieve the Poor, to give them of the said Share which they have a right to, so much of it as is in their hands, and to acquit themselves of this Duty *f*.

Since Hospitals are founded with an intent to relieve the Necessities of the Poor, and that their Necessities are of many sorts, there are therefore erected different sorts of Hospitals. Some are for receiving sick Persons *g*, who labour under Diseases which are curable, and those are for every poor Man or Woman only for a certain time; others are for Diseases that are incurable: there are some for Foundlings, for Orphans *h*, and for other sorts of Children *i*, till they arrive at a certain Age, for Maids, for Widows, for old Men *l*, for Passengers *m*, and for other sorts of Poor *n*. For as the Causes of Poverty are infinite, it extends it self many ways to all sorts of Ages and Conditions of both Sexes.

It is by the Variety of these Hospitals that Endeavours have been used to provide, as much as was possible, for the different sorts of Poor; but it was not possible to have Hospitals enough to receive all the Poor in general: for besides that there are many Places where they are not able to build Hospitals, it appears sufficiently that even in those Places where there are Hospitals of several sorts, they are not sufficient for all the Poor. Thus there are Persons of good Condition who are to be assisted out of Hospitals. Thus a Husband and a Wife having a great many Children, and who may be able by their Labour to provide a Part of the Necessaries for their Family, ought not to be taken from their Families, to be put into an Hospital, but they ought to be assisted in their Houses. Thus there are Diseases of which People cannot be conveniently cured in Hospitals; and many other Obstacles exclude several Persons from being received into them.

Since Hospitals are founded with a View to promote Religion, and to serve the State, and that they have their Use both in the one and in the other, as has been already explained; it is essential to all Foundations of Hospitals, that the Poor be there assisted with what they stand in need of both for their Spiritual and Temporal Concerns. And it is for this reason that this Order hath been established in almost all Hospitals, that for the spiritual Affairs there should be Churches or Chappels, and Churchmen appointed to administer the Sacraments there, to instruct the Poor, and to exercise towards them all the other Functions of their Ministry; and for their Temporal Concerns, that there should be sufficient Room and convenient Lodging for the Poor, according to their number, and as the

Beware that there be not a Thought in thy wicked Heart, saying, The seventh Year, the Year of Release is at hand, and thine Eye be evil against thy poor Brother, and thou givest him nought, and he cry unto the Lord against thee, and it be Sin unto thee: Thou shalt surely give him, and thy Heart shall not be grieved when thou givest unto him: because that for this thing the Lord thy God shall bless thee in all thy Works, and in all that thou puttest thy Hand unto. For the Poor shall never cease out of the Land; therefore I command thee, saying, Thou shalt open thine Hand wide unto thy Brother, to thy Poor, and to thy Needy, in thy Land. Deuter. 15. 9, 10, 11.

Save when there shall be no Poor among you; for the Lord shall greatly bless thee in the Land which the Lord thy God giveth thee for an Inheritance to possess it. Deuter. 15. 4.

He that giveth unto the Poor shall not lack; but he that hideth his Eyes shall have many a Curse. Prov. 28. 27.

f And six Years shalt thou sow thy Land, and shalt gather in the Fruits thereof; but the seventh Year thou shalt let it rest, and lie still, that the Poor of thy People may eat, and what they leave the Beasts of the Field shall eat. In like manner thou shalt deal with thy Vineyard and with thy Olive-Yard. Exod. 23. 10, 11.

If there be among you a poor Man of one of thy Brethren within any of thy Gates in thy Land which the Lord thy God giveth thee, thou shalt not harden thy Heart, nor shut thine Hand for thy poor Brother; but shalt open thine Hand wide unto him, and shalt surely lend him sufficient for his Need, in that which he wanteth. Deut. 15. 7, 8.

Give Alms of thy Substance, and when thou givest Alms let not thine Eye be envious, neither turn thy Face from any Poor, and the Face of God shall not be turned away from thee. Tob. 4. 7.

See 1 *Sam.* 2. 7.

He that oppresseth the Poor, reproacheth his Maker; but he that honoureth him, hath Mercy on the Poor. Prov. 14. 31.

He that hath Pity upon the Poor lendeth unto the Lord, and that which he hath given will he pay him again. Prov. 19. 17.

g Nosocomia. *l.* 19. *C. de Sacr. Eccl.*

h Orphanotrophia. *d. l.*
i Brephotrophia. *d. l.*
l Gerontocomia. *d. l.*
m Xenodochia. *d. l.*
n Ptochotrophia. *d. l.*

Apart-

Apartments ought to be diſpoſed for their Uſe, whether it be for the Diſtinction of Sexes, or for employing them in ſome Work in the Hoſpitals which are deſigned for receiving the Poor that are able to work. There ought alſo to be in them convenient Lodging for the Perſons who are appointed to ſupply the Spiritual Functions, and to aſſiſt the Poor in their Temporal Concerns; and to the end that thoſe Houſes may be maintain'd in the good Order in which they ought to be, there ſhould be ſome Revenues allotted to them, and they ought to have ſtanding Regulations and Orders, both for the Functions of the Perſons appointed to aſſiſt and attend the Poor in their ſpiritual and temporal Neceſſities, as alſo for the Duties of the Poor: And in order to have the ſaid Regulations punctually obſerved, to have the Oeconomy of the Houſe well looked after, and care taken of the receiving and diſburſing of the Revenues belonging to the Hoſpitals, there is occaſion for Governours and Overſeers, who may divide among them the Functions neceſſary for the Adminiſtration and Oeconomy of the Hoſpitals.

It follows from this Uſefulneſs of Hoſpitals, both to Religion, and to the State, that they ought always to remain the ſame, as the Neceſſities for which they are eſtabliſhed never ceaſe, and conſequently that their Goods ought to be inalienable, as much or rather more than thoſe belonging to Communities *o*.

We may alſo conſider Hoſpitals as being a kind of Communities *p*; but of a Character different from the others. For whereas all other Communities are compoſed of Perſons who form a Body, of which every one is a Member, and out of which he cannot be excluded without ſome juſt Cauſe, as for ſome Offence, and in which he has his Share in the Rights and Privileges belonging to the whole Body, and may be named to ſerve Offices therein; Hoſpitals on the contrary are Communities in which the Poor, for whoſe behoof they are eſtabliſhed, have no other ſhare beſides the Uſe of the Favour which is done them by receiving them into the Hoſpital, and they may be excluded from it; and as for the Adminiſtration of the Revenues, of the Rights, and of the Affairs of the Hoſpital, they cannot be employed therein. For this Adminiſtration is not committed to the Poor who are in the ſaid Houſes; but is placed in the hands of other Perſons, ſuch as the Magiſtrates and Burgeſſes of Towns, and others, according to the Nature and Foundations of the ſeveral Hoſpitals. And there are ſome Hoſpitals which are regular Communities of Men or Women, who make profeſſion to ſerve the Poor out of their own Goods, or thoſe of the Foundation, or out of other Goods put into their hands for that purpoſe. And in this kind of Hoſpitals the Adminiſtration of the Goods, and the Affairs thereof, and the Direction of the manner of ſerving the Poor, is in the hands of the Superiors of the ſaid Communities; unleſs the ſaid Houſes had been eſtabliſhed in ſuch a manner as that the Monks or Nuns were to have their Community apart to themſelves, and were to ſerve the Poor out of the Revenues of the Hoſpitals, which were to be managed by other Perſons. But there is this belongs in common to all ſorts of Hoſpitals, that as to their Goods, their Rights, their Affairs, they are conſider'd as Communities which are in the

o Jubemus, nulli poſthac Archiepiſcopo in hac urbe regia ſacroſanctæ orthodoxæ Eccleſiæ præſidenti nulli œconomo, cui res Eccleſiaſtica gubernanda mandatur, eſſe facultatem, fundos vel prædia, ſive urbana ſive ruſtica, res poſtremo immobiles aut in his prædiis, colonos, vel mancipia conſtituta, aut annonas civiles, cujuſcunque ſuprema vel ſuperſtitis voluntate, ad religioſas eccleſias devolutas, ſub cujuſque alienationis ſpecie, ad quamcunque transferri perſonam. Sed ea etiam prædia dividere quidem, colere, augere, & ampliare: nec ulli eiſdem prædiis audere cedere verum, ſive teſtamento quocunque jure facto, ſeu codicillo vel ſola nuncupatione legato, ſeu fideicommiſſo, aut mortis cauſa donatione, aut alio quocunque ultimo arbitrio, aut certe inter viventes habita largitate, ſive contractu, venditionis ſive donationis, aut alio quocumque titulo quiſquam ad præfatam venerabilem eccleſiam patrimonium ſuum, partemque certam patrimonii in fundis, prædiis, ſive domibus, vel annonis, mancipiis, & colonis, eorumque peculiis voluerit pertinere: inconcuſſa ea omnia ſine ulla penitus immutatione conſerventur. Scientes nulla ſibi occaſione, vel tempore, ad viciſſitudinem beneficii collocati aut gratiæ referendæ, donandi, vel certe hominibus volentibus emere, alienandi aliquam facultatem permiſſam: nec ſi omnes cum religioſo epiſcopo & œconomo clerici in earum poſſeſſionum alienationem conſentiant; ea enim quæ ad beatiſſimæ eccleſiæ jura pertinent, vel poſthac pervenerint, tanquam ipſam ſacroſanctam & religioſam eccleſiam intacta convenit venerabiliter cuſtodiri: ut ſicut ipſa religionis & fidei mater perpetua eſt; ita ejus patrimonium jugiter ſervetur illæſum. *l.* 14. *c. de ſacroſanct. Eccl.*

p Id quod pauperibus teſtamento vel codicillis relinquitur, non ut incertis perſonis relictum evaneſcat, ſed omnibus modis ratum firmumque conſiſtat. *l.* 24. *c. de Epiſc. & Cler.*

place

place of Perſons, and which may acquire and poſſeſs Goods, and ſue in Courts of Juſtice; ſo that they are as it were Perſons repreſented by thoſe who have the Government and Adminiſtration of them, as has been explained in *the Civil Law in its Natural Order q.*

It follows from all that has been ſaid in relation to Hoſpitals, that the ſubject matter of this Title may be reduced to two Parts, which ſhall be explained in two Sections. The firſt, of that which relates to the Government of Hoſpitals; the ſecond of the Functions and Duties of thoſe who have the Government or Adminiſtration of them.

q Id quod pauperibus teſtamento vel codicillis relinquitur, non ut incertis perſonis relictum evaneſcat, ſed omnibus modis ratum firmumque conſiſtat. *l.* 24. *eod. de Epiſc. & Cler.*

Sed etſi pauperes quidem ſcripſerit hæredes, & non inveniatur certum ptochotrophium, vel certæ eccleſiæ pauperes de quibus teſtator cogitaverit: ſed ſub incerto vocabulo pauperes fuerint hæredes inſtituti: ſimili modo & hujuſmodi inſtitutionem valere decernimus. *l.* 49. §. *eod.*

Nulli licere decernimus, ſive teſtamento hæres ſit inſtitutus, ſive ab inteſtato ſuccedat, ſive fideicommiſſarius vel legatarius inveniatur, diſpoſitiones pii teſtatoris infringere, vel improba mente violare, adſerendo incertum eſſe legatum vel fideicommiſſum, quod redemptioni captivorum relinquitur: ſed modis omnibus exactum, pro voluntate teſtatoris, piæ rei negotio proficere. *l.* 28. *eod.*

See the 15th Article of the 2d Section of Perſons, in the *Civil Law in its Natural Order.*

SECT. I.

Of the Government of Hoſpitals.

The CONTENTS.

1. *Divers Uſes of Hoſpitals.*
2. *The Government of Hoſpitals.*
3. *Governours of Hoſpitals.*
4. *Regulation for the Expences of Hoſpitals.*
5. *Nomination of the Governours.*

I.

1. *Divers Uſes of Hoſpitals.*

THE firſt Rule of the Government of Hoſpitals, is to make them ſerve for the Uſe to which they are deſtined, and to receive in them only the Poor for whom they are eſtabliſhed. Thus, in Hoſpitals that are founded for ſick Perſons, they do not receive any Poor that are ſtrong and well in health; nor do they admit ſick Perſons into Hoſpitals which are founded only for the Poor that are to be employed at work *a.*

a ‘ Every Hoſpital hath its Uſe regulated by its ‘ Eſtabliſhment and Foundation.

II.

2. *The Government of Hoſpitals.*

Seeing the End for which Hoſpitals are founded, is that the Poor may be there ſubſiſted, and that they may be there kept in good Order, it is part of the Government of every Hoſpital, to have Orders and Regulations ſuited to their different Uſes, whether they be intended for the relief of the Sick or of the Whole; to have in every one of them the Helps that are neceſſary to the Poor for their ſpiritual and temporal Concerns; to have Overſeers appointed to take care of the Functions both of the one and of the other *b.*

b ‘ Since Hoſpitals are founded for a Publick ‘ Good, and for the Intereſt both of Religion and ‘ of the State, they ought to be regulated in ſuch ‘ a manner as that the Poor may be aſſiſted both ‘ in their ſpiritual and temporal Wants.

III.

3. *Governours of Hoſpitals.*

Hoſpitals having their own proper Goods, their Rights, their Affairs, their Privileges *c*, it is neceſſary for the good Government of thoſe Houſes, that the management of all their Affairs be put into the hands of Perſons who may take care of them; and the ſame Order of Government requires alſo that there ſhould be ſome Body appointed to gather in the Revenues of the Hoſpital, and to receive the Alms that are given to it, and that the ſaid Perſon be able to find ſufficient Security for his Adminiſtration.

c ‘ The Ordinances of *France* have made pro- ‘ viſion for this Adminiſtration or Government of ‘ Hoſpitals, and the Nomination of the Perſons ‘ who are to be charged therewith, and to take ‘ care of their Affairs, and of their Privileges.

Sancimus res ad venerabiles eccleſias, vel xenones, vel monaſteria, vel orphanotrophia, vel gerontocomia, vel ptochotrophia, vel noſocomia, vel brephotrophia, vel denique ad aliud tale conſortium deſcendentes, ex qualicunque liberalitate, ſive inter vivos, ſive mortis cauſa, ſive in ultimis voluntatibus habita, a lucrativorum inſcriptionibus liberas immuneſque eſſe, lege ſcilicet quæ ſuper hujuſmodi inſcriptionibus poſita eſt, in aliis quidem perſonis ſuum robur obtinente. *l.* 22. *C. de ſacroſ. Eccl.*

IV.

4. *Regulation for the Expences of Hoſpitals.*

The Fund of the Revenues belonging to the Hoſpital, and of the Alms given to it, being ſet apart for the different neceſſary Expences in Hoſpitals, whether it be for the Perſons of the Poor, or for the Salaries and Maintenance

tenance of the Domeſticks, the Reparations of the Building, or for the other occaſions of all ſorts, all theſe Expences ought to be regulated by the Governours in proportion to the Wants and to the Revenues *d*.

d ‘ This Oeconomy is a part of the Adminiſtra-
‘ tion of Hoſpitals.

V.

5. Nomination of the Governours.

Seeing Hoſpitals are founded in Towns, and in other Places for a common good, and that it is the intereſt of Towns that they ſubſiſt, and that they be well regulated; the Eſtabliſhment of Hoſpitals is therefore a part of the Policy of the ſaid Towns, and the Inhabitants in their Aſſemblies or Town-Councils make proviſion for what concerns the Government and Adminiſtration of the ſaid Houſes. They have likewiſe the Nomination of the Governours thereof, if there be no other ways appointed for the ſame, according to the Uſage of the Place, and Nature of the Foundations *e*.

e See the Ordinances of *France*.

SECT. II.

Of the Duties of thoſe who are appointed Governours of Hoſpitals.

The CONTENTS.

1. *Duties of the Governours of Hoſpitals with reſpect to the Domeſtick Diſcipline.*
2. *Care of the Revenues and of the Affairs.*
3. *Receivers of the Rents.*
4. *The Receivers are to give an Account.*
5. *Thoſe who are imployed in the Service of Hoſpitals, have their Duties preſcribed to them by the Rules of the Houſe.*
6. *It is only thoſe who are real Objects of Charity that ought to be received into Hoſpitals.*

I.

1. Duties of the Governours of Hoſpitals with reſpect to the domeſtick Diſcipline.

THE Duties of the Governours of Hoſpitals in what relates to the Diſcipline of the Houſe, is Vigilance, and Application in every one of them to the Functions committed to their Care: and this implies in general the Care of ſeeing that all the Orders and Regulations be punctually obſerved, of viſiting the Places, and of informing themſelves of the Conduct of the Poor, and of the Domeſticks, of giving the neceſſary Corrections with the Temperament of Moderation and Reſolution which the ſaid Function may require, and to make a Report to their Superiors or Viſitors of what may deſerve to be laid before them in order to have the ſame redreſſed, and to take care in general and in particular of all the Functions of the ſaid Adminiſtration *a*.

a ‘ It is in theſe Functions that the Duties of
‘ Governours conſiſt, with regard to the Govern-
‘ ment and Diſcipline of Hoſpitals.

II.

2. Care of the Revenues and of the Affairs.

As to what concerns the Oeconomy, the Adminiſtration of the Revenues, the Care of the Affairs, the Preſervation of the Privileges, the Perſons who are charged with the ſaid Functions ought to have the Inventaries of the Goods, the Writings relating to the Affairs and to the Law-ſuits if there be any, and the Inſtructions touching every thing that any way relates to the ſaid Oeconomy and Adminiſtration; and they ought to apply themſelves with diligence to every thing belonging to it: which implies the viewing of the Buildings, of the Lands, the care of cultivating, letting or farming out the Lands, the Houſes and other Goods, of ſeeing that the Rents be duly paid, of defending the Poor in their Law-ſuits, ſuing for their Rights, preſerving their Privileges to them, informing themſelves of the Charities left to the Poor that are under their Care by Teſtaments, and other Diſpoſitions, that they may procure Payment thereof, and in general to uſe all poſſible diligence to have the Oeconomy and the Affairs of the Hoſpital kept in a good Condition *b*.

b ‘ It is in all theſe Cares that the preſervation
‘ of the Goods and of the Rights of Hoſpitals does
‘ conſiſt.

Neceſſarium quoque eſſe credidimus, etiam ſub his aliquid definire, qui curam ſuſceperunt ſuſcepturive ſunt venerabilium xenonum, & noſocomiorum, & ptochotrophiorum, & orphanotrophiorum, & brephotrophiorum. Nam & ipſis omnem licentiam auferimus, de adquiſitis rebus poſt ſuſceptas hujuſmodi curationes, vel per teſtamentum, vel per alium quemlibet modum vel machinationem quicquam in alias transferri perſonas: exceptis, quæ prius habuerant, vel poſtea a parentibus, vel theiis, vel fratribus ad ipſos pervenerunt. Omnia enim, quæcumque ad ſancta pertinent loca, vel quæ ad ipſorum præpoſitos poſt ſuſceptam hujuſmodi curam pervenerunt, vel perventura ſunt, ad ipſa venerabilia pertinebunt loca, eaque pie in eos diſtribui & erogari volumus, qui in illis locis ſunt, vel curantur. Manifeſtum enim eſt, quod quiſquis derelinquit vel donat, ſive in ſcriptis, ſive ſine ſcriptis xenodocho, vel noſocomo, vel ptochotropho, vel orphanotropho: idcirco dat ut pie per ipſum diſpenſetur: ut qui multam de eorum pietate præſumptionem & occaſionem habeat, qui iis locis præfecti ſunt. Neque vero juſtum eſt, ipſum

ſum ea, quæ ſub pretextu eorum qui ſub ejus cura ſunt accipit, non in ipſos vel pro ipſis impendere, ſed in propriam perſonam auferre, & proprio lucro applicare, timore Dei contempto: quis enim tali curæ præpoſitum non exiſtimet idcirco eam ſuſcepiſſe, ut non ſolum quæ extrinſecus ad eum pervenient, ſed etiam omnia, quæ habere eum contigerit, in eam rem impendat. *l.* 42. §. 6. *c. de Epiſc. & Cler.*

Amplius id quoque jubemus, ut quæcunque poſt neceſſariam erogationem in eos, qui eorum curæ commiſſi ſunt, & debitam curationem rerum & ædificiorum ſupereſſe contigerit, ea ad reddituum comparationem proficiant. Undique enim noſter ſcopus noſtraque intentio eſt, ad amplificationem & augmentum adducere res ad pios uſus ſegregatas. Sic enim quiſquis pro ſua anima quidquam facere volet, promptius erogabit: ſi crediderit, ea quæ ab ipſo data fuerint pie adminiſtranda eſſe. *d. l.* §. 7.

III.

3. *Receivers of the Rents.*

Thoſe who are intruſted with receiving the Rents, the Alms, and the other Funds deſtined for the ſubſiſtence of the Poor, and for defraying the other Charges of the Hoſpitals, ought to be diligent in getting in the Monies which they are to receive, whether it be from Farmers, Debtors, or others; but without uſing any harſh or rigorous means for procuring Payment, except in the Caſes where it is abſolutely neceſſary; and even in that Caſe they ought not to proceed to thoſe Extremities without firſt acquainting thoſe who are the Directors and Governours of the Hoſpital: and this Moderation is more eſpecially neceſſary with regard to Benefactors, and their Heirs, not only becauſe of the Conſideration that is to be had for thoſe Perſons, but alſo for the intereſt of the Hoſpitals themſelves, leſt ſuch rigorous Proceedings ſhould alienate the Minds of Perſons diſpoſed to leave Charities to them *c*.

c ‘ It is by the Care of receiving what belongs ‘ and what is left to Hoſpitals, that Proviſion is ‘ made for the ſubſiſtence of the Poor, and for ‘ the other Charges of the Hoſpitals.

See the preceding Article, and the Texts there cited.

IV.

4. *The Receivers are to give an Account.*

The ſame Officers who are appointed to receive the Rents and other Incomes of the Hoſpitals, are obliged to give an account thereof to the Perſons whoſe buſineſs it is to examine and audit their Accounts, according to the Uſages and the Regulations; whether it be once a Year, or after the Term for their ſerving in that Office is expired, or otherwiſe, according to the ſame Uſages and Regulations of the Hoſpitals *d*.

d Orphanotrophos hujus inclytæ urbis (nulla ſubtilitate juris obſiſtente) qui quidem pupillorum ſunt quaſi tutores, adoleſcentium vero quaſi curatores: ſine ullo fidejuſſionis gravamine in emergentibus cauſis tam in judicio quam extra judicium, ut opus exegerit ad ſimilitudinem tutoris & curatoris, perſonas & negotia eorum ſi qua poſſint habere defendere ac vindicare jubemus, ita videlicet, ut præſentibus publicis perſonis, id eſt tabulariis, aut intervenientibus geſtis in hac quidem inclyta urbe apud virum perfectiſſimum magiſtrum cenſûs, in Provinciis vero apud moderatores earum, vel defenſores locorum: res eorum eis tradantur, a quibus ſunt cuſtodiendæ: ut ſi quis earûmdem rerum, propter fœnus forſitan, vel aliam urgentem cauſam, vel eo quod ſervari non poſſunt, alienandas eſſe perſpexerint prius habita æſtimatione, liceat eis alienationis inire contractum, & pretia eorum, quæ exinde colliguntur ab eiſdem perſonis cuſtodiantur; hujuſmodi autem pium atque religioſum officium pro tempore orphanotrophos ita peragere convenit, ut minime ratiociniis tutelaribus ſeu curationibus obnoxii ſint; grave enim atque iniquum eſt callidis quorumdam, ſi ita contigerit, machinationibus eos vexari, qui propter timorem Dei parentibus atque ſubſtantiis deſtitutos minores ſuſtentare, atque velut affectione paterna educare feſtinant. *l.* 32. *C. de Epiſc. & Cler.*

Si autem contigerit aliquem ab adminiſtratione ſua ceſſare, quam acceperat: ſancimus, eum qui in ejus locum conſtitutus eſt, cum timore Domini rationem redditioni ſubjici geſtæ ſub eo adminiſtrationis, ſicut divina noſtra lege continetur ſciente eo, qui poſt ipſum conſtitutus eſt, quod Domino Deo pro his rationem reddet. *l.* 42. §. 8. *C. eod.*

‘ Touching the Account to be rendred by Go- ‘ vernours of Hoſpitals in *France*, or other Per- ‘ ſons imployed in receiving and diſburſing the ‘ Monies thereto belonging, ſee the Ordinance of ‘ *Francis* I. 1545. and that of *Charles* IX. 1561. ‘ Art. 1.

By the 123*d Novel of* Juſtinian *Chap.* 23. *theſe ſorts of Officers were bound to make up their Accounts in preſence of the Biſhop: which ſeemed to be very juſt, ſince the Biſhops ought to be Protectors of the Poor, and that they are their Fathers.* Oeconomos autem & xenodochos, noſocomos, ptochotrophos, & aliorum venerabilium locorum gubernatores, & alios omnes clericos jubemus pro creditis ſibi gubernationibus, apud proprium Epiſcopum cui ſubjacent conveniri, & rationem ſuæ gubernationis facere, & exigi quod ex ipſis debentes oſtenduntur illi venerabili reddendum domui ex cujus ordinatione debitum apparuerit: ſi vero putaverint ſe gravari, poſt repetitionem metropolita cauſam examinet. Si vero metropolita fuerit contra quampiam prædictarum perſonarum hujuſmodi cauſas examinans, & debitum exegerit, & exactus putaverit ſe gravatum, Diœceſeos illi beatiſſimus Patriarcha cauſam determinet. Non enim concedimus prædictis perſonis pro memoratis cauſis ante examinationem & exactionem debiti propter Epiſcopos declinare, & ad alia venire judicia. Si quis autem ex Eccleſiaſticis cui aliqua talis diſpenſatio credita eſt, ante rationum expoſitionem & debitorum ſolutionem moriatur, jubemus ejus hæredes ſimili modo & rationibus & exactionibus ſubjacere. *Nov.* 123. *Cap.* 23.

V.

5. *Thoſe imployed in the ſervice of Hoſpitals, have their Duties preſcribed by the Rules of the Houſe.*

All the other Perſons who are appointed to ſerve the Hoſpitals in their different Functions, Clergymen and others, have their Duties preſcribed to them, according to their Functions, by the Orders and Rules of every Houſe *e*.

e ‘ It is in this that the Order of the Functions ‘ of thoſe Perſons does conſiſt.

VI.

VI.

6. It is only thoſe who are real Objects of Charity that ought to be received into Hoſpitals.

Since Hoſpitals are founded only for the benefit of the Poor, it is the Duty of thoſe who have the Government of them to receive no Perſons into them that can get their ſubſiſtence ſome other way, eſpecially not to receive Perſons who are able to work, and who labour under no other Infirmity but that of Idleneſs; unleſs their want of Age, or ſome other Conſideration, ſhould induce the Governours to take them into thoſe kinds of Hoſpitals, which are erected as Work-houſes for imploying the poorer ſort of People of both Sexes *f*.

f We ought not to encourage the idle Life of ſturdy Beggars. Exploretur in ſingulis & integritas corporum & robur annorum. *L. un. C. de Mendic. & valid.*

'It may be remarked here on all that has been 'ſaid touching the Government and Adminiſtra-'tion of Hoſpitals, that the deſign of relieving the 'Neceſſities of the Poor, who are in thoſe Houſes, 'and the expreſs command of the Law of God to 'give Alms, ought to engage particular Perſons to 'be as charitable as they poſſibly can.

Give Alms of thy Subſtance; and when thou giveſt Alms, let not thine Eye be envious, neither turn thy Face from any Poor, and the Face of God ſhall not be turned away from thee. If thou haſt abundance, give Alms accordingly: if thou have but a little, be not afraid to give according to that little. For thou layeſt up a good Treaſure for thy ſelf againſt the Day of Neceſſity. Becauſe that Alms do deliver from Death, and ſuffereth not to come into Darkneſs. For Alms is a good Gift unto all that give it, in the ſight of the moſt High. Tob. 4. 7, &c.

My Son, defraud not the Poor of his Living, and make not the needy Eyes to wait long. Make not an hungry Soul ſorrowful, neither provoke a Man in his diſtreſs. Add not more Trouble to an Heart that is vexed, and defer not to give to him that is in need. Reject not the Supplication of the afflicted, neither turn away thy Face from a poor Man. Eccluſ. 4. 1, 2, &c.

TIT. XIX.

Of the Uſe of the Temporal Power in what regards the Church.

SEEING Religion is the Foundation of the Order of the Society of Mankind, and that it is for the maintenance of the ſaid Order, that God hath given to Princes the Power that is neceſſary for the ſeveral Uſes of Government, their firſt Duty is to maintain Religion *a*; which implies the Power of imploying their Authority to ſupport that of the Church.

It is of this eſſential Duty of directing to the Glory of God the whole exerciſe of Government, that an Emperor has ſaid, that it ought to be the Beginning, the Progreſs, and the End of it *b*. For the Government and Policy which are to regulate the external Order of Human Society, ought to aim at the ſame end which the Divine Providence had in forming it, and which was only that he might thereby unite Men in his Service by the Spirit of Religion, which raiſes their Minds and Affections towards him.

It follows from this View which Divine Providence had in forming the Society of Mankind, and from this Uſe which Princes ought to make of the Power which he has given them over it, that there is a moſt ſtrict Union between the Spiritual Powers which God eſtabliſhes for the Miniſtry of his Church, and the Temporal Powers to whom he commits the Temporal Government of the ſaid Society; ſeeing theſe two ſorts of Powers have for their common end, the maintaining of Order in the Society, and the uniting of Men in the Worſhip of God, and in the obſervance of all the Duties which

a Decere arbitramur noſtrum imperium ſubditos noſtros de Religione commonefacere, ita enim & & pleniorem adquiri Dei ac ſalvatoris noſtri Jeſu Chriſti benignitatem poſſibile eſſe exiſtimamus, ſi quando & nos pro viribus ipſi placere ſtuduerimus, & noſtros ſubditos ad eam rem inſtituerimus. *l.* 3. *C. de ſum. Trin.*

Sancta Synodus——admonet imperatorem, reges, reſpublicas, principes, & omnes, & ſingulos cujuſcumque ſtatus & dignitatis extiterint, ut, quo largius bonis temporalibus, atque in alios poteſtate ſunt ornati, eo ſanctius, quæ Eccleſiaſtici juris ſunt tanquam Dei præcipua, ejuſque patrocinio tecta, venerentur, nec ab ullis baronibus, domicellis, rectoribus, aliiſve dominis temporalibus, ſeu magiſtratibus, maximeque miniſtris ipſorum principum, lædi patiantur: ſed ſevere in eos, qui illius libertatem, immunitatem, atque juriſdictionem impediunt, animadvertant: quibus etiam ipſimet exemplo ad pietatem, Religionem Eccleſiarumque protectionem exiſtant, &c. *Conc. Trid. ſeſſ.* 25. *cap.* 20. *de reform.*

b Unam nobis eſſe in omni noſtræ reipublicæ & imperii vita in Deo ſpem credimus, ſcientes quia hæc nobis & animæ & imperii dat ſalutem. Unde & legiſlationes noſtras inde pendere competit, & in eam reſpicere, & hoc eis principium eſſe & medium & terminum. *Novel.* 109. *in præfat.*

Cum ſancta atque irreprehenſibilis fides, quam prædicat ſancta Dei Catholica Apoſtolica Eccleſia, nullo modo innovationem recipiat: nos ſequentes ſanctorum Apoſtolorum, & eorum qui poſt eos in ſanctis Dei Eccleſiis converſati ſunt, dogmata, juſtum fore exiſtimavimus, cunctis manifeſtum facere qualiter de fide quæ in nobis eſt, ſentiamus inſiſtentes, & adhærentes traditioni & confeſſioni ſanctæ Dei Eccleſiæ Catholicæ. *l.* 5. *C. de ſum. Trin.*

Religion preſcribes unto them. So that it is a natural Effect of the Union which the Divine Providence has formed between the Spiritual and Temporal Powers, that they ſhould agree among themſelves, and that they ſhould mutually ſupport one another, to the end that every thing which may depend on the Temporal Government may be directed to the ſupport of the ſpiritual Authority, and that they may both of them draw one from the other the Uſe which may be neceſſary for the Publick Good. And altho theſe two ſorts of Powers have their diſtinct Uſes in the manner that has been explained in the 10th Chapter of the Treatiſe of Laws; yet the juſt Diſpenſation of the one and the other within the bounds of their Extent, reconciles and unites them together perfectly well, and they cannot be divided but by the diviſion of thoſe who exerciſe the Miniſterial Functions of them, and by the Encroachments of the one upon the other, when they have a mind to give to their Miniſtry an Extent that does not agree to it.

It belongs to the Power of Princes, and it is their Duty, to give to the Church within their Dominions, all the Protection, and all the Aſſiſtance that it may ſtand in need of. It is for this end that the Chriſtian Princes have made many Laws to enforce the Obſervance and Execution of the Laws of the Church, as may be ſeen in the Codes of the Chriſtian Emperors *Theodoſius* and *Juſtinian*, and in the Ordinances of *France*, wherein are comprehended a great number of Laws relating to Religion; which they have not done with a View to eſtabliſh Rules for the Church, or to ſet themſelves up for Lawgivers or Judges in Spiritual Affairs, as if their Power reached to govern in the Church, in the ſame manner as they may do in the State; but only to enforce the obſervance of the Laws which the Church her ſelf, and the Spiritual Powers to whom God has committed the Care of her have eſtabliſhed, and to protect and maintain the Execution of thoſe Laws *c*, in what they contain relating to the external Order, and where the Temporal Authority may be of Uſe. Thus, for example, Princes do not determine what are the Matters of Faith which God has revealed to his Church, neither do they compoſe the Canons of Eccleſiaſtical Diſcipline, but preſuppoſing that to be true which the Church places in the number of the Articles of Religion, and that which ſhe ordains to be the ſpiritual Diſcipline and Policy, they add to the Authority of the Laws of the Church, that which God has put into their hands; enjoining, as to what concerns the Articles of Faith, their Subjects to ſubmit themſelves to the Doctrine of the Church, prohibiting all Perſons to preach or to teach any thing contrary thereto, and enacting Puniſhments againſt Hereticks. And as to the Diſcipline, they do not regulate, for example, what belongs to the Celebration of the Feſtivals, and the Ceremonies of Divine Worſhip; but they forbid the profanation of the Feſtivals, and puniſh thoſe who do not obſerve them, as alſo thoſe who diſturb the eſtabliſhed Order of Worſhip *d*; they enact likewiſe Puniſhments againſt the Miniſters of the Church who diſturb the ſaid Order *e*.

c Neceſſarium igitur eſſe putavimus, tam hæreticorum vaniloquia & mendacia diſſipare, quam omnibus inſinuare, quomodo, aut ſentiat facta Dei Catholica & Apoſtolica Eccleſia, aut prædicent ſanctiſſimi ejus ſacerdotes. Quos & nos ſequuti, manifeſta conſtituimus ea quæ fidei noſtræ ſunt: non quidem innovantes fidem (quod abſit) ſed coarguentes eorum inſaniam, qui eadem cum impiis hæreticis ſentiunt. Quod quidem & nos in noſtri imperii primordiis pridem ſatagente cunctis fecimus manifeſtum. *l.* 6. *C. de ſum. Trin.*

Cunctos populos, quos clementiæ noſtræ regit temperamentum, in tali volumus religione verſari, quam divinum Petrum Apoſtolum tradidiſſe Romanis, religio uſque nunc ab ipſo inſinuata declarat, quamque Pontificem Damaſum ſequi claret & Petrum Alexandriæ Epiſcopum virum Apoſtolicæ ſanctitatis, hoc eſt, ut ſecundum Apoſtolicam diſciplinam Evangelicamque doctrinam Patris & Filii, & Spiritus ſancti unam deitatem, ſub parili majeſtate, & ſub pia Trinitate credamus. Hanc legem ſequentes Chriſtianorum Catholicorum nomen jubemus amplecti. *l.* 2. *C. Theod. de fid. cath.*

d Si quis in hoc genus ſacrilegii proruperit, ut in Eccleſias Catholicas irruens, ſacerdotibus & miniſtris, vel ipſi cultui, locoque aliquid importet injuriæ: quod geritur, a Provinciæ rectoribus animadvertatur, atque ita Provinciæ moderator ſacerdotum & Catholicæ Eccleſiæ miniſtrorum, loci quoque ipſius, & divini cultus injuriam capitali, in convictos ſive confeſſos reos ſententia noverit vindicandum: nec expectet, ut Epiſcopus injuriæ propriæ ultionem depoſcat cui ſanctitas ignoſcendi gloriam dereliquit, ſitque cunctis laudabile factas atroces ſacerdotibus aut miniſtris injurias veluti crimen publicum perſequi ac de talibus reis ultionem mereri. Quod ſi multitudo violenta a civilis apparitoris executione & adminiculo ordinum vel ordinatorum poſſeſſorumve non poterit flagitari quod ſe armis aut locorum difficultate tueatur: Præſides Provinciarum etiam militari auxilio per publicas litteras appetito competentem vindictam tali exceſſui imponere non morentur. *l.* 10. *C. de Epiſ. & Cler.*

e Sane cum hactenus canones obſervati non recte fuerint, diverſas ex eo paſſi ſumus interpellationes contra clericos & monachos, & quoſdam Epiſcopos

Since theſe ſorts of Laws of Princes regard the general Order of Society, and the common good of the Faithful, we ought not to conſider them as Laws of the Church, which have the Character of the ſpiritual Authority of the Powers who have the Government thereof; but as Temporal Laws, which the Religion of Princes, and their Zeal for the Church, obliges them to enact, for protecting within their Dominions the execution and obſervance of the Laws of Religion, and for maintaining the free exerciſe of it.

It may be obſerved concerning this Uſe of the Temporal Power to enforce the obſervance of the Laws of the Church, that it is an effect of the difference which diſtinguiſhes the preſent ſtate of the true Religion in the Countries where it is received, from that in which it was at the time of its Infancy in the Country where the Government was an Enemy to it: which difference conſiſts in this, that whereas Religion ſubſiſts free and unmoleſted in Chriſtian Countries by means of the protection of the Temporal Powers; it happened on the contrary that when it was eſtabliſhed in the Countries where it met with Oppoſition from the Civil Magiſtrate, it did, notwithſtanding the Perſecution it ſuffered from thoſe Princes who endeavoured to ſmother it in its Infancy, gather ſtrength daily from the blood of the Apoſtles and Martyrs who were ſacrificed to the Fury of the Princes who perſecuted it: and by this way, which would have deſtroyed all other Eſtabliſhments of what nature ſoever, it not only ſupported it ſelf under the Oppreſſion of the moſt cruel Perſecutions, but it was more holy and more flouriſhing in that State, than it has been in the ſtate of Peace which it has enjoyed by the favour of Chriſtian Princes: for it was in the Tranquillity of that peaceable State that the Decay of Chriſtian Piety firſt took its riſe. So that whereas it is by Peace in a State that the good Order of the Civil Government is maintained in it; that very Peace may on the contrary be an occaſion of diſorder to thoſe who do not know how to ſupport themſelves in the Spirit of Religion againſt that Softneſs and Luxury to which Peace and Tranquillity uſually expoſes Men. And this difference between this effect of Peace in Religion, ſo oppoſite to the effect of the ſame Peace in the Temporal Government, is an effect of the difference between the Spirit of the one, and that of the other: which it is of importance to remark, in order to diſcover the Spirit of the different Kinds of the Laws of Religion, and of Civil Government, and the Characters which diſtinguiſh them, and to be the better able to judge of the Principles of the Conduct which thoſe Perſons ought to hold who have the Government of the one and of the other, by the different Views of the Ends for which they were inſtituted.

This difference between the Spirit of Religion and that of the Civil Government of a State, conſiſts in this, that the Spirit of Religion tends to form between all Men a perfect Order, and a ſolid Peace which may be the effect of an Union of Hearts, and of ſuch a Love of every one towards others, that every Man may love all other Men in the ſame manner as he is obliged to love himſelf; that is to ſay, with that Love which raiſes the Mind to the ſole deſire and ſearch after the Sovereign Good, by taking it off from the love of Temporal Goods, of which the Spirit of Religion inſpires into the Minds of all thoſe who are animated with it a ſincere Contempt, and ſuch as allows only a ſober and moderate Uſe of them. So that we are obliged to uſe them only with a Diſpoſition of Mind to part freely with them, rather than do any thing that may be inconſiſtent with the ſole and tranſcendent Love of the Sovereign Good. Thus, it is natural to theſe Characters of the Spirit of Religion, that it ſhould maintain it ſelf under the ſtate of Perſecution, which ſtripping the Faithful of the Riches which they ought to deſpiſe, brings them back again to their Duty, and elevates their Minds to the love of the Sovereign Good, which they are bound to love, and from which nothing ought to

pos; ut qui ſecundum divinos canones non viverent, & quidam etiam inter eos invenirentur, qui nec ipſam quidem vel ſanctæ oblationis, vel ſancti baptiſmatis orationem tenerint aut ſcirent. *Nov.* 137. *in præfat. circa finem.*

Jubemus autem & Provinciarum Præſides, ſi quid neglectum ex his quæ ſtatuimus invenerint, primum quidem cogant Metropolitas & alios Epiſcopos dictas Synodos congregare, & omnia implere quæcunque de Synodis per præſentem legem juſſimus: ſi vera eos morantes noverint & remiſſos, tunc nobis indicent, ut ad competentem protinus correctionem procedamus contra detrectantes Synodos celebrare: ſcituris vero ipſis Præſidibus, & obedientibus ipſis officiis, quod ſi quidem iſta non ſervaverint, extremis ſubjicientur ſuppliciis; confirmamus autem & per præſentem legem a nobis diverſis legibus ſancita de Epiſcopis & Presbyteris & cæteris clericis. *Ibid. cap.* 6. *in f.*

to be capable of ſeparating them.

But the Spirit of the Temporal Government not conſiſting in the regulation of what paſſes in the ſecret corners of Mens Hearts, and regarding on the contrary only what paſſes in their outward Behaviour, the order of which it is to regulate independently of the good or bad Diſpoſitions of the Heart; the Temporal Government is to take notice only of this external Behaviour of Men, and to ſee that the ſame be orderly and peaceable.

One may be able to judge by this difference between the Spirit of Religion and that of the Civil Government, what ought to be the Views of thoſe who exerciſe any Miniſterial Function in either of them; and that as their Ends are different, their Conduct ought to be ſo likewiſe. But the diſtinction between the Spirit of Religion and that of the Temporal Government is no hindrance why they may not agree mutually with one another, ſince the Miniſtry of the one does not engage thoſe who exerciſe it to do any thing in breach of their Duties towards the other. Thus when thoſe who have the Temporal Government in their Hands, or who exerciſe any Function thereof, procure in a Kingdom plenty of all things that are uſeful in the Society of Mankind, they do nothing that is contrary to the Spirit of Religion, which teaches us to deſpiſe all earthly Goods; but they exerciſe a Duty of their Miniſtry: for if on the one part no body is diſpenſed with from obſerving the Law which enjoins the Contempt of earthly Goods, it is certain on the other, that plenty of all Things is neceſſary in a Kingdom for the ſeveral wants, both of the Prince and of the State, and for the wants of particular Perſons, which may be greater or leſs, according to the qualities of the Perſons and their Imployments, which renders neceſſary to one what would be ſuperfluous to another.

Thus, when Princes eſtabliſh Courts of Juſtice, and in order to have Juſtice therein adminiſtred to their Subjects, they chuſe for Judges ſuch Perſons as they believe to have both Capacity and Integrity, they do not in this do any thing contrary to the Spirit of Religion. For altho St. *Paul* teaches us, that the Spirit of Religion diſpoſes us to ſuffer Injuſtice, and to depart from our Intereſts, rather than to defend them by Law-ſuits *f*; and that by the ſame Principle of deſpiſing worldly Goods, this holy Apoſtle adviſes the Faithful to take for Judges of the differences which they may have with one another about Temporal Goods the leaſt among themſelves *g*, that they might avoid going to Law before the Heathen Judges under whom they lived; yet it is nevertheleſs true that Chriſtian Princes are bound to adminiſter Juſtice to their Subjects, whether they love or whether they deſpiſe worldly Goods; and the diſorder would be exceeding great, if under the pretext of the general Duty of the contempt of worldly Goods, Princes ſhould leave the Adminiſtration of Juſtice in the hands of Perſons who are ignorant of the Laws, and who are incapable of the Cares which that Adminiſtration requires.

It follows from theſe Remarks which have been made on the Laws of Religion, the obſervance of which may ſtand in need of the aſſiſtance of Temporal Princes, that the Laws of Princes, which ſerve to protect and maintain the Policy of the Church, having a relation to the publick Order of a Chriſtian State, it is neceſſary to comprehend under this Title, the Principles which concern the Affinity that is between the Policy of the State and that of the Church. The Reader may conſult on this Subject, what has been ſaid in the Preface touching the different Kinds of Unions and Conjunctions which make the Society of Mankind to ſubſiſt throughout the whole World.

It is eaſy to judge by the Remarks already made, what Rules this Title will contain relating to Religion; and that we ought here to confine our ſelves to thoſe Rules, the Violation of which might

f Recompenſe to no Man Evil for Evil. Provide things honeſt in the ſight of all Men. If it be poſſible, as much as lieth in you, live peaceably with all Men. Avenge not your ſelves. Rom. 12. 17, 18, 19.

Now therefore there is utterly a fault among you, becauſe ye go to Law with one another: why do ye not rather take wrong? why do ye not rather ſuffer your ſelves to be defrauded? 1 Cor. 6. 7.

And if any Man will ſue thee at the Law, and take away thy Coat, let him have thy Cloke alſo. Mat. 5. 40. See Luk. 6. 29.

g If then ye have Judgment of things pertaining to this Life, ſet them to judge who are leaſt eſteemed in the Church. I ſpeak to your ſhame. Is it ſo, that there is not a wiſe Man among you? no not one that ſhall be able to judge between his Brethren? But Brother goeth to Law with Brother, and that before the Unbelievers. 1 Cor. 6. 4, 5, 6.

might affect the Publick, by diſturbing or deſtroying the Order thereof, and of which the Obſervance ought for this Reaſon to be enforced by the Authority of the Civil Powers. Thus, for example, the Church forbids the preaching of Heretical Doctrines; ſhe enjoins the Celebration of the Feſtivals by abſtinence from the Works that are prohibited on thoſe Holy-days; ſhe commands abſtinence from Fleſh in Lent; and the Chriſtian Princes authorize the Prohibitions of preaching Hereſies, and puniſh thoſe who tranſgreſs the ſame. They eſtabliſh alſo certain Puniſhments againſt Hereticks *h*: they forbid the holding of Fairs and Markets on Holy-days, as alſo the Works that profane them; and they prohibit in Lent the publick Sale of Fleſh, the eating of which is forbid by the Church during that ſolemn Faſt.

It is to enforce the obſervance of theſe ſorts of Laws of the Church, and of many others of the like nature, that the Chriſtian Emperors and our Kings have made an infinite number of Laws relating to the Eccleſiaſtical Policy, in order to ſupport the ſame, as has been already remarked. And ſince theſe Laws of the Princes make a part of the Publick Law, we ſhall comprehend under this Title only the general Principles and the eſſential Rules that are contained in the ſaid Laws, on which depends the detail of the others: but we ſhall not here take in that whole detail, there being an ample Collection of them in the Ordinances of *France*, where it is eaſy to ſee them, and to compare them with the Rules of this Kind which are collected together in the Codes of the Emperors *Theodoſius* and *Juſtinian*; where it is neceſſary to diſtinguiſh ſuch of the ſaid Laws as are not in uſe with us, which it will be eaſy to perceive by the bare reading of them.

Theſe are the bounds within which we have thought fit to reſtrain the Rules concerning the Eccleſiaſtical Policy, which we intend to comprehend under this Title. But as for all the matters of this Policy which are purely Spiritual, altho they have a relation to the publick Order, and that for that Reaſon they make a part of the Publick Law, ſuch as the Articles of Faith, the Hierarchy of the Church, the diſtinctions of the ſeveral Degrees of Holy Orders, and thoſe of Prelates, the Eccleſiaſtical Juriſdiction in matters purely Spiritual, and other matters of the like nature; the Character which they may have of being a part of the Publick Law, and their Affinity to the matters of the Eccleſiaſtical Policy, do not make it neceſſary to join them with it, and to comprehend therein in general every thing of Religion which may have the Character of being a part of the Publick Law.

Some may be apt to think, that ſince thoſe who have collected the Laws of the Church in that Collection which is called the Canon Law, have inſerted therein an infinite number of Rules which relate only to Temporal Affairs, and many of which have been taken from the Heathen Authors of the Roman Laws touching the matters of Sale, Exchange, Letting and Hiring, Depoſits, Donations, Mortgages, Succeſſions, and other matters purely Temporal; ſo likewiſe we might take in here the Rules of the Church which concern only Spiritual Affairs: but this Example does not carry with it any ſuch Conſequence. For thoſe who were the Compilers of the Body of the Canon Law may have had Reaſons for inſerting in it thoſe Temporal Laws, which Reaſons would only juſtify the mixing of Eccleſiaſtical Laws in a Body of Publick Law, which relates only to the Civil Government. Thus, they may have imagined that thoſe Temporal Laws which are mixed in the Body of the Canon Law, might be conſidered as Rules for the Conduct of particular Perſons in their Temporal Concerns, and as Principles of the Duties of Conſcience, which oblige them to do Juſtice to one another in their Dealings, and in the ſeveral Affairs which they may have with one another. So that thoſe Temporal Laws may be conſidered under this View, as Acceſſories to the Laws of Religion, and ſuch as might be uſeful to the Miniſters of the Church for deciding Caſes of Conſcience. Thus thoſe Compilers may

h Omnes hæreticos utriuſque ſexus, quocunque nomine cenſeantur, perpetua damnamus infamia, diffidamus, atque bannimus: cenſentes, ut omnia bona talium confiſcentur, nec ad eos ulterius revertantur, ita quod filii eorum ad ſucceſſionem eorum pervenire non poſſint; cum longe gravius ſit, æternam, quam temporalem offendere majeſtatem. Qui autem inventi fuerint ſola ſuſpicione notabiles, niſi ad mandatum Eccleſiæ juxta conſiderationem ſuſpicionis, qualitatemque perſonæ, propriam innocentiam congrua purgatione monſtraverint; tanquam infames & banniti ab omnibus habeantur. *l.* 19. *C. de hæret. & manic.*

See the 4th Article of the 1ſt Section of the 1ſt Title that follows.

may have been induced to make this mixture in consideration of the double Authority of the Popes in the Church, and in their Dominions, of which they are the Temporal Princes, having a right to make Temporal Laws therein; and they may likewise have proposed to themselves the Example of the Divine Law in the Old Testament, which God himself endited unto *Moses*, and where he added to the Laws of Religion many Rules for Temporal Affairs; because he himself exercised in a visible manner, both the Spiritual and Temporal Government over the elect People to whom he gave those Laws.

They may also have had in view the Ecclesiastical Jurisdiction, in which there may fall out differences touching all matters, which was more common when the said Jurisdiction was less restrained than it is at present in *France:* but seeing our design of digesting into Order the Rules of the Publick Law reaches no farther than to the Temporal Government, we cannot here take in as Accessories the Laws of Religion; and the mixing together of these two sorts of Laws under one and the same Title, would be injurious to the Dignity and Holiness of the Laws of Religion, and to the distinguished Character of Authority which they receive from the Spirit of God who has inspired them, and who by the said Laws governs and guides the Church in a manner very different from that in which God governed it under the antient Covenant. For under the New Covenant, Jesus Christ who is the Lawgiver, has not only not made any Laws for the Temporal Government, but he would not so much as make himself a Judge of a difference at the request of the Parties *i*; and as for every thing which relates to the Temporal Affairs, he has left the direction thereof to the Temporal Powers, teaching, both himself and by his Disciples, the Obedience that is due to them, and informing us of the Dispositions that are necessary for the right Use of worldly Goods.

One may be able to judge by all these Reflections, in what manner the Spiritual and Temporal Powers agree and are reconciled together; it remains only to consider what Use ought to be made of the Temporal Power in matters relating to the Church, and what is, in relation to the said Use, the Power, and also the Duty of Princes.

As it is the Duty of those who exercise the Spiritual Ministry, to teach and to inculcate on all Men the Duty of Obedience to the Civil Powers, and the observance of the Laws and Orders of their Princes; so it is in the same manner the Duty of those who exercise the Ministry of the Temporal Government, to enjoin all those who are subject to them, to be obedient to the Spiritual Powers, and to oblige them to the performance of the Duties which that Obedience requires, by all the means which may depend on the Use of the Temporal Power: which implies a Right to support, protect and enforce the execution of the Laws of the Church, to punish those who transgress them in such a manner as thereby to disturb the Publick Order, and even to enact Laws for the support and defence of the Laws of the Church, and of the Ecclesiastical Discipline. Thus for example, seeing the Laws of the Church ordain the Celebration of Sundays and Holy-days, by a Cessation from Labours which are a violation of the Solemnity of them, and that the Ministers of the Church can inflict no other Punishments but Spiritual Corrections and Penances, the Accomplishment whereof does often depend on the will of those to whom they are enjoined, and which moreover do not always repair the publick Scandal that is given by the profanation of the Festivals; Princes therefore ordain Punishments against those who do not celebrate them as they ought, condemning them in Fines, and other Penalties, according to the quality of the Facts and the Circumstances. Thus for another example, the Laws of the Church oblige to Residence *l* Pastors and others whose Functions require their Presence for the exercise of their Ministry and discharge of their Duty; and if they disobey the said Laws, it is the Duty of the Prince, and he has Authority to constrain them to it by ways that depend on his Temporal Power, such as the Seizure of their Revenues; and the Kings of *France* have made divers Regulations on this Head.

It is therefore to enforce the Observance of the Laws of the Church, and

i Luke 12. 13, 14.
See the 10th Chapter of the Treatise of Laws, N° 6.

l See the 8th Article of the 2d Section of the Duties of the Clergy with respect to the publick Order in the tenth Title of the Clergy, and the Texts and Ordinances which are there quoted.

to

to oblige the Clergy to pay a due Obedience to them, that Princes have a Right to make Laws and Regulations for putting them in execution: and this is what has been practiſed by the Chriſtian Emperors, and by the Kings of *France*, who have made ſeveral Laws to enforce the Obſervance of the Laws of the Church, as may be ſeen by the Collections of the Conſtitutions of the Emperors in their Codes, by many Novels of the Emperor *Juſtinian*, and by the Ordinances of the Kings of *France*, who call what they ordain concerning Matters which relate to the Church, Political Laws *m*, and ſtile themſelves therein *Protectors*, *Guardians*, *Conſervators* and *Executors* of what the Church teaches and enjoins *n*.

It appears by this Uſe of the Temporal Authority in what relates to the Church, that the temporal Power makes no Encroachment on the ſpiritual Authority, and that it only conforms it ſelf thereto, and enforces the Execution of what the Church has already decreed: and it is only to procure Obedience to be paid to the Laws of the Church, that Princes give their helping Hand; and this Service which they render to the Church is a part of the temporal Government, the Order whereof demands that the Laws of the Church be obſerved in it.

This Duty and Power of Princes to enforce the Obſervance of the Laws of the Church, obliges them alſo not to ſuffer them to be violated by the Miniſters of the Church themſelves, or by the Eccleſiaſtical Judges, who ſhould attempt any thing contrary to the Diſcipline of the Church; and in the Caſes of Attempts of this nature an effectual Remedy is to be applied by the Temporal Power of the Prince in the manner that is practiſed in his Dominions. Thus in *France* there lies an Appeal from what has been decreed contrary to the Rules of the Church; and theſe ſorts of Appeals are called Appeals from Abuſes, becauſe they tend to reform the Abuſe which the Miniſters and Eccleſiaſtical Judges have made of their Authority by the ſaid Encroachments. This extends even to the Briefs of Popes which may interfere with the Laws of the Church. And the ſaid Appeals are interpoſed, either by the particular Perſons who have an Intereſt therein, or by the King's Sollicitors General in the Parliaments of *France*, which the Kings have veſted with the Power of deciding theſe ſorts of Appeals, in order to maintain the Diſcipline of the Church in its Purity againſt the ſaid Abuſes. But when it is a Brief of the Pope that is complained of, ſuch reſpect is paid to the Holy See, that they do not appeal from the Brief itſelf, but from the Execution thereof, which is called Fulmination.

It is this Purity of the Eccleſiaſtical Diſcipline, which is called in *France* the Liberties of the *Gallican* Church; not by virtue of any particular Privilege which exempts the Church of *France* from the Laws of the Univerſal Church, but by an inviolable Attachment to that Purity of Diſcipline which conſiſts in that which is the Antient and Common Law of the Univerſal Church *o*. Thus, when the Authority of the Temporal Power reſtrains thoſe Encroachments, it does nothing but preſerve to the Church of *France* the free Uſe of the Eccleſiaſtical Diſcipline in its Purity, and give in effect to the Church that Liberty which is agreeable to its Spiritual Reign, which ought to reſtrain the Abuſes and Encroachments that diſturb the Order thereof.

m *Charles* IX. *July* 17. 1561.

n *Francis* I. *July* 1543.

Cupiens ſancta Synodus Eccleſiaſticam diſciplinam in Chriſtiano populo non ſolum reſtitui, ſed etiam perpetuo ſartam, tectam a quibuſcunque impedimentis conſervari; prætereaque de Eccleſiaſticis perſonis conſtituit, ſæculares quoque principes officii ſui admonendos eſſe cenſuit, confidens eos, ut catholicos, quos deus ſanctæ fidei eccleſiæque protectores eſſe voluit, jus ſuum Eccleſiæ reſtitui, non tantum eſſe conceſſuros, ſed etiam ſubditos ſuos omnes ad debitam erga clerum, parochos & ſuperiores ordines reverentiam revocaturos; nec permiſſuros ut officiales, aut inferiores magiſtratus, eccleſiæ & perſonarum eccleſiaſticarum immunitatem, dei ordinatione & Canonicis ſanctionibus conſtitutam, aliquo cupiditatis ſtudio, ſeu in conſideratione aliqua violent, ſed una cum ipſis principibus debitam ſacris ſummorum Pontificum, & conciliorum conſtitutionibus obſervantiam præſtent, &c. *Conc. Trid. Seſſ.* 25. *c.* 20.

o ¶ ‘ We have made uſe of this Expreſſion of the *antient and common Law* ‘ of the Univerſal Church, becauſe of ‘ the Diverſity of Sentiments among ‘ the Authors who have writ on this ‘ Subject of the Liberties of the *Gallican* Church, ſome of them having confined to the four firſt Councils the Laws ‘ of the Church, which the Liberties of ‘ the *Gallican* Church preſerve in their ‘ Purity, and others having comprehended under the ſaid Laws the Decrees ‘ of the Popes, even thoſe of the lateſt ‘ Reign, with this Qualification, that ‘ none of the ſaid Decrees of the Popes ‘ ſhould

'ſhould be conſider'd as having the force 'of Laws in *France*, except ſuch of them 'as have been there received in Uſe, 'which is very juſt. For on one part 'there are a great many of the ſaid 'Decrees which are very juſt and equi-'table, and which we obſerve: and on 'the other part, not only are there 'ſome of them which we do not ob-'ſerve, becauſe we keep cloſe to other 'Rules of the Church, and to Tradi-'tion in ſuch Matters wherein the Diſ-'cipline cannot vary according to 'Times and Places; but there are ſome 'of them which we reject, as not pre-'ſerving that Purity, and there is one 'of them which we look upon to be 'erroneous and contrary to the Spirit 'of the Church, which is the Extrava-'gant *Unam Sanctam* of *Boniface* VIII. 'who declares himſelf to be ſuperior 'to Kings in Matters Temporal, and 'claims a Right to depoſe them. Eve-'ry body knows the Hiſtory of what 'paſt between the Pope and King *Phi-'lip* the *Fair*, and that the ſaid Decre-'tal was a Conſequence thereof.

Unam ſanctam Eccleſiam Catholicam, & ipſam Apoſtolicam urgente fide credere cogimur, & tenere. Noſque hanc firmiter credimus, & ſimpliciter confitemur; extra quam nec ſalus eſt, nec remiſſio peccatorum, ſponſo in canticis proclamante (una eſt columba mea, perfecta mea. Una eſt matri ſuæ, electa genitrici ſuæ) quæ unum corpus myſticum repræſentat, cujus caput Chriſtus: Chriſti vero Deus. In qua unus Dominus, una Fides, unum Baptiſma. Una nempe fuit diluvii tempore Arca Noe, unam Eccleſiam præfigurans, quæ in uno cubito conſummata, unum (Noe videlicet) gubernatorem habuit, & rectorem, extra quam omnia ſubſiſtentia ſuper terram legimus fuiſſe delata. Hanc autem veneramur & unicam dicente Domino in Propheta, (erue a framea Deus animam meam, & de manu canis unicam meam) pro anima enim, id eſt, pro ſeipſo capite ſimul oravit, & corpore: quod corpus unicam ſcilicet Eccleſiam nominavit, propter ſponſi fidei, ſacramentorum, & charitatis Eccleſiæ unitatem. Hæc eſt tunica illa Domini intonſutilis, quæ ſciſſa non fuit, ſed ſorte provenit. Igitur, Eccleſiæ unius, & unicæ unum corpus, unum caput, non duo capita, quaſi monſtrum, Chriſtus videlicet & Chriſti Vicarius Petrus, Petrique ſucceſſor: dicente Domino ipſi Petro (paſce oves meas) meas, inquit, & generaliter, non ſingulariter has, vel illas, per quod commiſiſſe ſibi intelligitur univerſas. Sive ergo Græci, ſive alii ſe dicant Petro, ejuſque ſucceſſoribus non eſſe commiſſos, fateantur neceſſe ſe de ovibus Chriſti non eſſe: dicente Domino in Joanne, unum ovile, & unicum eſſe paſtorem. In hac ejuſque poteſtate duos eſſe gladios, ſpiritualem videlicet, & temporalem Evangelicis dictis inſtruimur. Nam dicentibus Apoſtolis (ecce gladii duo hic) in Eccleſia ſcilicet, cum Apoſtoli loquerentur, non reſpondit Dominus nimis eſſe ſed ſatis. Certe qui in poteſtate Petri temporalem gladium eſſe negat, male verbum attendit Domini proferentis (converte gladium tuum in vagina.) Uterque ergo eſt in poteſtate Eccleſiæ, ſpiritualis ſcilicet gladius & materialis. Sed is quidem pro Eccleſia, ille vero ab Eccleſia exercendus. Ille ſacerdotis, is manu regum & militum, ſed ad nutum, & patientiam ſacerdotis. Oportet autem gladium eſſe ſub gladio, & temporalem auctoritatem ſpirituali ſubjici poteſtati: nam cum dicat Apoſtolus; Non eſt poteſtas niſi a Deo, quæ autem ſunt a Deo ordinata ſunt; *non autem ordinata eſſent, niſi gladius eſſet ſub gladio, & tamquam inferior reduceretur per alium in ſuprema. Nam ſecundum beatum Dionyſium, lex divinitatis eſt infima per media in ſuprema reduci. Non ergo ſecundum ordinem univerſi omnia æque, ac immediate, ſed infima per media, & inferiora per ſuperiora ad ordinem reducuntur. Spiritualem autem & dignitate, & nobilitate terrenam quamlibet præcellere poteſtatem, oportet tanto clarius nos fateri, quanto ſpiritualia temporalia antecellunt. Quod etiam ex decimarum donatione, & benedictione, & ſanctificatione ex ipſius poteſtatis acceptatione, ex ipſarum rerum gubernatione claris occulis intuemur. Nam veritate teſtante, ſpiritualis poteſtas terrenam poteſtatem inſtituere habet, & judicare, ſi bona non fuerit: ſic de Eccleſia & Eccleſiaſtica poteſtate verificatur vaticinium Jeremiæ (Ecce conſtitui te hodie ſuper gentes, & regna) & cætera quæ ſequuntur. Ergo ſi deviat terrena poteſtas, judicabitur a poteſtate ſpirituali; ſed ſi deviat ſpiritualis minor, a ſuo ſuperiori: ſi vero ſuprema, a ſolo Deo, non ab homine poterit judicari;* teſtante *Apoſtolo,* Spiritualis homo judicat omnia, ipſe autem a nemine judicatur. *Eſt autem hæc auctoritas (etſi data ſit homini, & exerceatur per hominem) non humana, ſed potius divina, ore divino Petro data, ſibique, ſuiſque ſucceſſoribus in ipſo, quem confeſſus fuit; Petra firmata: dicente Domino ipſi Petro,* Quodcumque ligaveris, &c. *Quicunque igitur huic poteſtati a Deo ſic ordinatæ reſiſtit, Dei ordinationi reſiſtit, niſi duo (ſicut Manichæus) fingat eſſe principia; quod falſum & hæreticum judicamus: quia teſtante Moyſe, non in principiis ſed in principio cœlum Deus creavit, & terram. Porro ſubeſſe Romano*

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Pontifici omni humanæ creaturæ declaramus, dicimus, definimus, & pronuntiamus omnino eſſe de neceſſitate ſalutis. Extravag. Unam. ſanctam.

Beſides this Uſe of the temporal Power in maintaining the Laws of the Church, it extends alſo to the Uſe of defending it ſelf againſt the Attempts of the Miniſters of the Church, who ſhould encroach upon any of the Rights and Functions which the Civil Magiſtrate holds of God. And as it is juſt that Princes ſhould maintain the Laws of the Church, and protect it in the Exerciſe of all its Rights; ſo it is equally juſt, that they ſhould ſee to the Obſervance of their own Laws, and maintain themſelves in the exerciſe of the Rights which belong to them by virtue of the Power which they derive from God. It is by virtue of this Right, that as our Princes give order for reforming the Abuſes that Miniſters of the Church, and Eccleſiaſtical Judges may make of their Authority in breach of the Laws of the Church, ſo alſo they reform in the ſame manner whatever Encroachments may be made by the Miniſters of the Church, or by Eccleſiaſtical Judges, on the Laws of the State, or on the Rights of the Sovereign. And by doing themſelves this Juſtice, they are ſo far from breaking in on the Laws of the Church, that they obſerve on the contrary one of the chiefeſt and moſt capital of them, and which is not only a Law of the Church, but of God himſelf, which has ordained the Miniſters of the Church themſelves to pay Obedience to the temporal Powers in Matters belonging to their Functions.

We muſt alſo take notice of a third Uſe of the temporal Power in what concerns the Church, and which conſiſts in the Right which Princes have over whatever is in the Diſcipline of the Church relating to temporal Affairs; as for example, the Poſſeſſion of Goods given to the Church, all her Right to which ſhe profeſſes to hold of the Princes *o*.

Theſe are the ſeveral Uſes of the temporal Power in Matters relating to the Church, which ſhall be the ſubject Matter of this Title, which we ſhall divide into three Sections: The Firſt ſhall be of the Uſe of the temporal Power in Matters relating to the Church; the Second, of the Uſe of the ſame Power, for reſtraining the Encroachments of the Miniſters of the Church on the Rights of Princes, and of Appeals on account of ſuch Encroachments; and the Third, of the Uſe of the ſame Power in Matters which are temporal, in the Eccleſiaſtical Policy.

It is neceſſary to obſerve touching all the Matters that are to be treated of in this Title, that we do not intend to enlarge on the Detail of any one of them; for it not being the Deſign of this Book to treat of Matters relating to the Church, we have inſerted here this laſt Title, only to give general Ideas of ſome Matters which relate to the Policy of the Church, and where the Spiritual Authority ſtands in need of Aſſiſtance from the temporal Power of Princes. But it was not our buſineſs to explain the Detail of the Rules concerning theſe Matters: for what is ſpiritual in the ſaid Rules does not come within the Deſign of this Book; and what they contain relating to temporal Affairs, conſiſts in arbitrary Rules which the Ordinances, the Agreements and other Laws of the Church, and Uſage have eſtabliſhed; and which for this reaſon do not come within the Deſign of this Book, but are to be met with in their proper Places, and in the Collections which have been made of them; and thoſe among others which have been made by ſeveral Authors touching Matters which relate to the Liberties of the *Gallican* Church, Appeals from Abuſes, and the Right of the Regale *p*.

o Quo jure defendis villas Eccleſiæ, divino an humano? Divinum jus in ſcripturis habemus: humanum jus in legibus Regum. Unde quiſque poſſidet, quod poſſidet? Nonne jure humano? *Diſt.* 8. *Can.* 1.

Jura autem humana jura imperatorum ſunt. Quare? Quia ipſa jura humana per Imperatores & Reges ſæculi Deus diſtribuit generi humano. *Ibid.*

p See the laſt Article of Sect. 2.

SECT. I.

Of the Uſe of the Temporal Power in Matters relating to the Church.

The CONTENTS.

1. *There are two ſorts of Duties which require the Uſe of two ſorts of Powers.*
2. *Uſe of the ſpiritual Powers.*
3. *Uſe of the temporal Powers.*
4. *Penalties againſt Hereticks.*
5. *Penalties againſt thoſe who tranſgreſs the Laws of the Church.*
6. *Pu-*

6. *Punishment of Crimes which are injurious to the Majesty of God in a more especial manner.*
7. *Laws of temporal Princes to enforce the Observance of the Laws of the Church.*
8. *The Use of the temporal Power for executing the Sentences of Ecclesiastical Judges.*
9. *The Right of the Regale.*

I.

1. *There are two sorts of Duties which require the use of two sorts of Powers.*

THE Duties which Religion enjoins are of two sorts: One is, of those which relate to the inward Dispositions of the Mind and of the Heart of every Person, and which demand in the Mind the Knowledge and Belief of the Mysteries and Truths it teaches us, and in the Heart a Respect and Love of the said Mysteries and Truths. The other is, a sincere and faithful Observance of all its Laws, whether they be limited to what passes inwardly in the Mind and in the Heart, or whether they enjoin any Duties to be performed outwardly, and which have a relation to other Persons, or even to the Publick. It is of this second sort of Duties that those are which demand on some occasions the Use of the temporal Power: which distinguishes them from the other Duties, in which the temporal Power can be of no use, and which must be maintained and enforced by the spiritual Powers alone *a*.

a See the Articles which follow.

II.

2. *Use of the spiritual Powers.*

As to what passes inwardly in the Mind and Heart of Man, the Church hath its own proper Ways for bringing back to their Duty those who go astray from it; but without any occasion for the Assistance of the temporal Power, and it employs in this Particular only its own Power. This Power which is peculiar to the Church, consists in the Power of binding and loosing, by the Ministry which is called the Power of the Keys, which were put into the hands of St. *Peter*, the Head of the Church, and his Successors, and which is by them communicated to those who have a Share in the said Ministry and Power, which they exercise in the Administration of the Sacraments, and by the Ways which bind and which loose, and who by this double Function open or shut the Gates of Heaven; and in this the temporal Power has no manner of right, nor any share *b*.

b And the Lord spake unto Moses, *saying, Bring the Tribe of* Levi *near, and present them before* Aaron *the Priest, that they may minister unto him. And they shall keep his Charge, and the Charge of the whole Congregation before the Tabernacle of the Congregation, to do the Service of the Tabernacle.* Numb. 3. 5, 6, 7.

And thou shalt appoint Aaron *and his Sons, and they shall wait on their Priests Office: And the Stranger that cometh nigh, shall be put to Death.* Numb. 3. 10.

And I say also unto thee, that thou art Peter, *and upon this Rock I will build my Church, and the Gates of Hell shall not prevail against it. And I will give unto thee the Keys of the Kingdom of Heaven; and whatsoever thou shalt bind on Earth, shall be bound in Heaven; and whatsoever thou shalt loose on Earth, shall be loosed in Heaven.* Mat. 16. 18, 19. Mat. 18. 18. *See* John 20. 22.

III.

3. *Use of the temporal Powers.*

As to the external Actions of Man, which may have some relation to the publick Order of the Society, every thing that violates or transgresses any Duty of Religion, and tends likewise to disturb the publick Order of the Society, is restrained by the Authority of the temporal Power, which inflicts the Punishments that the Nature of the Fact may deserve, according to the Circumstances. Thus, as to what concerns the first Duties of Religion; seeing the Rules of a sincere and true Belief of the Mysteries and Articles of Faith, imply the Duty of making a publick Profession of that Faith, and of teaching and publishing nothing that is contrary to it; it belongs to the Power of Princes, and it is their Duty to restrain and punish those who transgress the said Rules, and who teach or propagate false and erroneous Doctrines contrary to the established Faith of the Church: and Princes acquit themselves of this Duty, not by judging of the Doctrine, which belongs only to the Church herself, and to her Ministers, but by causing false and erroneous Doctrines to be examined by the Ministers of the Church, and by inflicting on those who after having maintained and defended the said Errors, refuse to retract them, the Punishments which they may deserve on account of their Rebellion to the Church, and of the Trouble which they cause in the publick Order of the Society, where Divisions about Matters of Faith may be attended with Seditions, or other great Inconveniences. It is to fulfil this Duty of Princes, that the Kings of *France*, after the Example of the first Christian Emperors, have caused to be transcribed in their Ordinances, the Articles of Faith drawn out of the Councils, and have enjoined the Observance of them, forbidding the preaching of any thing that may be directly or indirectly contrary to

to them, and puniſhing Hereticks, and thoſe who preach or teach falſe and erroneous Doctrines contrary to the Faith, even with corporal Puniſhments *c*.

c Nemo clericus, vel militaris, vel alterius cujuſlibet conditionis, de fide chriſtiana, publice turbis coadunatis & audientibus, tractare conetur in poſterum ex hoc tumultus & perfidiæ occaſionem requirens. Nam & injuriam facit judicio reverendiſſimæ Synodi, ſi quis ſemel judicata ac recte diſpoſita revolvere & publice diſputare contenderit: cum ea quæ nunc de chriſtiana fide a ſacerdotibus, qui Chalcedone convenerunt, per noſtra præcepta ſtatuta ſunt, juxta Apoſtolicas expoſitiones & inſtituta ſanctorum patrum trecentorum decem & octo in Nicæa, & centum quinquaginta in hac regia urbe definita eſſe noſcantur. Nam in contemptores hujus legis pœna non deerit: quia non ſolum contra fidem vere expoſitam veniunt, ſed etiam Judæis & Paganis ex hujuſmodi certamine profanant veneranda myſteria. Igitur ſi clericus erit, qui publice tractare de religione auſus fuerit a conſortio clericorum removebitur, ſi vero militia præditus ſit, cingulo ſpoliabitur. Cæteri autem hujus criminis rei, ſi quidem liberi ſint, de hac ſacratiſſima urbe expellentur, pro vigore judiciario etiam competentibus ſuppliciis ſubjugandi: ſi vero ſervi, ſeveriſſimis animadverſionibus plectentur. *l.* 4. *c. de ſum. Trin.*

Cum recta atque irreprehenſibilis fides quam prædicat ſancta dei catholica & apoſtolica eccleſia, nullo modo innovationem recipiat: nos frequentes ſanctorum Apoſtolorum, & eorum qui poſt eos in ſanctis Dei eccleſiis converſati ſunt dogmata, juſtum fore exiſtimavimus, cunctis manifeſtum facere qualiter de fide quæ in nobis eſt, ſentiamus inſiſtentes & adhærentes traditioni & confeſſioni ſanctæ dei eccleſiæ catholicæ, &c. *l.* 5. *in princ. eod.*

Si enim aliqui poſt hanc noſtram præmonitionem certo & liquido id cognoſcentibus & competentibus locorum epiſcopis deo amantiſſimis; inventi fuerint poſthac in contraria his opinione eſſe: hi nullius indulgentiæ expectent veniam. Jubemus enim tales, tanquam confeſſos hæreticos, competenti animadverſioni ſubjugari. *d. l.* §. *ult.*

See the Ordinances of *Francis* I. in *July* 1543. of *Henry* II. the 17th and 23d of *June*, 1551.

See the following Article, and the Texts there quoted.

IV.

4. *Penalties againſt Hereticks.*

It is by the ſame Policy which ought to maintain Religion, that Catholick Princes prohibit within their Dominions Diviſions touching Matters of Religion, Schiſms, and the Exerciſe of any other Religion except the Catholick alone, and exclude all Hereticks from it, by inflicting Penalties againſt them as there is occaſion *d*.

d Cunctos populos quos clementiæ noſtræ regit imperium, in tali volumus religione verſari quam divum Petrum Apoſtolum tradidiſſe Romanis religio uſque adhuc ab ipſo inſinuata declarat. *l.* 1. *C. de ſumm. Trin.*

Hanc legem ſequentes chriſtianorum catholicorum nomen jubemus amplecti: reliquos vero dementes, veſanoſque judicantes, hæretici dogmatis infamiam ſuſtinere, divina primum vindicta, poſt etiam motus animi noſtri quem ex cæleſti arbitrio ſumpſerimus ultione plectendos. *d. l.* 1. §. 1.

Nullus hæreticis miniſteriorum locus, nulla ad exercendam animi obſtinatioris dementiam pateat occaſio. Sciant omnes, etiam ſi quid ſpeciali quolibet reſcripto per fraudem elicito ab hujuſmodi hominum genere impetratum ſit, non valere. Arceantur cunctorum hæreticorum ab illicitis congregationibus turbæ: unius & ſummi Dei nomen ubique celebretur. Nicænæ fidei dudum a majoribus traditæ, & divinæ religionis teſtimonio atque aſſertione firmatæ obſervantia ſemper manſura teneat. *l.* 2. *eod.*

Qui vero non iiſdem inſerviunt, deſinant affectatis dolis alienum veræ Religionis nomen aſſumere, & ſuis apertis criminibus denotentur, atque ab omni ſubmoti Eccleſiarum limine penitus arceantur: cum omnes hæreticos illicitas agere inter oppida congregationes vetemus. At ſi quid eruptio factioſa tentaverit, ab ipſis etiam urbium mœnibus exterminato furore propelli jubemus, ut cunctis orthodoxis epiſcopis qui Nicænam fidem tenent catholicæ eccleſiæ toto orbe reddantur. *d. l.* §. 2.

Primum eſſe & maximum bonum omnibus hominibus credidimus, veræ & immaculatæ Chriſtianorum fidei rectam confeſſionem: ut per omnia hæc roboretur, & omnis orbis terrarum ſanctiſſimi ſacerdotes ad concordiam copulentur, & conſone immaculatam Chriſtianorum confeſſionem prædicent, & omnem occaſionem quæ ab hæreticis invenitur auferant, quod oſtenditur ex diverſis conſcriptis a nobis libris & edictis. Sed quoniam hæretici neque Dei cogitant timorem, neque interminatas talibus pœnas ex legum ſeveritate conſiderantes, diaboli opus implent, & quoſdam ſimplicium ſeducentes ſanctæ fidei catholicæ & apoſtolicæ eccleſiæ, adulteras collectas, & adultera baptiſmata latenter faciunt: pietatis exiſtimavimus, per præſens noſtrum edictum monere eos qui tales ſunt, quatenus & ipſi recedant ab hæretica veſania, & nec aliorum animas per ſimplicitatem perdant, ſed magis concurrant ad ſanctam dei eccleſiam: in qua recta prædicantur dogmata, & omnes hæreſes cum principibus ſuis anathematizantur. Noſſe enim volumus omnes quia ſi de cætero aliqui inveniantur aut contrarias collectas facientes, aut apud ſemetipſos collectionem: nequaquam omnino eos ferimus; ſed domos quidem ubi aliquid delinquitur ſanctæ aſſignamus eccleſiæ: his autem qui colligunt, aut apud ſe colliguntur, ex conſtitutionibus pœnas inferri omnibus modis jubemus. *Nov.* 132.

Hæc igitur ſunt in quibus per divinum noſtrum edictum hæreticos coarguimus, cui divino edicto, vel omnes reperti hic veriſſimi epiſcopi & reverendiſſimi archimandritæ cum tua ſanctitate ſubſcripſerunt, &c. *l.* 7. §. 3. *c. de ſumm. Trin.*

'According to the Ordinances of *France* a Proſecution is carried on againſt Hereticks, and upon 'Conviction they are condemned to undergo the 'Puniſhments of ſeditious Perſons, Schiſmaticks and 'Diſturbers of the publick Peace and Tranquillity.

See the Ordinance of the 27th of *June* 1551, Art. 1. and of the 29th of *January* 1534, and of *July* 1543. and others.

['By the antient Law of *England* he that was 'duly convict of Hereſy, and refuſed to abjure the 'ſame, was to be burnt to Death. *Coke* 3. *Inſt.* 'cap. 5. But by *Stat.* 29. *Car.* 2. *Cap.* 9. the 'Writ *de haretico comburendo* was taken away, and 'all Puniſhment by Death, in purſuance of any Eccleſiaſtical Cenſures, utterly aboliſhed; in which 'Statute there is a ſaving of the Juriſdiction of the 'Eccleſiaſtical Courts, that in Caſes of Atheiſm, Blaſphemy, Hereſy or Schiſm, and other damnable 'Doctrines and Opinions, they may proceed to puniſh the ſame according to his Majeſties Eccleſiaſtical Laws, by Excommunication, Deprivation, Degradation, and other Eccleſiaſtical Cenſures.

'The Law in *England* has likewiſe received an 'Alteration of late Years in relation to the Penalties which thoſe who ſeparated themſelves from 'the Communion of the Church of *England* were

'formerly

‹ formerly liable to; all Proteſtant Diſſenters being ‹ at preſent exempt from the ſaid Penalties, and ‹ being allowed the free Exerciſe of their Worſhip ‹ in their publick Meetings, under certain Reſtric- ‹ tions and Limitations. *Stat.* 1. *Gul. & Mar. Seſſ.* 1. *cap.* 18.]

V.

5. Penalties againſt thoſe who tranſgreſs the Laws of the Church.

As to what concerns the Manners of the People, and the Diſcipline of the Church, the Civil Magiſtrate has Power, and it is likewiſe his Duty to employ his Authority for enforcing the Obſervance of the Laws of the Church, in ſo far as they contain Rules about Manners which may regard the publick Order. Thus, by their Laws they exhort their Subjects to attend diligently on the divine Service, particularly on Holy-Days. Thus they prohibit the Profanation of Places conſecrated to God's Worſhip, and every thing that is contrary to the Celebration of the great Feſtivals of the Church; ſuch as the holding of Fairs and Markets, the working upon thoſe Holy-Days, and every thing that might diſturb the ſolemn Obſervance of them. Thus they prohibit the Sale of Meat during the time of *Lent*, except it be for the Sick in Hoſpitals, and for other ſick Perſons, in caſes of Neceſſity; and they puniſh by Fines and other Penalties, according to the Quality of the Facts, the Perſons who tranſgreſs the ſaid Order *e*.

e See the Ordinances of *Orleans*, Art. 23. of *Blois*, Art. 38. and the other Ordinances touching theſe Matters.

VI.

6. Puniſhment of Crimes which are injurious to the Majeſty of God in a more eſpecial manner.

The Temporal Government which reſtrains and puniſhes every thing that may diſturb the publick Worſhip of God, or the Solemnization of the great Feſtivals of the Church, and other the like Diſobediences to the Laws of the Church, reſtrains and puniſhes with much more Reaſon, and by more ſevere Penalties, Crimes which wound Religion in a more ſenſible manner, ſuch as the Crimes of High Treaſon againſt the Divine Majeſty, Sacrilege, Blaſphemy, Impiety, Simony, Sorcery, Witchcraft, Fortune-telling, and other Crimes againſt Religion *f*.

f Si quis in hoc genus ſacrilegii proruperit, ut in eccleſias catholicas irruens, ſacerdotibus & miniſtris, vel ipſi cultui, locoque aliquid importet injuriæ, quod geritur, a Provinciæ rectoribus animadvertatur: atque ita provinciæ moderator, ſacerdotum & catholicæ eccleſiæ miniſtrorum, loci quoque ipſius, & divini cultus injuriam capitali in convictos ſeu confeſſos reos ſententia noverit vindicandum, nec expectet, ut Epiſcopus injuriæ propriæ ultionem depoſcat, cui ſanctitas ignoſcendi gloriam dereliquit. Sitque cunctis laudabile, factas atroces ſacerdotibus, aut miniſtris injurias, veluti crimen publicum perſequi, ac de talibus reis ultionem mereri: quod ſi multitudo violenta, a civilis apparitoris executione & adminiculo ordinum (vel ordinatorum) poſſeſſorumve non poterit flagitari, quod ſe armis aut locorum difficultate tueatur: præſides provinciarum etiam militari auxilio, per publicas literas appetito, competentem vindictam tali exceſſui imponere non morentur. *l.* 10. *C. de Epiſc. & Cler.*

Si quis cum ſacra miniſteria celebrantur, in ſanctam eccleſiam ingrediens, epiſcopo, aut clericis, aut miniſtris aliis eccleſiæ injuriam aliquam inferat; jubemus hunc verbera ſuſtinere & in exilium mitti. Si vero hæc ſacra miniſteria conturbaverit, aut celebrare prohibuerit, capitaliter puniatur. *Nov.* 123. *cap.* 31.

VII.

7. Laws of temporal Princes to enforce the Obſervance of the Laws of the Church.

It is by virtue of this Right and Duty of Princes to maintain and protect the Diſcipline of the Church, that the firſt Chriſtian Emperors, and after their example, our Kings, have made divers Regulations concerning the Election and Duties of Biſhops and other Miniſters of the Church, enjoining them Reſidence and Application to their Functions, as for example, the Viſitations to be made by Biſhops of their Dioceſes, commanding them to abſtain from profane Shews and Spectacles, from Games of Hazard, and other things misbecoming their Character. It is by virtue of this Right that the Kings of *France* have made many Ordinances touching the Collation of Benefices, touching Elections with reſpect to thoſe Benefices which are elective, the appropriating of the Benefices to Graduates, and the manner in which the Univerſities ought to confer Degrees, the Age that is required for making Profeſſion of a Religious Order, the Duties of the Heads of Orders, and other Superiors, to ſee that the Rules of the Order be duly obſerved; the erecting of Seminaries in the reſpective Dioceſes, the holding of Provincial Councils, and other Matters of the like nature, which relate to the Obſervance of the Eccleſiaſtical Diſcipline: and in all the ſaid Laws and Regulations they have only joined the temporal Authority to that of the Church, to enforce the Obſervance of the Rules thereof, and to give Directions conformable to the ſacred Decrees and Councils, as it is expreſly mentioned in the ſaid Ordinances *g*.

g Sancimus igitur ſacras per omnia ſequentes regulas, dum quiſpiam ſequenti omni tempore ad ordinationem Epiſcopatus adducitur, conſiderari prius ejus vitam ſecundum ſanctum apoſtolum, ſi honeſta & inculpabilis & undique irreprehenſibilis ſit, & in bonis teſtimonium habeat, & ſacerdotem decens——neque enim idiota, ex iis qui vocantur laici exiſtens, ita mox ad Epiſcopatum aſcendat: nec

nec imaginariam ſuſcipiat ordinationem tamquam modo quidem idiota, mox autem clericus, deinde parvum aliquod tempus præteriens Epiſcopus appareat, &c. *Nov. 6. C. 1.*

Hæc autem de amabilibus Epiſcopis ſecundùm divinas conſtituentes regulas, & Religioſos clericos cum multa fieri inquiſitione ſecundum divinas regulas, & boni teſtimonii viros ordinari ſancimus, litteras omninò ſcientes & eruditos conſtitutos. Litteras enim ignorantes, omnino nolumus, neque unum ordinem ſuſcipere clericorum videlicet, preſbyterorum, & diaconorum, tam ſacras orationes docentium quam Eccleſiarum & Canonum legentium libros ordinationem ſine querela, & inculpabilem & ſine aliqua contradictione & datione pecuniarum aut rerum ſuſcipientes. Neque autem eos volumus omnino officiales aut curiales conſtitutos ſuſcipere ordinationem niſi ſecundum leges quas ſuper his poſuimus pridem quas & hic nunc confirmamus: ipſos autem ordinatos ſacra præcepta in conſpectu totius populi ſuſcipere, propter has ipſas cauſas propter quas hoc ipſum agi etiam ſuper Deo amabilibus epiſcopis ſancivimus. *Nov. 6. C. 4.*

Caſſa & irrita eſſe denuntiari per totam Italiam præcipimus omnia ſtatuta & conſuetudines contra libertatem Eccleſiæ ejuſque perſonas inductas adverſus Canonicas & imperiales ſanctiones, & ea de capitularibus penitus aboleri mandat nova conſtitutio: & de cætero ſimilia attentata ipſo jure nulla eſſe decernit. Si quid contra fiat, pœnæ quæ ſtatutæ ſunt, imminebunt. Sed ſi per annum hujus novellæ conſtitutionis aliqui inventi fuerint contemptores, bona eorum per totum noſtrum imperium impune ab omnibus occupentur. *l. 12. Cod. de ſacroſ. Eccl.*

See the ſeveral Ordinances concerning theſe matters.

V. tot. Tit. C. de Epiſc. & Cler. & de Epiſcop. Aud.

'There is an infinite number of Conſtitutions 'of the firſt Chriſtian Emperors, and of Ordinances 'of the Kings of *France* concerning all the mat-'ters mentioned in this Article, and many others 'relating to the Church, the detail of all which it 'would be ſuperfluous to ſet down here. We have 'not diſtinguiſhed in the Article what is enjoined 'by the Conſtitutions of the Emperors, from that 'which is enjoined by the Ordinances of *France*; 'but thoſe who are deſirous to know all the par-'ticulars more diſtinctly, may read the firſt Titles 'of the Code, and the Ordinances relating to theſe 'matters.

VIII.

8. *The Uſe of the Temporal Power for executing the Sentences of Eccleſiaſtical Judges.*

The ſame Duty of Princes, which obliges them to maintain by their Laws thoſe of the Church, obliges them alſo to employ their Authority, not only to enforce the obſervance of the Laws of the Church, but likewiſe to give all the aſſiſtance and protection to its Miniſters in the diſcharge of their Functions that they may ſtand in need of from the Temporal Power. Thus when the Sentences of Eccleſiaſtical Judges cannot be executed but by the Temporal Power, it is uſual to have recourſe to it, which is called imploring the Secular Arm: and in theſe Caſes the King's Judges are obliged by the Ordinances in *France* to give a helping hand for the execution of thoſe Sentences, without enquiring into the Juſtice or Equity of the Judgment or Decree: but if there was in the Sentence any one of the Abuſes, which ſhall be mentioned in the following Section, the Parties, who think they have Cauſe of Complaint, may appeal from the Sentence as an Abuſe, as ſhall be ſaid in the following Section *h*.

h See the Ordinance called the Edict of *Melun* in 1580. Art. 24.
See that of *Orleans*, Art. 55. of *Blois*, Art. 100.

IX.

9. *The Right of the Regale.*

Beſides theſe Rights of the Temporal Power in what relates to the Church, the Kings of *France* have a Right, which is called the Regale, which gives unto the King the Revenues of a Biſhoprick which falls void, and the Collation of Benefices to which the Biſhop had the Right to collate *i*.

i See the Ordinances of *France* touching this matter, and the laſt Remark on the Preamble of this Title.

['As to the Right which the Kings of *England* 'have on the Revenues of Eccleſiaſtical Dignities 'and Benefices, ſee *Stat. 26. H. 8. cap. 3.* by 'which the firſt Fruits and annual Tenths of all 'Spiritual Dignities, Benefices, Offices or Promo-'tions were granted unto the ſaid King, his Heirs 'and Succeſſors. But her late Majeſty Queen '*Anne*, conſidering the ſlender Proviſion that is 'made for many of the inferiour Clergy, did out of 'her ſingular Zeal for the ſupport of the Clergy of 'the Church of *England* as by Law eſtabliſhed, by 'and with the Conſent of Parliament, appropriate 'all the ſaid firſt Fruits and Annual Tenths for the 'better maintenance of the inferiour Clergy. *Stat.* 2 & 3. *Annæ cap.* 11.]

SECT. II.

Of the Uſe of the Temporal Power, for reſtraining the Encroachments of the Miniſters of the Church on the Rights of the Prince, and of Appeals on account of ſuch Encroachments.

The CONTENTS.

1. *Diſtinction of the Spiritual and Temporal Powers.*
2. *The Encroachments of one Power upon the other, deſtroy the Order of Things which God has eſtabliſhed in the World.*
3. *The Right of Princes to maintain their Authority.*
4. *Uſe of Appeals from Abuſes.*
5. *Who may appeal from the ſaid Abuſes.*
6. *Caſes where an Appeal from Abuſes may lie.*

7. *Other*

7. *Other Cases of Abuſes.*
8. *Liberties of the* Gallican *Church.*

I.

Diſtinction of the Spiritual Temporal Power.

SEEING it is immediately from God, that Temporal Princes derive their Power, they have the Uſe of it independently of the Spiritual Power, even of that which the firſt Miniſters of the Church, Succeſſors of Jeſus Chriſt, hold likewiſe immediately of God. And theſe two Powers having between them an eſſential Union, which unites them to their common Origin, that is to God, whoſe Worſhip they are bound both of them to maintain each in its proper way, are diſtinct and independent one of another in the Functions that are peculiar to every one. Thus the Miniſters of the Church have on their part a Right to exerciſe their Functions, without any diſturbance from thoſe who have the Temporal Government in their hands, who ought on the contrary to afford them all the aſſiſtance and protection that may be neceſſary from the Secular Power. Thus thoſe who are veſted with the Supreme Power in Civil Matters, have on their part a Right to exerciſe the Functions of the Civil Government, in which the Miniſters of the Church have no right to oppoſe them, but ought on the contrary to exhort People to pay Obedience, and the other Duties they owe to the Princes whom God has eſtabliſhed over Temporal Affairs *a*.

a See the 6th Article of the 1ſt Section of the 1ſt Title, and the 1ſt Article of the 2d Section of the ſame Title.

II.

2. The Encroachments of one Power upon the other, deſtroy the Order of things which God has eſtabliſhed in the World.

It follows from the Rule explained in the preceding Article, that as the Encroachments of Temporal Princes on the Functions of the Spiritual Powers, are attempts, which wound Religion, and break in on the Order of Things which God has eſtabliſhed in the World; ſo the Encroachments of the Miniſters of the Spiritual Power on the Functions of Temporal Princes, are alſo attempts, which being in the ſame manner a ſubverſion of the Order eſtabliſhed by God, are likewiſe contrary to Religion *b*.

b ‘ This is a Conſequence of the Truth explained in the foregoing Article.

III.

3. The Right of Princes to maintain their Authority.

It follows likewiſe from theſe Truths, that as there is no viſible Power on Earth which has a common Superiority over thoſe who fill the chief Poſts in the Church, and in the State, and that no Perſon has a Right to revenge the Encroachments which the Miniſters of the Church may make on the Rights of Temporal Princes; it is the Right of thoſe whom God has veſted with the Temporal Power to maintain their Authority againſt all attempts whatſoever; and the exerciſe of this Right is in their hands a Function which they hold of God *c*.

c ‘ This is a Conſequence of the ſame Truth explained in the firſt Article.

IV.

4. Uſe of Appeals from Abuſes.

According to theſe Principles, if thoſe who have in their hands the exerciſe of the Spiritual Power ſhould ordain or attempt any thing contrary to the Right of the Prince in Temporal Affairs, or which might tend to diſturb the publick Order and Tranquillity which the Prince is bound to maintain; he might in ſuch caſes imploy his Authority to reſtrain attempts of this kind. And ſeeing theſe ſorts of Encroachments are not made by forcible means, ſo that it ſhould be neceſſary to oppoſe Force to Force, as is uſual in Quarrels that happen between Princes; but that they are made by Conſtitutions, Reſcripts, Sentences, or other Acts, which have the form of Juſtice; the way of redreſſing ſuch Abuſes, is likewiſe the way of Juſtice; and this is what is done in *France* by the means of Appeals from Abuſes, which are determined by the Parliaments, the Kings of *France* having lodged with them the Cognizance of ſuch Appeals *d*.

d ‘ This is a Conſequence of the preceding Articles.

See the laſt Remark of the Preamble of this Title.

[‘ In *England*, many Acts of Parliament have ‘ been made to redreſs Abuſes of this kind, and to ‘ guard againſt the daily Encroachments that were ‘ made by the Popes on the Sovereignty of our ‘ Kings. See the Statute of Proviſors 25 *Edw.* III. ‘ the Statute of Præmunire 16 *R.* II. *cap.* 5. And ‘ in the firſt Year of Q. *Elizabeth*, an Act was ‘ made to reſtore to the Crown the antient Juriſdiction over the Eſtate Eccleſiaſtical and Spiritual, ‘ and aboliſh all Foreign Powers repugnant to the ‘ ſame.]

V.

5. Who may appeal from the ſaid Abuſes.

If thoſe ſorts of Encroachments or Injuſtices which give occaſion for theſe Appeals from Abuſes do likewiſe affect the Intereſt of particular Perſons, the Parties aggrieved have a Right to appeal from them; and if either the King or the Publick have an Intereſt to ſee the ſaid Abuſes redreſſed, the Appeal would

would be interpoſed by the King's Solicitors General in the Parliaments of *France*, or by their Subſtitutes in the inferior Courts, in order to have the ſame decided by the Parliament which has the cognizance of it: for it is the Function of thoſe Officers to act as Parties in any thing where the publick Intereſt is concerned, as ſhall be ſhewn in its proper place in the ſecond Book *e*.

e This is the Uſage in *France*, which is a Conſequence of the Rules explain'd in the foregoing Articles.

VI.

6. Caſes where an Appeal from Abuſes may lie.

Appeals from Abuſes lie in all Caſes where the Right and Intereſt of the Publick are encroached on, whether it be that the Temporal Power is thereby directly invaded, as if it were an Encroachment on ſome Right of the Prince, or that the buſineſs were only to protect and maintain the publick Order of the Eccleſiaſtical Diſcipline, which had been violated by ſome attempt of the Miniſters of the Church; as if an Election to ſome Eccleſiaſtical Dignity, a Collation to a Benefice, or to ſome Office in the ſpiritual Miniſtry, ſhould appear to be made contrary to the Diſcipline and Practice of the Church, and contrary to publick Agreements; for in all theſe Caſes, it is for the common Intereſt of the Church and of the State, to reſtrain Attempts of this nature, and to have the Diſcipline of the Church kept up in its Purity *f*.

f All theſe Caſes are comprehended in the Rule concerning the Right of Temporal Princes to maintain their own Authority and that of the Church.

VII.

7. Other Caſes of Abuſes.

We muſt reckon in the number of the Caſes wherein Appeals from Abuſes are to take place, the Encroachments of Eccleſiaſtical Judges on the Temporal Juriſdiction, when they decree beyond what they have Power to do, and when they take cognizance of what belongs wholly to the Temporal Juriſdiction, or when even in matters belonging to the Spiritual Juriſdiction they do not obſerve the Proceedings regulated by the Ordinances of the Kingdom; for in theſe Caſes they encroach on the Temporal Power, and fall into the Abuſe which the Temporal Power has a right to reform and to redreſs *g*.

g This Rule follows from the ſame Principles.

VIII.

8. Liberties of the Gallican *Church.*

It is by the means of theſe Appeals from Abuſes, that Princes maintain the Rights of their own Temporal Authority, and preſerve the Diſcipline of the Church in its primitive Purity; and it is the defence of that Purity which is called in *France* the Liberties of the *Gallican* Church; which conſiſt, not in the Privileges of the ſaid Church, but in the common Right of the Univerſal Church, as the ſame has been explained in the Preamble of this Title *h*.

h See what has been ſaid touching this matter in the Preamble, and the laſt Remark there made upon it.

SECT. III.

Of the Uſe of the Temporal Power in Matters which are Temporal in the Eccleſiaſtical Policy.

The CONTENTS.

1. *Two ſorts of Powers, one for Spiritual Affairs, the other for Temporal.*
2. *Every State has a dependence on the two Powers.*
3. *The Right of Princes over the Temporalities of the Church.*
4. *Firſt Fruits and other Taxes paid by the Clergy.*
5. *No Eccleſiaſtical Communities can be eſtabliſhed without the Prince's leave.*
6. *Aliens cannot poſſeſs Benefices in the Kingdom without the King's leave.*
7. *The King's Right to judge of the Poſſeſſion of Benefices.*
8. *Policy about Marriages.*
9. *Officers of the Crown cannot be excommunicated for the diſcharge of their Offices.*
10. *The Clergy cannot direct Moneys to be levied on the Temporalities of Benefices without the King's leave.*
11. *Other matters of the ſame Character with theſe mentioned in this Title.*

I.

1. Two ſorts of Powers, one for Spiritual Affairs, the other for Temporal.

ALL Kingdoms in which the true Religion is profeſſed, are governed by two ſorts of Powers, the Spiritual and the Temporal, which God has eſtabliſhed for regulating their Order; and ſince both the one and the other have their diſtinct Functions, and that they hold their Authority immediately of God, they are independent one of the other; but in ſuch a manner, that altho thoſe who have the Adminiſtration of one of theſe two Powers, may exerciſe it independently of thoſe who have the Adminiſtration of the other, yet they ought however to be reciprocally ſubject to the Miniſtry one of another

another in what depends on their reſpective Powers. Thus the Temporal Princes ought to be ſubject to the Spiritual Powers in Spiritual Matters, and the Miniſters of the Church ought alſo on their part to be ſubject to the Power of the Temporal Princes in what relates to Temporal Affairs: And becauſe this Truth is of Divine Authority, and that it is God himſelf that has taught it to Mankind *a*, it has been equally acknowledged for true, both on the part of thoſe who have exerciſed the Spiritual Miniſtry *b*, and on the part of the Princes who have had the Temporal Government *c*.

a See the Preamble of this Title.

Take unto thee Aaron *thy Brother, and his Sons with him, from among the Children of* Iſrael, *that he may miniſter unto me in the Prieſts Office.* Exod. 28. 1.

And behold Amariah *the Chief Prieſt is over you in all matters of the Lord.* 2 Chron. 19. 11.

For every High Prieſt taken from among Men, is ordained for Men in Things pertaining to God. Heb. 5. 1.

Let a Man ſo account of us, as of the Miniſters of Chriſt, and Stewards of the Myſteries of God. 1 Cor. 4. 1.

As my Father hath ſent me, even ſo ſend I you. Joh. 20. 21.

‘ When Jeſus Chriſt gives unto his Apoſtles the ‘ ſame Miſſion with that which he had received of ‘ his Father, he does not give them any Right to ‘ exerciſe the Temporal Power, ſince he himſelf ‘ who might have exerciſed it, did not do it, but ‘ paid Obedience to the Laws of the Princes, both ‘ at the time of his Birth and during his Life, being ‘ born in a place, where he was obliged, in obedience ‘ to a Law of the Emperor *Auguſtus*, to pay Tribute, which he did willingly, and taught himſelf ‘ and enjoined his Apoſtles to preach Obedience to ‘ the Laws of Princes, as unto an Order of God, ‘ of whom they hold their Anthority; and when ‘ he gave unto the Apoſtles their Miſſion, he comprehended in it only Spiritual Affairs, without ‘ granting them any Right or Power over Temporal ‘ Affairs, which he left unto the Princes.

Let every Soul be ſubject unto the higher Powers: for there is no Power, but of God. The Powers that be are ordained of God. Rom. 13. 1.

Render therefore unto Ceſar *the Things which are* Ceſar's. Mat. 22. 21.

Quoniam idem mediator Dei & hominum homo Chriſtus Jeſus, ſic actibus propriis, & dignitatibus diſtinctis officia poteſtatis utriuſque diſcrevit propria, ——ut & Chriſtiani Imperatores pro æterna vita Pontificibus indigerent, & Pontifices pro curſu temporalium tantummodo rerum imperialibus legibus uterentur, quatenus ſpiritualis actio a carnalibus diſtaret incurſibus, & ideo militans Deo minime ſe negotiis ſæcularibus implicaret, ac viciſſim non ille rebus divinis præſidere videretur, qui eſſet negotiis ſæcularibus implicatus. *Diſt.* 10. *c.* 8.

Duo ſunt quibus principaliter mundus hic regitur, autoritas ſacra Pontificum, & regalis poteſtas. *Diſt.* 96. *c.* 10.

b See the Text cited at the end of the Preamble of this Title.

c Maxima quidem in hominibus ſunt dona Dei a ſuperna collata clementia *ſacerdotium & imperium:* & illud quidem divinis miniſtrans, hoc autem humanis præſidens ac diligentiam exhibens ex uno eodemque principe utraque procedentia humanam exornant vitam. *Novel.* 6. *in præfat.*

II.

It follows from this Origin of the two ſorts of Powers Spiritual and Temporal which come from God, that as thoſe who exerciſe one of them ought to be ſubject to the Miniſtry of the other in what depends on it, as has been explained in the preceding Article; ſo all particular Perſons, whether they be Church-men or Lay-men, ought to be ſubject to the Miniſtry of both thoſe Powers; and that therefore it is a Duty common to them to be faithful in every thing which they owe reciprocally to the one and to the other of the ſaid Powers: which obliges thoſe who exerciſe the Miniſtry of thoſe Powers to keep every one within his own, and to require of particular Perſons nothing that may be inconſiſtent with their Duty to the other Power *d*.

2. *Every State has a dependance on the two Powers.*

d ‘ This is a Conſequence of the preceding Article.

III.

It is becauſe of the Right which Princes have over Temporal Affairs, that every thing of this nature in the Society of Mankind, ſuch as matters relating to Trade, Succeſſions, the ſeveral ſorts of Covenants, Poſſeſſion of Goods, and the other matters of the like nature, are regulated by the Authority of Princes and by their Laws; and it is by the ſame Laws, and by the ſame Authority, that the Church and its Miniſters poſſeſs their Temporal Goods *e*. Thus the Rights which Church-men have in their Goods make no alteration in the Rights which the Temporal Princes have over them; for they retain the Right of raiſing out of the Goods of the Clergy, the ſupplies which the occaſions and wants of their States may render neceſſary; and it is only by Favour and Privilege that Princes have granted unto them the Right of enjoying many Exemptions *f*.

3. *The Right of Princes over the Temporalities of the Church.*

e Quo jure defendis villas Eccleſiæ, &c.

See this Text at the end of the Preamble of this Title.

f ‘ The Exemptions from Taxes, which the Clergy enjoy, are mere Favours which the Princes ‘ have granted unto them. For altho their ſacred ‘ Function may ſeem to require this diſtinction, ‘ yet it is only by the Conceſſion of the Prince ‘ that they enjoy it. And the Apoſtles, after the ‘ Example of Jeſus Chriſt, having taught the Duty ‘ of paying Tribute unto Princes, made exception ‘ of no Perſon, no more than Jeſus Chriſt excepted St. *Peter*, or even himſelf from paying ‘ Tribute, altho being King of Kings and Lord of ‘ Lords, he was really exempt: but to avoid giv-

‘ ing

‘ ing of Scandal he would pay Tribute, and wrought ‘ a Miracle that he might have wherewithal to pay ‘ for himſelf and for St. *Peter*; in the ſame manner as he taught thoſe who were ſent to him by ‘ the Prieſts, that it behoved them to render unto ‘ *Ceſar* what was *Ceſar's*, without excepting any ‘ Perſon from this Duty. See *Luke* 20. 25. See ‘ *Rom.* 13.

IV.

4. Firſt-Fruits and other Taxes paid by the Clergy.

It is by virtue of this Right which Princes have over the Temporalities of the Church, that our Kings have not ſo far exempted the Clergy from all manner of Contributions, but that they raiſe even out of the Lands belonging to the Benefices Supplies for the Wants of the State. Thus the King takes the Tenths of the Temporal Revenues of the Benefices, altho they be deſtined for the uſe of the Churches; and they draw likewiſe from them other different Aids and Supplies according as the occaſions of the State require *g*.

g ‘ Theſe Duties are legally due from Eccleſiaſticks, becauſe of the Temporal Goods which they ‘ enjoy, and of the Intereſt which they have in the ‘ welfare of the State.

V.

5. No Eccleſiaſtical Communities can be eſtabliſhed without the Prince's leave.

Beſides theſe Rights which Kings have over the Temporal Goods of the Church, the Temporal Power gives them likewiſe other different Rights of ſeveral natures in what relates to the Church. Thus in general, as it is by virtue of the Temporal Power that Princes have a Right to regulate the Temporal Policy of their Dominions, ſo every thing that depends on this Policy is ſubject to the ſaid Power. Thus in particular, as it is part of the Order of the Temporal Policy that there ſhould be no Aſſemblies of many Perſons who compoſe a Society and Community without leave from the Prince, as has been explained in its place *h*; ſo there can be no Eccleſiaſtical Society or Community, nor any Orders of Religion, Monaſteries or other regular Houſes, eſtabliſhed within the Kingdom without the King's Letters Patent.

h Neque ſocietas, neque collegium, neque hujuſmodi corpus paſſim omnibus habere conceditur. Nam & legibus & ſenatuſconſultis, & principalibus conſtitutionibus ea res coercetur. Paucis admodum in cauſis conceſſa ſunt hujuſmodi corpora: ut ecce vectigalium publicorum ſociis permiſſum eſt corpus habere, vel aurifodinarum, vel argentifodinarum, & ſalinarum. Item Collegia Romæ certa ſunt, quorum corpus ſenatuſconſultis atque conſtitutionibus principalibus confirmatum eſt, veluti piſtorum & quorundam aliorum & navicullariorum. *l.* 1. *ff. quod cui un. nom.*

See the 14th Article of the 2d Section of the 2d Title.

VI.

6. Aliens cannot poſſeſs Benefices in the Kingdom without the King's leave.

It is becauſe of this Temporal Policy, that it is the Intereſt of the King and of the State, that Strangers are not capable of poſſeſſing either Eccleſiaſtical Offices, or Benefices, or even of exerciſing publick Functions without the King's leave: for beſides that ſuch Perſons may be ſuſpected on account of the Intereſts of their Princes, or Magiſtrates, the ſurety of obliging Incumbents to Reſidence, and the preference of Natives to Strangers, are juſt Cauſes for excluding them from Benefices; and the Ordinances of *France* have ſo eſtabliſhed it with reſpect to Archbiſhopricks, Biſhopricks, Abbies, and for all other Benefices *i*.

i ‘ It is our Will and Pleaſure, that henceforward no Perſon ſhall be admitted to any Archbiſhoprick, Biſhoprick, or Abby belonging to ‘ the Chief of any Order, whether by Reſignation, ‘ or otherwiſe, unleſs he be a natural born *French-man. Ordinance of* Blois, *Art.* 4.

See the Ordinance of *Charles* VII. of the tenth of *March* 1431.

[In *England*, ſeveral Acts of Parliament have been made, prohibiting Aliens to enjoy, or occupy any Benefices within the Kingdom. *Stat.* 3. R. *II. c.* 3. 7 R. *II. c.* 12. 1 H. *V. c.* 7. And upon conſideration of the ſaid Statutes, it has been reſolved, that if an Alien or Stranger born be preſented to a Benefice, the Biſhop ought not to admit him, but may lawfully refuſe him. *Coke* 4. *Inſt. pag.* 338.]

VII.

7. The King's Right to judge of the Poſſeſſion of Benefices.

In this matter of Church-Benefices, the Temporal Policy has given to the King a Right of another nature, the exerciſe whereof is approved by the Church it ſelf, which is the Right to cauſe the differences about the Poſſeſſion of Benefices to be decided by his Temporal Judges: for ſeeing the Right to poſſeſs demands that the Perſon who has the Right be maintained in his Poſſeſſion, which implies a Right to hinder all Perſons from diſturbing him in his Poſſeſſion, and to reſtrain by the uſe of Force all Acts of Violence; and ſeeing the ſaid Force can be no where elſe but in the hands of the Temporal Power, the Spiritual Authority having no ſuch Weapons; it is neceſſary, in order to maintain Poſſeſſors againſt thoſe who would attempt to diſturb them in their Poſſeſſion, to have recourſe to the Temporal Authority. Thus when the Controverſy is merely about the Poſſeſſion of Benefices, it is only the King's Judges who have the Cognizance thereof *l*.

l Poſſeſſio facti eſt. *l.* 1. §. 15. *ff. ſi is qui teſtam. lib. eſſe juſſ. er.*

Cur

Cur ad arma & rixam procedere patiatur prætor quos poteſt juriſdictione ſua componere? *l.* 13. §. 3. *ff. de uſufr.*

See the Statutes relating to this matter.

' When the queſtion is about the Right to a Be-
' nefice, and not about the Poſſeſſion; it is the
' Eccleſiaſtical Judge who is to have the cognizance
' of it.

VIII.

8. *Policy about Marriages.* It is alſo by virtue of the Power of Princes over the Temporal Policy, that in other matters, which in their nature have relation to Spiritual Affairs, Kings have eſtabliſhed Rules in relation to what is of Temporal concern in thoſe Spiritual Matters. Thus, altho the Celebration of Marriages be a Spiritual matter which relates to a Sacrament of the Church, yet the Kings of *France* have made ſeveral Regulations as to what is of Temporal concern therein; ſuch as the neceſſity of the conſent of Parents to the Marriage of their Children till they arrive at a certain Age, as alſo the neceſſity of publiſhing the Banns of Marriage *m*.

m See the Ordinances concerning this matter.

IX.

9. *Officers of the Crown cannot be excommunicated for the diſcharge of their Offices.* We may likewiſe reckon this as an effect of the Temporal Power which Princes have in Spiritual Matters, in ſo far as they relate to things Temporal, that the Officers of the Crown cannot be excommunicated for what they do in the execution of their Offices; which in *France* is a Conſequence of the Liberties of the *Gallican* Church: for if ſuch Excommunications were tolerated, it would be a means to deſtroy the ſaid Liberties, and to diſturb the Temporal Policy which defends them *n*.

n ' This is one of the Heads of the Liberties of
' the *Gallican* Church, and a Conſequence of the
' Authority of the Temporal Power.

X.

10. *The Clergy cannot direct Moneys to be levied on the Temporalities of Benefices without the King's leave.* The Clergy nisters of the Church cannot levy any Moneys within the Kingdom, not even on the Temporalities of Benefices, upon any pretence whatſoever, without the Authority of the King, who has the ſole Power and Direction in matters of this kind *o*.

o ' This is likewiſe one of the Heads of the Li-
' berties of the *Gallican* Church, and a Conſe-
' quence of the Power of the Prince in Temporal
' matters.

XI.

11. *Other matters of the ſame Character with theſe mentioned in this Title.* One may be able to judge by the Nature of theſe ſeveral matters, of which mention has been made in this Title, of the Character which diſtinguiſhes in every one of them that which relates to the Spiritual Power, and that which depends on the Temporal; and to diſcern likewiſe in other matters of the like nature, which it is not neceſſary to enumerate here at large, what they may contain that is ſubject to the Temporal Policy. And ſince it is only this Character which is in the ſaid matters, that has obliged us to collect what is here ſaid of them under this Title, purſuant to the deſign we have propoſed in this Book, we have been obliged to confine our ſelves here to theſe few Rules for the Reaſons that have been explained in their proper place *p*. For theſe Rules ſuffice to ſhow the eſſential Principles of the Rights of the King in theſe matters, and in all others of the like nature; and the detail of the other Rules relating to all theſe ſeveral matters is to be met with in the Ordinances, in the Agreements, in the other Laws of the Church, and in the Uſages, as has been already obſerved in the Preamble of this Title *q*.

p See the Preface to this Book.
q See the Preamble of this Title.

THE

THE

PUBLICK LAW:

BEING A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

BOOK II.

Of the OFFICERS and other PERSONS, who are employed in the Publick Functions.

HAVING explained in the Firſt Book, the general Order of the Government and Policy which regulates in a State every thing that relates to the common Good of the Society of Mankind; we muſt in the next place proceed to what concerns the Adminiſtration of Juſtice to the perſons who compoſe the ſaid Society, in order to contain them all within their duties towards the Publick, and to maintain among them in particular, Peace and Tranquillity, which ought to be the fruit of the Order of Government.

This Adminiſtration of Juſtice conſiſts

ſiſts in reſtraining and puniſhing thoſe who diſturb the publick Order and Tranquillity, by Attempts, Offences, and Crimes; and in regulating the differences which ſet perſons at variance together, and diſturb the quiet of Families.

It is for the obtaining of theſe Ends, that it has been neceſſary to eſtabliſh Judges, that they might be Protectors of the Laws, in order to impoſe the Yoke thereof on ſuch as do not voluntarily ſubmit themſelves to them, and by enforcing the obſervance of what they preſcribe, to maintain the publick Order and Tranquillity, which is the ſole end of the Laws of the Temporal Policy; and it is for this reaſon that there have been always Judges in all States, but differently; for as in all States there is always this in common, that the Sovereign is the firſt Judge, and the only one who derives his Power immediately from God, and who not being able to exerciſe this Function in all its particular branches, ſubſtitutes perſons in his ſtead, to whom he gives a right to judge, and with whom he intruſts his Authority; ſo that the Prince may diſpenſe to whom he pleaſes the Right of judging. We read likewiſe in the Holy Scriptures, which contain the moſt ancient Hiſtory of the World, that *Moſes* who had the ſole Government of the *Jewiſh* Nation, not being able by himſelf alone to decide all the particular Affairs that came before him, made choice, by the advice of his Father-in-Law, of perſons to whom he committed this Function, giving them power to judge only of the leſſer Affairs of the People, and reſerving to himſelf the Cognizance of every thing of greater importance [a]. Thus in all other States, it has been neceſſary to eſtabliſh Judges; and becauſe in States of a large extent, the multitude of Affairs has given riſe to an infinite number of diſputes of ſeveral ſorts, and has occaſioned the multiplicity of Laws and of Matters, it has made it neceſſary to have Judges, who beſides the knowledge of the Rules of Natural Equity, ſhould be well verſed in the ſaid Laws, and in the detail of the ſaid Matters. And they have allotted to the ſaid Judges, their Dignity, their Authority, and have diſtinguiſhed even their Functions, by eſtabliſhing different Juriſdictions for deciding the different ſorts of Matters.

[a] *Exod.* xviii. 17.

Thus we ſee in the *Roman* Law a great number of different Magiſtrates, whoſe Juriſdictions were diſtinct, and ſome of whom had the power of appointing Judges, whom they themſelves choſe to determine the differences that might ariſe between particular perſons.

One may judge by that variety of Magiſtrates, of which we ſee the Names and different Functions in the *Roman* Law; that the different Juriſdictions which we ſee in *France* are no novelty.

It is therefore to puniſh Crimes and Offences, and to decide Law-Suits, that Judges have been appointed, and likewiſe other Functions eſtabliſhed, which are neceſſary for the Adminiſtration of Juſtice, as ſhall be ſhewn hereafter. And altho' it would ſeem as if the Adminiſtration of Juſtice, and the Cognizance of Crimes, of Offences, and of Law-Suits were reſtrained to the Functions of thoſe Officers who are properly called Officers of Juſtice, who are diſtinguiſhed from the Officers of the Civil Policy, and of the Revenue, yet all theſe ſorts of Officers have a ſhare in the Adminiſtration of Juſtice, and take Cognizance of certain Crimes, of certain Offences, of certain Law-Suits; and there are likewiſe other ſorts of Officers, who have their Juriſdiction, and a right to judge of certain Differences, and of certain Crimes; ſuch as the chief Officers of the King's Houſhold, the Officers of War, and others. Thus, altho' this ſecond Book relates chiefly to the Officers who are called Officers of Juſtice, yet we may apply to all the other Officers who have any ſort of Adminiſtration of Juſtice, the Rules which ſhall be explained in this Book, in ſo far as they are applicable to them.

Since all the Functions of the Adminiſtration of Juſtice relate to Crimes, to Offences, to Law-Suits, and to every thing that may demand the uſe of the Authority of Juſtice, ſome perſons may be apt to think that the Matter of Crimes and Offences, and that of the Order of Judicial Proceedings, which ſhall be treated of in the third and fourth Books, ought to have preceded the matters relating to Officers; ſeeing they are eſtabliſhed only for the puniſhment of Crimes and Offences, and for judging Law-Suits and Differences: but becauſe the eſtabliſhment of Officers, is a neceſſary conſequence of that of Government, and becauſe every thing which relates in general to Government, ſuppoſes the neceſſity of obliging Men to perform their duties towards the Publick,

Publick, and the duties they owe to one another, and not to diſturb the Tranquillity which ought to unite the Society which they all compoſe; the ſame reaſon which induced us to explain every thing relating to Government in general, before we ſhould proceed to Crimes, requires that we ſhould explain likewiſe what concerns Officers, before we come to this detail, ſeeing their Functions and their Duties make a part of the Order of the Government.

The Adminiſtration of Juſtice which has made the eſtabliſhment of Judges neceſſary, has made it neceſſary likewiſe to have the Miniſtry of Perſons who ſhould explain to the Judges the Rights of the Parties, whether it be becauſe there are few perſons who are capable to explain diſtinctly to others their Rights, and that many do not underſtand them themſelves, or becauſe it is for the dignity of Juſtice to remove from its Tribunal, the indecency, the confuſion, and the other inconveniences which would follow from the granting a liberty indifferently to all parties to explain themſelves their demands, or their defences, as well on account of their incapacity as becauſe of the tranſports of their paſſions. It is upon theſe conſiderations, that the uſe of the Miniſtry of Advocates is eſtabliſhed, as alſo that of Proctors. And as for theſe laſt, there is likewiſe another reaſon which has rendred their Functions neceſſary, becauſe the manners of proceeding in Juſtice for inſtructing a Cauſe, have been regulated to certain forms, the uſe of which is neceſſary, and which cannot be obſerved unleſs each party have a Proctor to repreſent him, who may appear in all the ſteps and proceedings of the Cauſe. But as for the Advocates, their Miniſtry is not required in the ordinary ſteps of the proceedings in the Cauſe, and is reſtrained to what ſhall be explained hereafter.

The ſame Adminiſtration of Juſtice, demands likewiſe other Functions, ſuch as thoſe of Regiſters, to take down in writing, and ſign the Orders of the Court, the Sentences, the Decrees, and the other Judicial Acts, and to be Depoſitaries of them; as alſo thoſe of Apparitors and Bailiffs, for the execution of the Orders and Decrees of the Courts of Juſtice.

We may ſet down in the Order of this Adminiſtration of Juſtice, the manner in which it is rendred voluntarily between the Parties by Arbitrators, whom the Parties chuſe to be their Judges; and thoſe who exerciſe this Function, have their proper Duties, which ought to make a part of the Matters of this Book. As to which it is neceſſary to obſerve, that ſince people may take for Arbitrators, Advocates and other perſons who have not the quality of Judges, this Function of Arbitrators implies a kind of Adminiſtration of Juſtice, which hath its Authority from the Laws, and from the Ordinances, which permit References, and even enjoin them, in certain matters [b]. And it is for this reaſon that we have comprehended in the Title of this ſecond Book, other perſons beſides Officers, who are employed in the Functions of Juſtice, which takes in likewiſe the Judges and Conſuls of Merchants in *France*, who without having any Commiſſion from the King, or Title of Office, have by the Ordinances the power of deciding the differences which belong to their Cognizance; and it is the ſame thing with reſpect to thoſe who exerciſe Municipal Offices, ſuch as thoſe of Sheriff, Alderman, and others who have a ſhare in the Civil Policy, and in the Functions of Juſtice which depend on it; for theſe have not the Title of Officers [c].

[b] *See the Ordinances.*

[c] *See concerning the nature of Offices, the Preamble of the firſt Title of this Book.*

Since the reflections which we have juſt now made on the Subject Matter of this Second Book, relate, not only to Officers of Juſtice, but alſo to other perſons who without the Title of Office render Juſtice, as has been juſt now obſerved, and that they regard likewiſe other perſons, who without an Office, and without the quality of Judges, exerciſe ſome Miniſterial Function, which has relation to the Order of the Adminiſtration of Juſtice, ſuch as Advocates, and Arbitrators; we ſhall comprehend in this Book, the Functions and the Duties both of Judges, and of the other perſons, who have any ſhare in the Functions of Juſtice; ſo that the Rules which ſhall be explained here may be applied to all theſe ſorts of perſons, Judges, and others, according as they may be applicable to the Functions of every one, and to their Duties; which is to be underſtood of the Rules which are within the deſign of this Book, and we ſhall here confine our ſelves to the eſſential Principles, and to the Rules of

Natural Equity, whether they be comprehended in the Laws and Ordinances, or that they be part of the divine Law: for it is upon theſe Principles, and upon theſe Rules, that all the duties of the perſons who exerciſe Functions of the Adminiſtration of Juſtice, or Functions which have any relation to it, are founded.

Seeing the Matters relating to the Functions and Duties of the Officers of Juſtice, and the other perſons of whom we are to treat in this Book, have a connection with the Matters which relate to the Authority, the Dignity, the Rights, the Rank, and the Privileges annexed to thoſe Functions; and that we are obliged to explain the Principles and the general Rules of theſe other matters; we ſhall give in the firſt Title the general Ideas of the ſeveral Natures of Offices: we ſhall explain in the ſecond, that which relates alſo in general to the Authority, the Dignity, the Rights, the Privileges, and the Ranks which Offices and other Charges give: the third Title ſhall be of the Duties of thoſe who exerciſe them: the fourth, of the Duties of the Officers of Juſtice: the fifth, of the Functions and Duties of ſome other Officers beſides Judges, whoſe Miniſtry makes a part of the Adminiſtration of Juſtice: the ſixth, of Advocates: and the ſeventh and laſt, of Arbitrators.

TITLE I.

Of the ſeveral ſorts of OFFICES, and other CHARGES.

BEfore we diſtinguiſh the different ſorts of Offices and Officers, it is agreeable to Method and Order, that we ſhould firſt give the definition of what we properly call Office, and Officer. An Office is a Title given by the Letters of the Prince, which are called a Patent, or Commiſſion, and which confer the power, and impoſe the duty of exerciſing ſome publick Functions; and the Officers are thoſe who are provided of the ſaid Offices. We reckon alſo in the number of Officers, thoſe of Lords of Mannors, becauſe they have a right to give Commiſſions to their Officers of Juſtice, according to the power which they have from the King ſo to do. There are other Officers of a leſſer rank, who have their Titles from ſome ſuperior Officers, to whom the King gives likewiſe the right to confer theſe ſmall Offices.

It is by this Title of a Commiſſion, that Offices are diſtinguiſhed in *France* from ſeveral Charges, which engage perſons to ſome publick Functions, ſuch as, for example, thoſe which are called Municipal Offices, thoſe of the Judge and Conſuls of Merchants, thoſe of Receivers of the publick Money, and of others who are imployed in other Functions, which are all of them only for a time, whereas the Offices are for life; ſo that in *France* the word *Charges* is a general name which is common to Offices, and to thoſe other Functions.

We may diſtinguiſh the different ſorts of Offices and Officers, by divers views, which make different Orders of them; for there are Officers of Juſtice, of Policy, of the Revenue, of War, of the King's Houſhold, and of many other different ſorts.

All the different manners of diſtinguiſhing the ſeveral ſorts of Charges and Offices, may be reduced to two principal diſtinctions: one, which diſtinguiſhes them by their different natures, and by certain characters peculiar to every one of them; and the other, which diſtinguiſhes them by the different Functions of thoſe who exerciſe them. It is neceſſary to make theſe diſtinctions, becauſe they have their eſſential differences, and becauſe there are different ſorts of Officers, whoſe Functions are the ſame, altho' their Charges be diſtinguiſhed by characters wholly different; and that on the contrary there are Officers of ſeveral ſorts, whoſe Functions are different, altho' their Charges be of the ſame nature. Thus, there are Offices of Judicature, which are Royal Offices, that is, of the King's Nomination, others which are given by Lords of Mannors; others which are in the Gift of Biſhops, and are Eccleſiaſtical Offices: but altho' theſe Offices be of a nature altogether different, yet the greateſt part of their Functions are common to them all, and the Officers, who execute the ſaid Offices, render Juſtice to particular perſons in ſeveral matters, which belong to the Juriſdiction of every one of the ſaid Tribunals. Thus on the contrary, there are Offices of the ſame nature, whoſe Functions are altogether different; for in the ſame Tribunals the

Functions

Functions of the King's Council in Royal Juriſdictions, thoſe of Fiſcals in the Courts of Lords of Mannors, and thoſe of the Promoters of the Office of the Judge in Eccleſiaſtical Juriſdictions, are all of them different from thoſe of the Judges.

It is becauſe of theſe diſtinctions of Offices and Charges, by the different characters of their Nature, and by their ſeveral Functions, that we have divided this Title into two Sections: the firſt, of the diſtinction of Offices by their Natures and different Characters: and the ſecond, of the diſtinction of Offices by the Functions peculiar to every one of them.

SECT. I.

Diſtinction of Charges and Offices, by their Natures, and their different Characters.

The CONTENTS.

1. *Difference between Charges and Offices.*
2. *All publick Functions are Charges, but all the ſaid Charges have not the Title of Office.*
3. *Municipal Charges are for a certain time; Offices for life; Commiſſions for an indefinite time.*
4. *Three ſorts of Judges, thoſe named by the King, thoſe appointed by Lords of Mannors, and thoſe named by Biſhops.*
5. *Extent of the Juriſdiction of the Officers of Lords of Mannors.*
6. *Eccleſiaſtical Officers in the Officialities.*
7. *The Eccleſiaſtical Officers have two ſorts of Juriſdiction, the Spiritual and Temporal.*
8. *The Officers belonging to Officialities, and thoſe of Lords of Mannors, are Officers of Juſtice.*
9. *Different ſorts of Offices held of the King.*
10. *The King diſpoſes of the Offices mentioned in the foregoing Article, which diſtinguiſhes them from the other ſorts of Offices.*
11. *Lands erected into Titles and Peerages, which give the quality of Peers.*
12. *Eccleſiaſtical Offices beſides thoſe of the Officialities.*
13. *Two ſorts of Offices, thoſe which are Venal, and thoſe which are not.*
14. *The King's Commiſſion for Royal Offices, thoſe which are Venal, and others.*
15. *Divers Combinations of the Functions of Juſtice, Policy, and the Revenue.*
16. *Offices whoſe Functions are mixed, conſiſting partly of Juſtice, and partly of Policy.*
17. *Offices of Juſtice without any Function of Policy.*
18. *Offices which have a Mixture of the Functions of Juſtice, and of the Revenue; and ſome which relate both to Juſtice, the Revenue, and to Policy.*
19. *Offices in the Revenue, without Functions of Juſtice, or of Policy.*
20. *Functions of Policy imply Functions of Juſtice.*
21. *The Great Council.*
22. *Judges of Privileged Perſons.*
23. *Judges of the Merchants.*
24. *Regiſters.*
25. *Proctors.*
26. *Tip-ſtaves and Apparitors.*
27. *Sergeants and Bailiffs.*
28. *Two ſorts of Juriſdiction, Voluntary and Contentious.*
29. *Publick Notaries.*
30. *Diſtinction of Offices Compatible, and of thoſe which are Incompatible.*
31. *Other Offices, beſides thoſe of Juſtice, Policy, and the Revenue.*
32. *Difference between Offices and Commiſſions.*

I.

ALtho' in *France* they give commonly and without diſtinction the name of *Charge* to all ſorts of Offices, becauſe in effect every Office is a Charge, yet we muſt not confound together the ſenſe of theſe two words; for, as has been remarked in the Preamble of this Title, the word *Charge* is a general name; which beſides the Offices, takes in other different Imployments which are diſtinguiſhed from Offices, in that thoſe other Imployments or Charges are exerciſed without any Commiſſion, and only for a time; whereas for Offices, it is neceſſary to have Letters Patent from the Prince, which aſcertain the Title thereof to the Officers during their life-time, unleſs they render themſelves unworthy thereof, or reſign them voluntarily. Thus the Charges in the Parliaments of *France*, and in the other ſupreme Courts of Juſtice, and thoſe of the Preſidial Courts, and of the Courts within the precincts of Bailiffs and Seneſchals, are Offices. Thus, the Charges of Sheriffs and Aldermen, and the other Municipal Charges, and thoſe of the Judge and Conſuls of Merchants, are

1. *Difference between Charges, and Offices.*

are not Offices, and those who are called to them, exercise them only for a time, without any other Title besides that of their Election. So that we may place for a first distinction of Charges, those which are erected by the Title of Office, and which give to those who execute them the quality of Officers, and those which without that quality give the right to exercise some publick Function, whether it be that of Justice or other[a].

[a] *See the Preamble of this Title, and the following Articles.*

II.

2. *All publick Functions are Charges, but all the said Charges have not the Title of Office.*

According to this first distinction of Charges and Offices, we may take in under the name of Charges all kinds of publick Imployments, which have not the Title of Office. Thus, besides the Municipal Charges, and those of the Judge and Consuls of Merchants in *France*, of which mention has been made in the foregoing Article, and which are a kind of Charges, the Commissions which the King gives are another kind; for altho' they do not give them in particular the name of Charges, they have in effect the character of them, which is to impose the Charge of a publick Imployment, whether it be in relation to the Administration of Justice, or other Imployment. Thus Embassies, the Governments of Provinces, the Courts which consist of persons nominated by the King to judge of certain Affairs, the Courts of Justice, and many other Imployments in the Administration of Justice, the Civil Policy, the Revenue, the War, and others, are Commissions, and make it a Charge to those whom the King nominates to them, to exercise a publick Function without the Title of Office[b].

[b] *This is a consequence of the foregoing Article.*

III.

3. *Municipal Charges are for a certain time; Offices for Life; Commissions for an indefinite time.*

There is this difference between the Commissions, which have been just now mentioned in the foregoing Article, and the Municipal Charges, and those of the Judges and Consuls of Merchants; that Commissions are for an indefinite time, and determine whenever the King is pleased to revoke them; whereas those other sorts of Charges have their duration for a time that is certain and fixed. Thus we must distinguish in all Charges, Offices and Commissions, three different Rules of their duration. For Offices are for life; Municipal Charges, and those of the Judges and Consuls of Merchants in *France* are for a certain time; and Commissions are for an indefinite time, such as the King pleases; so that whereas those who execute Commissions may be removed without any cause, those who execute Offices have them for their life, and cannot be removed, without some cause which may deserve it. It is the same thing with respect to those who execute those other Charges of Judge and Consuls, or Municipal Charges; for they cannot be removed or deprived during the time that the exercise of their Imployment ought to last, unless they are guilty of some misdemeanor[c].

[c] *This is the difference that is to be made between Municipal Charges, Offices and Commissions.*

IV.

4. *Three sorts of Judges, those named by the King, those appointed by Lords of Mannors, and those named by Bishops.*

As to Offices, they may be distinguished in the first place into three different kinds: The first, of Royal Offices; that is to say, of which the King has the Nomination: the second, of Offices disposed of by Lords of Mannors, who have the right of giving Commissions for exercising these sorts of Offices of Judicature which are annexed to their Lands, pursuant to the power which they have from the Sovereign so to do, by the Grant of the Rights of Jurisdiction[d]: the third, of Ecclesiastical Offices, of which Bishops give the Titles and Commissions, for administring Justice in matters which are cognizable in their Officialities.

[d] *The Lords of Mannors, who have the Right of Jurisdiction in their Lands, have likewise that of chusing and naming those who are to exercise the Offices of Judicature within their Districts, and they give them their Commissions; that is to say, the Title to possess the said Offices, and to execute them. Thus the Bishops who had only a Spiritual Jurisdiction, having obtained the privilege of the Temporal Jurisdiction with respect to the Clergy, they have the right to name Judges, who are called Officials, who besides the Spiritual Jurisdiction, have likewise by vertue of this privilege, which the Kings of* France *have granted unto the Church, the Temporal Jurisdiction for taking cognizance of matters belonging to this Jurisdiction, in so far as the same is limited by the Grant of the said Jurisdiction.*

V.

5. *Extent of the Jurisdiction of the Officers of Lords of Mannors.*

The Officers appointed by Lords of Mannors are every where the same for the exercise of the ordinary Justice, and of the Civil Policy in the Lands belonging to their District; where they judge of all Civil Matters, except some which are reserved to the King's Judges: they take cognizance likewise of all Crimes, except some, which are called Royal Cases, or Pleas of the Crown;

Crown; and the ſaid Officers are the Judges and Fiſcals who perform in the ſaid Courts of Lords of Mannors the Functions which the King's Judges and Council perform in the King's Courts. The Lords of Mannors have alſo in the Courts belonging to their Juriſdictions, Regiſters, Notaries, and Bailiffs[e].

[e] *It is not our Buſineſs to explain here, what are the Matters which the Judges of the Courts of Lords of Mannors cannot take cognizance of; thoſe matters are ſufficiently known.*

VI.

6. *Eccleſiaſtical Officers in the Officialities.*

The Eccleſiaſtical Officers in the Officialities, are the Officials, their Vicegerents or Surrogates; that is to ſay, the Lieutenants of the Officials, the Promoters, who exerciſe in the Spiritual Courts the Functions which the King's Council do in the Royal Courts. We muſt likewiſe place in the number of Officers, whoſe Miniſtry relates to the Eccleſiaſtical Juriſdiction, Regiſters, Apoſtolical Notaries, and Apparitors who exerciſe the Functions of Tipſtaves and Bailiffs[f].

[f] *We muſt not reckon in this number of Eccleſiaſtical Officers, the Eccleſiaſtical Perſons who are Judges in the Temporal Courts of Juſtice in* France, *and who are called Eccleſiaſtical Counſellors or Judges; for theſe are of the number of the King's Judges, and have no ſhare in the Spiritual Juriſdiction of Officials, of which we ſhall treat in the following Article.*

VII.

7. *The Eccleſiaſtical Officers have two ſorts of Juriſdiction, the Spiritual and Temporal.*

These Eccleſiaſtical Officers, Officials, their Vicegerents or Surrogates, and Promoters, have two ſorts of Juriſdiction, which are of a character altogether different: One for ſpiritual matters, of which they are the proper and natural Judges, ſuch as Hereſy, and what relates to the Sacraments, and other Spiritual Matters; and they take cognizance of theſe matters, not only between Eccleſiaſticks, but alſo between Laymen; ſuch as, for example, that concerning the validity of a Marriage. The other Juriſdiction which they have by vertue of a Privilege which the Kings of *France* have granted unto the Church in favour of the Clergy, the cognizance of all Cauſes, in which Clergymen are concerned, even altho' they relate to Temporal Matters, being granted to the Eccleſiaſtical Courts, that they may judge not only between Eccleſiaſticks, but alſo between a Clergyman and a Layman, of Matters which are not reſerved to the King's Judges[g].

[g] *The Vicegerents or Surrogates, are as it were the Lieutenants of the Officials; and the Promoters are they who perform in the Courts of Officials the Functions which the King's Proctors or Sollicitors perform in the Temporal Courts.*

VIII.

8. *The Officers belonging to Officialities, and thoſe of Lords of Mannors, are Officers of Juſtice.*

These two ſorts of Officers; to wit, thoſe belonging to Officialities[h], and thoſe of the Courts of Lords of Mannors, are all of them Officers of Juſtice, whoſe Functions relate to the Adminiſtration of Juſtice; and the Officers belonging to the Courts of Lords of Mannors have moreover Functions relating to the Civil Policy, as being a part of the ordinary Juriſdiction; and they have one and all of them their Functions limited, as has been explained in the preceding Articles: but the Officers of the Crown have their Functions in a more eminent degree, and in a larger extent, as will appear from the Articles which follow.

[h] *There is this difference between Officials, and the Eccleſiaſtical Counſellors who are of the number of Judges in the Temporal Courts in* France, *of whom mention ſhall be made in the twelfth Article of this Section, that the ſaid Eccleſiaſtical Counſellors or Judges have no ſhare in the Spiritual Juriſdiction, and are only Judges of Matters Temporal in the Parliaments and Preſidial Courts, which are Lay-Tribunals; and that the Officials have two Juriſdictions, one, which is natural to them, and which they derive from the Biſhops, in what relates to Spiritual Matters; and the other, for Temporal Affairs, which they have only by conceſſion.*

It is the uſage in France, *that the Lords of Mannors have their proper Judges in their Lands, as in the Dutchies, Counties, Marquiſſates, and other Lands which the Lords of Mannors have with a Grant of Juriſdiction, and where they name their Officers, for the adminiſtration of Juſtice.*

See the remarks which have been made on the fourth Article of this Section.

[*As to the conſtitution of the Courts of Lords of Mannors in* England, *it may not be improper to obſerve here that this Court is of two Natures. The firſt is by the Common Law, and is called a Court Baron, as ſome have conjectured, for that it is the Freeholders, or Freemens Court, (for Barons in one ſenſe ſignify Freemen,) and of that Court the Freeholders, being Suitors, be Judges. The ſecond is a Cuſtomary Court, and that doth concern Copyholders, and therein the Lord of the Mannor, or his Steward, is the Judge. Now as there can be no Court Baron without Freeholders, ſo there cannot be this kind of Cuſtomary Court without Copyholders, or Cuſtomaryholders. And as there may be a Court Baron of Freeholders only, without Copyholders, and then is the Steward the Regiſter; ſo there may be a Cuſtomary Court of Copyholders only, without Freeholders, and then is the Lord, or his Steward, the Judge. And when the Court Baron is of this double nature, the Court-Roll containeth as well matters appertaining to the Cuſtomary Court, as to the Court Baron.* Coke 1 Inſtit. fol. 58. a.]

IX.

9. *Different ſorts of Offices held of the King.*

In order to diſtinguiſh the ſeveral ſorts of Officers who hold their Offices of the King, it is neceſſary to conſider the different Orders of them, which have been explained in the IX^th^ Title of the Firſt Book. For we may place in this rank all thoſe who exerciſe Offices, the

Title to which they derive from the King's Authority, and which gives them the name and quality of the King's Officers; which takes in all the ſeveral kinds of Offices from the greateſt, which in *France* are called rather Charges than Offices, to the leaſt. Thus the Charges of the Officers of the Crown, the Charges of the Officers of the King's Houſhold, and thoſe of the Officers of War, of which mention has been made in the third Article of the ſecond Section of the ninth Title of the Firſt Book, are three kinds of Offices that are held of the King. Thus the Charges of all the Officers of Juſtice, of the Civil Policy, of the Revenue, of the Mint, of Mines, of Foreſts, and all the others mentioned in the third Section of the ſame ninth Title, are alſo kinds of Offices whereof the Title is conferred by the King's Authority.

[i] *In order to know the different characters of Offices whereof the King confers the Title, the Reader may conſult the ninth Title of the Firſt Book.*

X.

10. *The King diſpoſes of the Offices mentioned in the foregoing Article, which diſtinguiſhes them from the other ſorts of Offices.*

All theſe different ſorts of Offices which have been mentioned in the preceding Article, have this in common, that they are held of the King: which diſtinguiſhes them from the Offices belonging to the Spiritual Courts, and to the Courts of Lords of Mannors, as alſo from Municipal Offices, and from thoſe of the Judge and Conſuls of Merchants, for altho' it is only by vertue of the King's Authority that the ſaid Officers exerciſe their Functions, yet they exerciſe them without any Commiſſion, and without any other Title beſides that of their Election; and this Title diſtinguiſhes them from all Offices held by Commiſſion. But it is neceſſary to obſerve with reſpect to the ſaid Offices, that they are not only diſtinguiſhed by their Natures from the other Offices mentioned in the preceding Articles, but that they are alſo diſtinguiſhed among themſelves by Characters which give them different Natures independently of their Functions; which are the foundation of the other diſtinctions thereof which ſhall be explained in the following Section[1].

[1] *This is a conſequence of the preceding Articles.*

XI.

11. *Lands erected into Titles and Peerages, which give the quality of Peers.*

Among the diſtinctions between the ſaid Charges in *France*, the moſt remarkable is that which ariſes from a character that is peculiar to the ſole Dignity of the Peers, as they are diſtinguiſhed from all other Officers, even thoſe of the Crown; in regard that the ſaid Dignity, which makes of the Peerages Offices of the Crown, is annexed, with reſpect to the Spiritual Peers, to their Biſhopricks, to which are united the Dutchies or Counties which give them the Title of Peers; and as for the Temporal Peers, their Dignity is annexed to Lands which have Titles, and are erected into Peerages, for which all the Temporal Peers, as well as the Spiritual, take an Oath of Fidelity to the King; whereas all the other Offices without exception, are independent of all manner of Union to any Land whatſoever.

XII.

12. *Eccleſiaſtical Offices beſides thoſe of the Officialities.*

We may obſerve as another diſtinction between all the Charges of all the Officers of the Crown without diſtinction, that of the Eccleſiaſtical Offices, which are different from thoſe of the Officialities. Thus the Charge of King's Almoner, and the others under him, are Eccleſiaſtical Offices; and we muſt place in the ſame rank the Charges of the Eccleſiaſtical Counſellors, or Judges in the Temporal Courts of Juſtice; which appropriates the ſaid Charges to Eccleſiaſtical perſons, and by that means gives them a character which diſtinguiſhes them from all the other Charges which belong properly to Laymen. In relation to which we muſt take notice of this difference between the Charges of the Lord Almoner, and others whereof the Functions relate to the Spiritual Miniſtry, and thoſe of the Eccleſiaſtical Counſellors or Judges, that the former are naturally Eccleſiaſtical Offices in reſpect of their Functions, altho' they be appropriated to the Service of the Prince; and that the latter, to wit the Offices of the Eccleſiaſtical Counſellors or Judges in the Temporal Courts, where they judge of Temporal Affairs between all Lay Perſons and others, are appropriated to Eccleſiaſtical perſons, only by vertue of a privilege granted in favour of the Church, for the honour of the Eccleſiaſtical State, and for maintaining in the ſaid Tribunals the Liberties and Immunities of the Church.

XIII.

13. *Two ſorts of Offices, thoſe which are venal, and thoſe which are not.*

We muſt likewiſe take notice of another diſtinction of all the Charges which are held of the King, whereby they are diſtinguiſhed into two kinds. One is of thoſe which are venal; and the other is of thoſe which are not venal.

*

nal. Thus the Offices of the Crown are not venal; and as touching thoſe of the King's Houſhold, and thoſe of the Army, many of them are venal, and the chief of them are not. Thus the Offices belonging to the Adminiſtration of Juſtice, and to the Revenue, excepting a very ſmall number, are all of them venal [m].

[m] ☞ It would be ſuperfluous to make a more particular diſtinction of the Offices which are venal, and thoſe which are not; but we cannot forbear obſerving with reſpect to the venality of the Offices belonging to the Adminiſtration of Juſtice, which are called Offices of Judicature, as they are termed in the Ordinances, that the Sale thereof had been very ſtrictly prohibited in *France*, by a great number of Ordinances.

We, purſuant to the Ordinances of our Predeceſſors, prohibit all our Officers and Counſellors, and all our Subjects, that from henceforward our Officers and Counſellors do not accept of any promiſe, or reward, for procuring or obtaining for any one any of the ſaid Offices, upon pain for our Officers and Counſellors to pay unto us the quadruple of what ſhall have been promiſed or given to them, and to incur our diſpleaſure, and to be otherwiſe ſeverely puniſhed; and as to our Subjects, upon pain of forfeiting the Office which they ſhall have obtained in this manner, and of being deprived of all Royal Offices, and of paying likewiſe unto us the quadruple of what they ſhall have paid for procuring the ſaid Office. And it is our will and pleaſure, that theſe our Offices be given and conferred upon fit and able perſons, freely, by our favour, and without any fee or reward, to the end that the ſaid Officers may adminiſter Juſtice unto our Subjects, without demanding or taking any reward for the ſame. *Ordinance of* Charles VII. *of the Month of* April, 1453. *Art.* 84.

See *the Ordinances of* Charles VIII. *in* July, 1493. *Art.* 68. *of* Lewis XII. *in* March, 1498. *Art.* 40. *of* Francis I. *in* October, 1535. *Chap.* I. *Art.* 2. *of the Eſtates of* Orleans, *Art.* 39, 40. *of* Moulins, *Art.* 11. *and of* Blois, *Art.* 100, 104.

Theſe Ordinances were conformable to the Laws made by *Juſtinian*, for prohibiting the Sale of Offices of Judicature.

Ad hanc ſacram venimus legem, per quam ſancimus, neque proconſulariam ullam, neque hactenùs vocatam vicariam, neque comitem orientis, neque aliam quamlibet adminiſtrationem, neque proconſularem, neque præſidalem, (quam conſularitias & correctivas vocant) quarum expreſſim meminit ſubjecta huic ſacræ legi noſtræ deſcriptio, quaſq; ſolas ſub hac lege ducimus, dare aliquod ſuffragium, neque pro adminiſtratione quamlibet donationem neque judici ulli, neque horum qui circa adminiſtrationem ſunt alicui, neque alteri per occaſionem patrocinii: ſed gratis quidem ſumere adminiſtrationes. Novel. 8. cap. 1.

Cogitatio igitur nobis facta eſt, quod agentes omnia quæcunque in noſtris provinciis ſunt, uno actu communi ad meliora migraremus. Hoc enim omninò eventurum credimus, ſi præſides gentium quicunque civiles adminiſtrationes provinciarum habent, puris *procuremus uti* manibus, *& ab omni abſtinere acceptione pro illis ſolis contentos eis quæ à fiſco dantur, quod non aliter fiet, niſi & ipſi cingula ſine mercede percipiant, nihil omninò dantes nec occaſione ſuffragiorum, neque iis qui cingula habent, nec alii omnium ulli. Conſideravimus enim, quia licet quæſtus immodicus imminuitur imperio, attamen noſtri ſubjecti incrementum maximum percipient, ſi indemnes à judicibus conſerventur:* & imperium & fiſcus abundabit utens ſubjectis locupletibus; *& uno introducto ordine, plurima rerum & innumera erit ubertas.* Nov. 8. in Præfat.

Volentes enim inhoneſta hæc & ſervilia furta perimere, & noſtros ſubjectos in quiete à provincialibus judicibus conſervare: propterea feſtinavimus gratis adminiſtrationes eis dare, ut nec ipſis liceat delinquere, & abripere ſubjectis, quorum cauſa omnem perferimus laborem, dedignantes imitari eos qui ante nos imperaverunt, qui pecuniis ordinabant adminiſtrationes ſibimetipſis auferentes licentiam adminiſtratoribus nocentibus increpandi juſtè, & ipſi ea quæ percipiebant, celando, juſti putati & proprios collatores propter hoc abripere à malis judicibus non valentes: unde nec ipſis judicibus increpare poterant agere caſtè, occaſione prædictæ cauſæ. Nos autem ſufficientem imperio quæſtum eſſe putamus, ut collatores ſola fiſcalia conferant tributa, & nihil aliud extrinſecùs quæratur quod ſubjectis omnem commoveat vitam. Nov. 8. c. 11.

Oportet igitur, ut qui hunc magiſtratum ſuſcipit ſemper autem gratis eum & abſq; ulla datione pecuniæ ipſi conferimus, ut & ipſe per omnia ſordibus abſtineat, & his ſolis quæ ex publico ſolvuntur, contentus ſit, id quod etiam prima noſtra lex dicit, juſtè & purè, & cum quadam aſperitate humaniter ſe erga ſubditos gerat quemadmodum in priore lege diſpoſuimus. Novel. 24. c. 2.

But the example of the ancient venality of Offices, and the preſſing neceſſities of the State in the latter Ages, made people begin to derogate from the ſaid Laws and Ordinances, and the venality of Offices came to be eſtabliſhed in *France* inſenſibly in the manner in which it now is. So that this Abuſe, which is ſo highly condemned by all the ſaid Laws, by all the ſaid Ordinances, came to be a ſtated and a fixed Uſage, and has been authorized by other ſubſequent Ordinances.

See the Ordinance of the 1ſt of *December* in 1567, and the Edict of the 28th of *December* 1604. So that it has not any longer the odious name of Abuſe; and perhaps it may not be attended with much greater inconveniences than even the moſt natural ways of filling the ſaid Offices may have.

Every body knows that the moſt natural way of filling theſe ſorts of Offices, and all others, is that the Prince himſelf names the Officers; and as it is he that regulates their Functions, and gives them their Authority, ſo it is likewiſe he who ought to make choice of the perſons. But ſeeing it is impoſſible that the Sovereign of large Dominions can ſpare time to provide for the filling up of all the vacant Offices, nor to make an exact enquiry into the characters of the Perſons, in order to fill all the Offices by his own proper choice; it is abſolutely neceſſary that he ſhould reſtrain himſelf to a few Officers, the Nomination of whom he reſerves to himſelf, and that he ſhould intruſt the Nomination of the greateſt part of them to other perſons.

It is for this reaſon that we ſee in the Ordinances of *France*, that it was provided that the Offices of Judicature ſhould be filled by Elections made by the Courts of Juſtice themſelves, who made choice of ſome perſons, one of which number the King named to ſucceed in the vacant Office. And the ſaid Elections were differently regulated by the Ordinances; as by thoſe of *Philip the Fair*, in 1302. Art. 22. Of *Charles* VI. in 1388. Of *Charles* VII. in 1406. in 1446. Art. 1. in 1453. Art. 83. Of *Lewis* XII. in *March*, 1498. Art. 47. in *November*, 1507. Art. 208. in *June*, 1510. Art. 41. Of *Francis* I. in *June*, 1536. Art. 30. Of the Eſtates of *Orleans*, Art. 39. Of thoſe of *Moulins*, Art. 11. and of thoſe of *Blois*, Art. 104.

Yet nevertheleſs this way which is ſo juſt and ſo regular, was not without its inconveniences; for intereſt, favour, caballing, the authority of great Perſons, and other motives, made the Election to fall often on perſons who were not worthy. And it may be ſaid of that way of Election, and of all the others that can be imagined, that every thing which depends upon Men, eſpecially upon a great number, is liable to depend often upon Principles which are very remote from Juſtice and Reaſon; and that if there is on one ſide the publick Intereſt alone, it is eaſily over-balanced by other views which are more ſenſible, and which lead to what is directly contrary to the ſaid publick Good. And for that reaſon we may even comfort our ſelves under the preſent ſtate, and be contented with this way of filling the Offices, and perhaps it may be ſaid of it, that it gives to the Publick Perſons leſs unworthy for ſupplying the ſaid Offices, than were provided by the way of Election. For whereas Elections are occaſions to great Lords, and others in Power, to imploy their Credit and Authority, for procuring the Election to fall upon Perſons to whom they owe ſome recompence, or whom they are induced to countenance upon other motives, and who perhaps may be perſons without merit, without probity, and without capacity; and that the Electors have likewiſe their private views, their intereſts, and their paſſions, which make them prefer to thoſe who deſerve to be named, their Relations, and their Friends, whether they be capable or not; whereas the perſons who have wherewithal to purchaſe Offices for their Children, endeavour to give them an education which may render them capable thereof; and notwithſtanding the venality of Offices, we ſee a great many Magiſtrates who have very great merit, and who, together with a great ſtock of Knowledge and Learning, have an Integrity that is proof againſt all bribery and corruption. It is true that the generality of them have not this merit; but to do juſtice to the Truth, it muſt be owned, that it is not the venality of Offices alone, which is the cauſe of it, and that there is another cauſe thereof, which we have much more reaſon to lament, and that is the great facility in admitting Perſons into Offices which relate to the Adminiſtration of Juſtice. For if even in the times when Offices of Judicature were not venal, and when the Judges were choſen with ſo great precaution, the Ordinances directed that nevertheleſs

leſs a ſtrict enquiry ſhould be made into the life and converſation of thoſe who were nominated by the King, after the ſolemn Election which had been made by the Courts of Juſtice, and that they ſhould be ſtrictly examined as to their capacity, as may be ſeen by the Ordinances of *Lewis* XII. in *March*, 1498. Art. 32. Of *Francis* I. in *October*, 1535. Chap. 1. Art. 1. Of the Eſtates of *Orleans*, Art. 4. Art. 10. Of *Moulins*, Art. 9. Art. 71. And of *Blois*, Art. 102. Art. 107. and 108.

We ought with much more reaſon now, when the Examination of the perſons who are to be received Judges is the only proof of their capacity, to make it ſuch as that the Examiners ſhould look upon themſelves to be, as really and truly they are, the Cautions and Sureties to the Publick for the capacity of thoſe whom they admit. But on the contrary, that Examination is ſo ſlight, that there is ſcarce an inſtance of any one that is rejected for want of capacity; whereas if it were performed in a rigorous manner, and ſuch as might ſuffice for making a right Judgment of the underſtanding and capacity of the Perſon who is to be received into the Office, it would repair the inconvenience of the venality of the Offices, by rendring that commerce fruitleſs to thoſe who ſhould be found not to be duly qualified for the Office.

We muſt obſerve here on the ſubject of the venality of Offices, that as the Title to the Office, and the Right to execute it, conſiſt in the Commiſſion which the King gives for the ſame, who is the only perſon that can make Officers, and that the ſaid Right is annexed to the perſon, and cannot be bought or ſold; ſo that when an Officer ſells his Office, in order to put the purchaſer into his place to execute the ſame, the effect of the Sale is to give unto the Purchaſer a Surrender of the Office into the King's hands, for the uſe and benefit of the Purchaſer, that he may be put into poſſeſſion thereof by vertue of the ſaid Surrender, which is made by a Proxy or Letter of Attorney, for reſigning the Office; and if the Officer dies without having diſpoſed of his Office, the Surrender is made by his Heirs. And it is in this manner that we are to underſtand the effect of the venality of Offices. As to which we muſt likewiſe obſerve, that the Heirs of the Officer have had this right no longer than ſince the eſtabliſhment of the Annual Duty, by the Edict of *Henry* IV. of the 12th of *December*, 1604; for before that time the death of the Officer deprived his Heirs of the Office; but by the eſtabliſhment of the Annual Duty, the Officer who has paid it within a year before his death, retains the right to reſign in his Succeſſion, and tranſmits it to his Heirs. But altho' the payment of the Annual Duty makes the right which the Officer had to reſign the Office, to paſs to the Heirs of the Officer, yet that does not give to the ſaid Offices the quality of Hereditary Offices, becauſe they are not ſuch in their nature, for the Reaſons which have been explained. But theſe Offices are diſtinguiſhed from thoſe which are commonly called Hereditary, ſuch as are thoſe Offices which are otherwiſe called Offices of the Demeſnes, not ſubject to the Annual Duty, as the Offices of Regiſters which are diſtinguiſhed from the other Offices, in that they are a part of the King's Demeſnes, by reaſon of the profits which ariſe from them, and which paſs from the Purchaſers of the ſaid Offices of Regiſters to their Heirs, in the ſame manner as the other Goods of the Demeſne which are alienated by Contract; whereas the other Offices which are not Hereditary, yield no other Revenue to the King, beſides the Annual Duty, which is not a Fruit or Perquiſite of the Office, as the ſaid Profits are a Fruit or Perquiſite of the Regiſters Places.

But it would ſeem that it might be ſaid of this diſtinction, which calls the Offices of the Demeſne Hereditary, that what is of Inheritance in the ſaid Offices is not the Office it ſelf, which gives the right to exerciſe the functions thereof, but that it is only the right to receive this Revenue, which is a right that is ſeparable from the Office; and ſo far ſeparable, that when the Regiſter dies, his Heirs, who ſhall be found incapable of diſcharging the Functions of this Office, as if they are Minors or Women, will nevertheleſs be intitled to this Revenue; but they will be obliged to ſubſtitute a Regiſter, to do the duty of the Office for a Salary; and it will be this acting Regiſter who will be in the place of the Officer, without having any right to this Revenue. So that in theſe Offices it is neither the Quality, nor the Function of the Regiſter, which is Hereditary; but it is only the right to the Perquiſites which may be ſeparated from the Function. Thus, ſeeing it is only the Function that makes the Officer, it is not, ſtrictly

ſpeaking, the Office that is Hereditary; and it is for this reaſon that we have not placed in the number of the diſtinctions of Offices, which have been explained in this Section, that of Hereditary Offices and thoſe belonging to the Demeſne.

By the *Roman* Law there were even ſome of thoſe Offices belonging to the Houſhold of the Prince, which were called *Militiæ*, which were venal.

Inter venditorem & emptorem militiæ, ita convenit, ut ſalarium, quod debebatur ab illa perſona, emptori cederet. Quæſitum eſt: Emptor militiæ quam quantitatem à quo exigere (debet) & quid ex ejuſmodi pacto venditor emptori præſtare debeat. Reſpondit: Venditorem actiones extraordinarias eo nomine, quas haberet præſtare debere. l. 52. §. 2. ff. de act. empt. & vend.

Super hypothecis, quas argenti diſtractores vel metaxarii, vel alii quarumque ſpecierum negotiatores pecunias ſibi credentibus dare ſolent, hoc ſpecialiter ſuper amputanda omni machinatione ſancimus, ut ſi poſt hujuſmodi contractum liberis ſuis, vel alio modo cognatis, quamcunque militiam iidem negotiatores acquiſierint (eam tamen quæ vendi vel ad hæredes ſub certa definitione tranſmitti poteſt) liceat creditoribus eorum etiam non probantibus ex pecuniis eorumdem negotiatorum liberos eorum vel cognatos militaſſe (dum tamen contrarium non probetur, alios ex ſuo patrimonio dediſſe pecunias) creditum ab his qui militarint exigere: vel tantum eos efflagitare quanti vendi eadem militia poſſit. Quod ita obtinere ſancimus, & ſi extraneis quibuſdam iidem negotiatores de ſuis pecuniis hujuſmodi militiam acquiſiſſe probentur: ut quod generaliter in ipſis debitoribus militantibus talem militiam, quæ vendi vel ad hæredes tranſmitti poteſt, permiſſum eſt, ut liceat creditoribus & adhuc viventium debitorum jure hypothecæ vindicare militias, niſi ſibi ſatisfiat: & poſt mortem eorum exigere quod pro hiſdem militiis pro tenore communis militantium placiti, vel divinæ ſanctionis tale præſtantis beneficium, dari ſolet: hoc in negotiatorum perſonis, licet ipſi militantes minimè debito obnoxii ſint, integrum creditoribus eorum ſervetur. l. ult. C. de pignor. & hypoth.

Propterea igitur ſancimus ea quæ appellantur ex caſu, non omnibus promptè ſubjacere: niſi tamen creditor fuerit qui ad hoc ipſum mutavit, ut militia illi meretur. Alioqui filiis creditoribus non promptè damus hoc: ſed ſiquidem alii fuerint aut uxor defuncti, iſtos omnibus præponimus modis, ut adeant nos: & ſecundùm juſſionem noſtram hoc habeant non tanquam paternam hæreditatem ſi in aliis inops ſit, ſed tanquam imperialem munificentiam: ut & ſubſtantiam relinquentibus, & non habentibus, meritò ſolatium præbeamus. Si vero nullus eis neque filius neque uxor fuerit, neque creditor qui ad ipſam militiam mutuarit: tunc & aliis creditoribus præbemus hoc, ne videamur inhumanum aliquid facere, & non propter piam & Deo placentem actionem ponere legem: de militia quippè ſpectabilium ſilentiariorum propriè datis & largitis eis privilegiis in ſua virtute manentibus. Nov. 53. cap. 5.

Vide Novel. 97. cap. 4.

['In *England* there is an expreſs Act of Parliament againſt the buying and ſelling of Offices, which do in any way touch or concern the Adminiſtration or Execution of Juſtice, or the Receipt, Comptrolment, or Payment of the King's Revenue, or the Keeping of any of his Majeſty's Towns, Caſtles, or Fortreſſes; upon pain to the Sellers, to loſe and forfeit all their Right, Intereſt and Eſtate, which they may have in and to any of the ſaid Offices; and to the Buyers, of being adjudged diſabled perſons in Law, to all intents and purpoſes, to have, occupy, or enjoy the ſaid Offices, or any part of them, for which they ſhall have given, or paid, or promiſed, any Sum of Money, Fee, or Reward. *Stat.* 5 & 6 Ed. VI. *cap.* 16. Coke 3. *Inſt. p.* 148.]

XIV.

The King's Commiſſion for Royal Offices, thoſe which are venal, and others.

14. As to all theſe Offices which are of the King's Nomination, whether they be venal or others, there is only one ſingle way of having the Title to poſſeſs and execute them, and that Title conſiſts in the Letters Patents or Commiſſion which the King grants; for as it is the King alone that can create Offices, ſo it is only he that can diſpoſe of them, and give the quality of Officer which is conferred by the ſaid Letters. But there is this difference between venal Offices, and thoſe which are not venal; that as to theſe it is the King who nominates to Offices ſuch perſons as he thinks fit, without any thing previous to their Title beſides the choice which he makes to diſpoſe of them to ſuch perſons as he judges worthy of them. And as for the venal Offices, he gives the Commiſſions for them without diſtinction of perſons to thoſe in whoſe favours they are reſigned; whether it be that the Reſignation is made by the Officer himſelf, or by his Heirs, to whom his Right had deſcended; and as to the enquiry that is to be made into the manners and capacity of the perſons whom he names to the Offices, whether they be venal Offices or others, he leaves that to the Officers to whom he intruſts the care of their admiſſion.

☞ It may be remarked on this Article, that altho' there be but one way by which the King confers the Title of an Office, and which conſiſts in the Patent or Commiſſion, yet there are many different caſes which diverſify the manners of acquiring Offices, and of tranſmitting the Title from one perſon to another. Thus with regard to the Offices which are not venal, when the King erects any Offices of this nature, he gives them to ſuch perſons as he nominates of his own free choice; and if one of the ſaid Offices happens to become vacant, either by the death of the Officer, or by his reſignation into the King's hands, that he may diſpoſe thereof, the King grants it to another: and it would be the ſame thing if the Office were void by the deprivation of the Officer, who had been guilty of ſome Miſdemeanour which had rendred him unworthy of the Office, and which deſerved that he ſhould be deprived for the ſame. Thus, as to Offices which are venal, when the King creates any of this ſort, as it is in order to draw from thence a Revenue, ſo they who pay the ſtated price are nominated to the Office: and if one of the ſaid Offices, whether it be of the ancient or new Creation, happens to fall void by the death of him who is in actual poſſeſſion, and who had not paid the annual duty, the King grants it unto him who pays the Price at which the Office is taxed; and if the Officer is turned out, the King puts in another perſon in his ſtead, either in conſideration of the Money that it is taxed at, or by favour, if it is his pleaſure to give it. And if the Officer reſigns his Office, or that he being dead after having paid the annual duty, his Heirs reſign it, the perſon in whoſe favour the reſignation is made, is named to ſucceed him. It is becauſe of theſe ways by which Offices become void, that is, which make that the Office ceaſes to be poſſeſſed by him who has the Title, that it is ſaid that Offices become void three ways, by Death, by Surrender, and by Forfeiture, that is to ſay, by the Offence of the Officer, who has deſerved to be turned out; for the Officer cannot be turned out, unleſs he has committed ſome Offence, as has been ſaid in the third Article.

XV.

15. *Divers combinations of the Functions of Juſtice, Policy, and the Revenue.*

There are ſome Offices whoſe Functions are mixed, conſiſting partly of Juſtice, and partly of Policy; others which have only Functions of Juſtice without Policy; and there are ſome likewiſe whoſe Functions are mixed, and conſiſt partly of Juſtice, and partly of the Revenue; and others which together with ſome Functions of Juſtice, and of the Revenue, have alſo ſome Functions of Policy; and others again have only Functions relating to the Revenue, without any Adminiſtration of Juſtice, or Function of Policy: but there is no Office which has the direction of the Policy, or Civil Government, without ſome ſhare in the Adminiſtration of Juſtice; for the Rules and Orders of the Civil Policy cannot be obſerved without the Miniſtry of the Authority that properly belongs to Juſtice. The Reader will ſee in the following Articles Offices of all theſe ſorts[o].

[o] *One may be able to judge of theſe ſeveral Combinations of the Functions of Juſtice, Policy, and the Revenue, by the Articles which follow.*

XVI.

16. *Offices whoſe Functions are mixed, conſiſting partly of Juſtice, and partly of Policy.*

The Offices whoſe Functions are of a mixt nature, conſiſting partly of Juſtice, and partly of Policy, are thoſe of the Parliaments in *France*, of Bailiffs, Seneſchals, and other the like Officers of the Crown, who render Juſtice in all matters, and who for that reaſon are called the Judges in Ordinary; and the Officers of the Courts of Lords of Manors have alſo the direction of the Policy, together with the Adminiſtration of Juſtice, in the Lands belonging to the Mannor[p].

[p] *All theſe ſorts of Offices have the Adminiſtration of Juſtice and of the Civil Policy, becauſe they have an univerſal Juriſdiction in all matters, except ſome that have been reſerved to other Officers.*
See the following Article.

XVII.

17. *Offices of Juſtice without any Function of Policy.*

The Offices which have only Functions of Juſtice, without any ſhare in the Civil Policy, are thoſe of the Courts of Aids in *France*, of the Mint, of the Elections, of the Magazines of Salt, and other Officers who have the Adminiſtration of Juſtice in matters belonging to their cognizance, and whoſe Functions do not extend to any thing relating to the Civil Policy[q].

[q] *The Officers mentioned in this Article not having the Adminiſtration of the Ordinary Juſtice in its full extent, and the Functions of Policy not being committed to them, they take no cognizance of it.*

XVIII.

18. *Offices which have a mixture of the Functions of Juſtice, and of the Revenue.*

The Offices which have a mixture of the Functions of Juſtice, and of the Revenue, are the ſame Offices which have been mentioned in the foregoing Article,

tice and of the Revenue, and ſome which relate both to Juſtice, the Revenue, and to Policy.

cle, to wit, thoſe of the Courts of Aids, of the Elections, of the Magazines of Salt; for in the ſaid Courts they exerciſe even the Functions of Juſtice between particular perſons in relation to matters which belong to their Cognizance, and which are matters touching the Revenue; and they likewiſe take cognizance there of other matters of ordinary Juriſdiction which come before them, as in Orders touching Goods ſeized by their Authority, where there may ariſe queſtions of all kinds in the diſputes touching the Title of Nobility, on which is founded an Exemption from Taxes, and others of the like Nature; and the Offices of the Chambers of Accompts, and thoſe of the Treaſurers of *France*, are likewiſe of a mixed kind, having Functions relating to Juſtice and to the Revenue; and the Treaſurers of *France* have moreover Functions of Policy for keeping in repair the High-ways, Cauſeys, Bridges, Pavements, Ports and Paſſages, which are committed to them by the Ordinances. Thus the Treaſurers of *France* have joined together Functions relating to Juſtice, to the Revenue, and to Policy[r].

[r] *Theſe different Juriſdictions of the ſaid Offices are an effect of the Appropriations thereof which have been made by the Ordinances.*

See the remark which has been made on the thirteenth Article of the following Section.

XIX.

19. *Offices in the Revenue, without Functions of Juſtice, or of Policy.*

The Offices which have only Functions relating to the Revenue, without Adminiſtration of Juſtice, or Functions of Policy, are thoſe of the Receivers general and particular of the Taxes, and other Officers of the like nature, whoſe Functions are limited, either to receive the Monies payable into their Receipt, and to give an Account thereof, or to other Functions reſtrained to the Revenue alone[s].

[s] *This is the Nature of theſe Offices.*

XX.

20. *Functions of Policy imply Functions of Juſtice.*

We give here no inſtances of Offices which have only Functions of Policy, without any Function of Juſtice; for, as has been ſaid in the ninth Article, the Adminiſtration of the Policy implies the uſe of the Authority of Juſtice. Thus the Offices, even the Municipal Offices, one of the Functions whereof relates to the Policy of the Towns which the Municipal Officers have the direction of in conjunction with the Bailiffs, Seneſchals, and other Officers of the Crown, as has been mentioned in its proper place[t], have alſo committed to them the Function of deciding the differences which ariſe between particular perſons in relation to matters of Policy, and to make together with the Officers of the Crown the neceſſary Regulations, and to enforce the Obſervance of them, which are ſo many Functions of Juſtice.

[t] *See the ſecond Article of the ſecond Section of the ninth Title of the firſt Book.*

XXI.

21. *The Great Council.*

Among the Charges of the Officers of Juſtice, we muſt diſtinguiſh one Company which has a peculiar Dignity and Authority, which is that of the Great Council, which is one of the Supreme Courts of Juſtice, and which is the only one of the kind in *France*, and judges of matters which relate to the Archbiſhopricks, Biſhopricks, Abbies, and other Benefices, the Cognizance of which is appropriated to the ſaid Council, of Indults, or Grants from the Pope, of the Cauſes which concern certain Perſons, and certain Orders, of Diſputes touching Juriſdiction between the Parliaments and Preſidial Courts, of the contrarieties in the Judgments of the ſeveral Courts of Juſtice, and of other matters of this kind[u].

[u] *This Tribunal hath its Functions regulated by the Ordinances, and other Regulations.*

[‘ Among the ſeveral Functions which are peculiarly reſerved to this great Tribunal mentioned ‘ in this Article, I cannot forbear taking notice of ‘ one which contributes much to the Peace and ‘ Quiet of the Subjects in *France*, and that is, the ‘ power it has to determine diſputes in point of ‘ Juriſdiction between the ſeveral Courts of Juſtice. It is not left to any of the Courts themſelves to determine how far their own Juriſdiction ‘ extends, which would be to make them Judges ‘ in their own Cauſe, contrary to all the Rules of ‘ Juſtice. And therefore to avoid this Abſurdity, ‘ and to prevent the Subject from being haraſſed ‘ and toſſed from one Court to another, to the ‘ great delay and hindrance of Juſtice, an indifferent Court is eſtabliſhed, which has no intereſt ‘ one way or other in the matter in controverſy, ‘ to determine and ſettle the point of Juriſdiction ‘ between the ſeveral Courts. If ſuch an Eſtabliſhment had been in other Countries, it would ‘ have preſerved the antient Juriſdiction of every ‘ Court within its proper bounds, and not ſuffered one Court to encroach upon another; which ‘ has rendred the Law touching the Juriſdiction ‘ of Courts ſo precarious and uncertain, that it is ‘ become a difficult matter how to fix it.]

XXII.

22. *Judges of privileged perſons.*

There are likewiſe other peculiar Juriſdictions eſtabliſhed in favour of privileged perſons, who have for Judges in their Cauſes, the Officers of the ſaid Courts. Thus the Courts of Requeſts

of the *Hôtel*, and thoſe of the Palace in *France*, have been eſtabliſhed to hear and determine the Cauſes wherein the Officers of the King's Houſhold are concerned, and other perſons who have that Right which is called *Committimus*, which allows them to remove their Cauſes from all other Courts, in order to have them decided in the ſaid Tribunals, in ſo far as belongs to their Cognizance, according as the ſame is regulated by the Ordinances. And we may place in this rank of Judges of Privileges, the Conſervators of the Privileges of the Univerſities, and other Officers, to whom the Kings have granted the like Juriſdiction in favour of ſome perſons [x].

[x] *Theſe Juriſdictions are diſtinguiſhed by the Ordinances which have eſtabliſhed them, and by the Regulations.*

XXIII.

23. *Judges of the Merchants.* We may place in the number of extraordinary Juriſdictions that of the Judges of Merchants in *France*, who are called Judge and Conſuls of the Merchants, whoſe Functions and Charges are not properly ſpeaking Offices; for they have not their Commiſſions from the King; but the Ordinances have permitted the Merchants to name every year ſome of their own number to take cognizance of the differences that may ariſe among them in matters of Commerce, as the ſame is regulated by the ſaid Ordinances. And this Juriſdiction hath its uſefulneſs by the great diſpatch which it gives in the determination of ſuch matters; the nature whereof is ſuch, that even the Merchants themſelves may be Judges of them [y].

[y] *See the Ordinances of* November 1563, *of* May 1566, *and others which relate to the Eſtabliſhment and Juriſdiction of the ſaid Judges.*

XXIV.

24. *Regiſters.* In all the Juriſdictions, it is neceſſary to diſtinguiſh another ſort of Offices, which are thoſe of Regiſters, whoſe buſineſs it is to put down in writing the Decrees, the Sentences, the Judgments, and the Orders of the Judges, and the other Acts that are done in Courts of Juſtice. It is likewiſe another Function of Regiſters, to be Depoſitaries of the Acts which are to be preſerved, and to give out authentick Copies of them, ſigned by them, to ſuch perſons as may have a right to demand them; and theſe Copies being ſigned by the Regiſters, carry along with them the proof of their Truth [z].

[z] *See the firſt Section of the fifth Title.*

XXV.

25. *Proctors.* We muſt likewiſe diſtinguiſh in all Courts, the Offices of Proctors, who are eſtabliſhed, to repreſent the Parties in Judgment, to make prayers and requeſts in their behalf, and to inſtruct and prepare the Cauſe for Sentence [a].

[a] *See the ſecond Section of the fifth Title.*

XXVI.

26. *Tip-ſtaves and Apparitors.* There is alſo another diſtinction of Offices neceſſary in all Juriſdictions, which are thoſe of Tip-ſtaves, or Apparitors, whoſe buſineſs is to attend and aſſiſt the Judges in the diſcharge of their Offices, as there is occaſion, to be diligent in their attendance on this Service, at the Places where Juſtice is adminiſtred, and on occaſions of publick Ceremony: The Functions of Tip-ſtaves and Apparitors conſiſt likewiſe in calling the Parties, and their Proctors, to appear in Court, and in executing the Decrees and Sentences of the Judges, and all the other Orders of the Court [b].

[b] *See the third Section of the fifth Title.*

XXVII.

27. *Sergeants and Bailiffs.* The Offices of Sergeants and Bailiffs, are alſo diſtinguiſhed from the other Offices mentioned in the foregoing Articles; and their principal Function is to execute, in the ſame manner as Tip-ſtaves and Apparitors, the Decrees, the Sentences, and other Orders of the Court [c].

[c] *See the third Section of the fifth Title.*

XXVIII.

28. *Two ſorts of Juriſdiction, voluntary and contentious.* We might likewiſe diſtinguiſh the Offices of Juſtice by the difference that is to be made of two ſorts of Juriſdiction: One, which is called voluntary, which is exerciſed without conteſtation between Parties, by the power of making Regulations, and by a direction of a great many particular Affairs belonging to the Cognizance of thoſe who exerciſe the ſaid Juriſdiction; and the other, which is called contentious, which is exerciſed between Parties who have Law-Suits one with another. Thus the Chambers of Accompts, and the Treaſurers of *France*, and other Officers of the Revenue, have a voluntary Juriſdiction, and a power of giving directions in the ſaid matters, whether it be in making general or particular Regulations, or in auditing the Accompts of

of Officers that are accountable, or for other Functions of the like nature. Thus the ſeveral Parliaments in *France*, the Courts of Aid, the Bailiffs and Seneſchals, and all other Officers of Juſtice, who have power to determine the differences between particular perſons, have a contentious Juriſdiction. But this diſtinction of a voluntary and of a contentious Juriſdiction, which hath a reaſonable and juſt foundation for diſtinguiſhing theſe two kinds of Functions, hath not the ſame reaſon and juſtice for the diſtinction of Offices; for altho' the principal Functions of the Offices of the Chambers of Accompts[d], and of the Treaſurers of *France*, do conſiſt of thoſe of a voluntary Juriſdiction, yet they have likewiſe ſome of a contentious Juriſdiction; and on the contrary, altho' the ordinary Functions of the Parliaments of *France*, of the Bailiffs and Seneſchals, and other Officers of Juſtice, conſiſt of thoſe of a contentious Juriſdiction, yet they have alſo Functions of a voluntary Juriſdiction, whether it be for the making of Rules and Orders, or for ſpeeding Acts of Juſtice, which belong to the ſaid Juriſdiction; ſuch as the admiſſion of Officers, the ſealing up of Effects which are in danger of being imbezzeled, the appointment of Tutors and Guardians, the exhibiting of Inventaries, and many others of the like kind. Thus, it may be ſaid of all Offices in general, that ſome of them have their moſt ordinary Functions conſiſting in the voluntary Juriſdiction; and that others have their moſt common Functions in matters pertaining to the contentious Juriſdiction[e].

[d] *Altho' the principal Functions of the Officers of the Chambers of Accompts, and of the Treaſurers of* France, *are thoſe which relate to the voluntary Juriſdiction, yet they have likewiſe ſome Functions of the contentious Juriſdiction, which come in as incidents to the matters belonging to their Cognizance; and the Treaſurers of* France *have a Juriſdiction in matters pertaining to the Demeſnes, and to the repairing of the Highways, which gives them a power to judge of diſputes between particular perſons, as the ſame has been explained in its proper place.*

[e] Omnes proconſules ſtatim quam urbem egreſſi ſunt habent juriſdictionem, ſed non contentioſam, ſed voluntariam ut ecce manumitti apud eos poſſunt tam liberi quàm ſervi & adoptiones fieri. *l.* 2. *D. de officio Proc. & leg.*

See the tenth Article of the ſecond Section.

XXIX.

29. *Publick Notaries.*

This diſtinction between a voluntary and a contentious Juriſdiction, obliges us to take notice of a particular kind of Officers, whoſe Functions are of a very great and very frequent uſe, and who have a kind of voluntary Juriſdiction, without any ſhare of the contentious Juriſdiction, which are the Publick Notaries: for the Functions of Notaries imply two characters of a voluntary Juriſdiction: the firſt conſiſts in this, that their Preſence and their Signature ſerves as a proof of the truth of the Acts which are ſped in their preſence; and that whereas in the Writings, which are called private, that is to ſay, which are ſigned only by the Parties, their Signatures being unknown in Courts of Juſtice, it is neceſſary to verify them, if they are called in queſtion, the Signatures of Notaries, who are Publick Officers, carry along with them the proof of the truth of the Acts which they ſign: and the ſecond of theſe characters conſiſts in this, that the Acts which contain ſome Obligation of one party towards another, being ſigned by a Notary Publick, give a Right of Mortgage on the Eſtate of the perſon who is bound, which a private Bond or Obligation, ſigned only by the Party, would not give. And ſince it is in *France* the Authority of Juſtice that gives the Mortgage, it is by vertue of a kind of Juriſdiction that Notaries have this Function, that a Mortgage is acquired by the means of their Signature; and it is becauſe of this voluntary Juriſdiction, that in ſome of the Provinces of *France* it is uſual for the Notaries to inſert in the Acts ſped in their preſence, that thoſe who are Parties to them *have duly ſubmitted themſelves, and are condemned to perform what they promiſe.* By which words they intend to ſignify this voluntary Juriſdiction, to which the contracting parties ſubmit themſelves[f].

[f] *The Function of Notaries implies this kind of Juriſdiction, which is ſignified by the Royal Seal, of which they are the Depoſitaries for ſealing the Acts; and this Seal is preſuppoſed in the Acts which are not ſealed.*

See the ſecond Article, and the following Articles of the fifth Section of the fifth Title.

XXX.

30. *Diſtinction of Offices compatible, and of thoſe which are incompatible.*

We may likewiſe remark in the different kinds of Offices another character, which makes another ſort of diſtinction of thoſe which are incompatible; that is to ſay, which cannot be held and exerciſed by one and the ſame perſon, and of thoſe which are compatible, and which one and the ſame perſon may enjoy and exerciſe together. Thus all the Offices of Juſtice are incompatible; for beſides that the Order of the Society of Mankind requires, that the Imployments therein ſhould be divided,

divided, and that every one ſhould have his own Imployment diſtinct from the others, every one of the ſaid Offices demands ſuch a conſtant application, whether it be to Study, or to the diſcharge of the particular Functions thereof, that it does not allow time for the exerciſe of other Imployments; and the ſame reaſons, which make two Offices of Juſtice incompatible, are good againſt the holding at the ſame time an Office of Juſtice, and an Office in the Revenue. Thus on the contrary, ſeeing the Offices of the Receivers may be executed by Clerks, and that one and the ſame Officer may take care of two different Receipts, theſe ſorts of Offices are not incompatible with one another; and one may be at the ſame time a Receiver of the Tenths, and likewiſe a Receiver of the Taxes [g].

[g] *See the Ordinance of the 17th of* July, 1554.

Nemo ex his, qui advocati cauſarum conſtituti ſunt vel fuerint etiam in hac regia urbe, in quocumque judicio deputati, & in aliis omnibus provinciis noſtro ſubjectis imperio, audeat in uno eodemque tempore tam advocatione uti, quàm conſiliarii cujuſcunque magiſtratibus, quibus reſpublica gerenda committitur curam arripere: cùm ſatis abundeque ſufficiat, vel per advocationem cauſis perfectiſſimè patrocinari, vel adſeſſoris officio fungi: ne, cum ad utrumque feſtinat, neutrum benè peragat: ſed ſive advocatus eſſe maluerit, hoc cùm debita ſolertia adimplere poſſit: vel ſi adſeſſionem elegerit, in ea videlicet permaneat. Ita tamen ut, poſt conſiliarii ſollicitudinem depoſitam, liceat ei ad munus advocationis reverti. Nec ſit conceſſum cuiquam duobus magiſtratibus adſidere & utriuſque judicii curam peragere: (Neque enim facilè credendum eſt etiam duabus neceſſariis rebus unum ſufficere. Nam, cum uni judicio adfuerit, alteri abſtrahi neceſſe eſt: ſicque nulli eorum idoneum in totum inveniri,) ſed altera adſeſſione penitùs ſemotâ unius magiſtratus eſſe contentum judicio. *l.* 14. *de adſeſſor.*

His quidem quibus indultum hactenùs demonſtratur, quo binis aut ternis, pluribuſve mereantur ſingulis non conjunctis ex priſca conſuetudine, ſed abſectis atque diſcrepantibus, detur electio quem retinendum ſibi potiùs cenſeant, quem deſerendum cognoſcant. Ut in eo quod optaverint, firmiter maneant: eò quòd deſpexerint, ſine dubitatione repellantur. In poſterùm verò nemini prorsùs facultas pateat eodem tempore plus quam unius ordinis nomen affectare: interdicendis in commune cunctis (ut dictum eſt) binis pluribuſve militiis, nec dignitatem conjungere cuilibet alii cingulo concedendis: ut & qui ſupplicandum de re vetita nobis exiſtimaverint, pœna decem librarum auri pro temeritate quamvis infructuoſa plectantur. *l.* 5. *C. qui milit. poſſ.*

XXXI.

31. *Other Offices, beſides thoſe of Juſtice, Policy, and the Revenue.*

Beſides the Offices of Juſtice, of Policy, and of the Revenue, there are other different ſorts, ſuch as the Offices of the King's Houſhold, diſtinguiſhed by an infinite number of different Functions, whether it be about the King's perſon, or for other ſervices of ſeveral natures, the Military Offices by Land and by Sea, in the Troops, in the Artillery, and for other ſorts of Military Functions, the Offices of the Mint, of the Mines, and others [h].

[h] *The Functions of theſe ſorts of Offices have different characters from thoſe of Juſtice, Policy, and the Revenue, altho' in one ſenſe ſome of theſe Offices have a kind of Adminiſtration of Juſtice, and of Policy in matters belonging to them. Thus the Officers of War exerciſe Functions of Juſtice and of Policy in the Army, but they are not called Officers of Juſtice; becauſe the exerciſe of Juſtice is not their principal Function.*

XXXII.

32. *Difference between Offices and Commiſſions.*

As it is neceſſary to diſtinguiſh in every one of the different ſorts of Offices which have been here explained, their natures, their characters, and their uſes, ſo it is neceſſary likewiſe to remark in them all that which they have in common, and that which diſtinguiſhes them from thoſe ſorts of Imployments or Functions which are called Commiſſions; which difference conſiſts in this, that the King gives ſometimes to thoſe who have only Commiſſions, the authority to exerciſe certain Functions, the ſame often as thoſe of the Offices. Thus, for example, the Intendancies or Governments of the Provinces in *France* are Commiſſions, and not Offices, and their Functions conſiſt in a mixture of thoſe of Juſtice, Policy, and the Revenue, and have the extent or limits which the King thinks fit to give them. So that it is not by the Functions, nor by the exerciſe of Authority, that the ſaid Commiſſions and all others are diſtinguiſhed from Offices; but there is this difference between Offices and Commiſſions, that Offices are either for a certain time, as the Municipal Offices, or perpetual, as are all the others; and altho' ſome of them have an interruption in their Functions during ſtated Intervals of time, ſuch as the Courts of Juſtice which ſit only ſix months in the year, thoſe of the Officers who ſerve by quarter, and of the Receivers who execute by turns the ſame Office of Receipt, they remain ſtill Officers, and cannot be turned out of their Offices, unleſs they have been guilty of ſome miſdemeanor, not even the Municipal Officers, before the ſtated time of their Office is expired; whereas Commiſſions are neither perpetual, nor for any certain time that is fixed and ſtated: but they are for an indefinite time, and continue or determine according to the will and pleaſure of him who gave the Commiſſion, and he may revoke it whenever he thinks fit [i].

[1] *It is a ſtanding Rule in the Kingdom, that the King does not diſpoſe of any Office, which has been given to any one, unleſs the Office is void by his death, or by his reſignation, or unleſs he has been deprived of it, by having forfeited the ſame. But Commiſſions do not give any Title or Right to exerciſe the Functions thereof, but during the pleaſure of the King, or other Perſon, who has the right to nominate.*

See the Ordinance of the 21ſt of October, 1467.

SECT. II.

Diſtinctions of Officers by their different Functions.

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I.

1. The Functions of Officers muſt be otherwiſe diſtinguiſhed, than by the nature of their Offices.

WE muſt not confound the ways of diſtinguiſhing Officers by their Functions, with the ways of diſtinguiſhing Offices by the characters which have been the ſubject matter of the firſt Section; for, as has been obſerved in another place[a], there are Officers who exerciſe Functions of the ſame nature, altho' their Offices be diſtinguiſhed by different characters; and there are likewiſe ſome Officers who exerciſe Functions of a nature altogether different, altho' their Offices have the ſame characters. Thus, for example, the Offices of the Judges of the King's Courts who adminiſter the Ordinary Juſtice, have other characters than the Offices of the Judges of the Spiritual Courts; for theſe Offices are Eccleſiaſtical, and are conferred by the Biſhops, and are not venal; and the others are Lay-Offices, which are conferred by the King, and are allowed in *France* to be bought and ſold; but yet the Judges of the Spiritual Courts in *France* are authorized to take cognizance of ſeveral matters of the ſame nature with thoſe which the King's Judges have cognizance of; and the Officers of the Lords of Mannors have ſtill more Functions that are common to them with the King's Judges, altho' their Offices be of another nature. Thus, on the contrary, the Offices of all the Parliaments in *France* are of the ſame nature; but the Parliament of *Paris* has Functions which the other Parliaments have not, ſuch as the cognizance of the Cauſes of the Peers of the Kingdom, and thoſe relating to the Regale. Thus, in the Parliaments, and all the other Courts of Juſtice in *France*, the Offices of the Preſidents, and the other Chiefs, thoſe of the Judges, and thoſe of the King's Council, have their Functions altogether different; altho' all the ſaid Offices are of the ſame nature, being Royal Offices of Judicature, and belonging to the ſame Juriſdiction. So that it is by other views than by the diver-

diverſity of the Offices, that we are to diſtinguiſh the different Functions which are here mentioned, as ſhall be explained in the Articles which follow.

[a] *See the end of the Preamble of this Title.*

II.

2. *Three general kinds of Functions of Offices.*

There is this belongs in common to all the Functions of all Officers whatſoever, that they tend to the publick Good: but ſeeing the publick Good conſiſts of many parts, the ſaid Functions relate differently to divers uſes which may be diſtinguiſhed into three ſorts, which divide the ſaid Functions into ſo many kinds: the firſt, of thoſe which regard directly and in general the Good of the State, and the Service of the Prince who is the Head of it. The ſecond, of thoſe which relate to the Service of the Perſon of the Prince: And the third, of thoſe which reſpect in the common Good of the Society that which more eſpecially concerns the Perſons who compoſe it, and who are Members of it [b].

[b] *There is no Function of any Office whatſoever which has not one of theſe three uſes.*

III.

3. *Firſt kind, Functions which relate to the State.*

The Functions which regard directly and in general the Good of the State, and the Service of the Prince, who is the Head of it, are of many ſorts: the firſt is that of the perſons whom the King is pleaſed to call to aſſiſt in his Council, for the Government of the State, and to whom he may differently intruſt the Affairs relating to the Government, whether they be Officers, ſuch as thoſe of the Crown, or Secretaries of State, or others, or Miniſters whom he honours with this Function; and we may place in this firſt Order of Functions which relate to the State, thoſe of the Peers of the Kingdom, who aſſiſt at the Coronation of the King [c].

[c] *Theſe Functions are the firſt, becauſe of the conſequence of the Good of the State.*

Of all the things which may be directed to the Good of the State, according to the three different views explained in the preceding Article, it is natural to place in the firſt Rank, the Functions which relate to the Good of the State, and to the Service of the Prince, who is the Head of it, and by and thro' whom it is that the Body and the Members are to receive their ſhare of this common Good.

IV.

4. *The Functions of Officers of War are of this kind.*

It is in the ſame Rank of Functions relating to the Good of the State, that we are to place thoſe of the Officers of War, who ſerve either by Land or by Sea, and who by their Conduct and Courage carry on, under the direction of the Prince, the Enterprizes againſt the Enemies of the Kingdom, and reſiſt the attempts of Enemies by their vigilance in taking advantage of all opportunities, and by a prudent ordering or diſpoſing of the Troops, whether it be for Marches, or for Encampments, for Sieges, Battels, Retreats, and for all warlike Expeditions; and the Officers who have this honour, ſerve the Prince and the State in the greateſt and moſt glorious of all the Functions, which is that of expoſing their Lives [d].

[d] *The Functions of War are the ſupport of the State, as thoſe of the Council of the Prince are the foundations of it.*

V.

5. *As alſo the Functions of the Governors of Provinces.*

We muſt likewiſe ſet down in this firſt Rank of Functions which relate to the Good of the State, thoſe of the Governors of the Provinces, who, as occaſion requires, and purſuant to the Orders of the Prince, maintain in each Province the publick peace and tranquillity, the fidelity of the Subjects to the Prince, and every thing relating to the King's Service, and to the Publick Good [e].

[e] *Theſe Functions have a relation to the publick tranquillity.*

VI.

6. *Second kind, Functions which relate to the Service of the Perſon of the Prince.*

The ſecond kind of Functions, which is of thoſe that relate to the Service of the Perſon of the Prince, comprehends many Functions of ſeveral ſorts; but they may be all reduced here into one Article, including in that kind of Functions, thoſe of all the Officers of the King's Houſhold, from the higheſt to the loweſt, whether it be for Services performed about his own Perſon, or for other Functions of his Service, or even for the execution of the particular Orders which the King may give to the ſeveral ſorts of Officers who are about him [f].

[f] *Altho' theſe Functions do not ſo preciſely relate to the Good of the State as thoſe of the firſt kind, yet they have a relation to it, and the conſequence of them is very great; for what concerns the Head, concerns alſo the Body.*

VII.

7. *Third kind, Functions which reſpect the Good of particular perſons.*

The third ſort of Functions are thoſe which have relation to the common Good of the Society; in ſuch a manner as that they do not ſo preciſely relate to the Good of the State, as thoſe of the firſt ſort; nor to the Service of the Perſon of the Prince, as thoſe of the ſecond; but they regard the Good of the

the Society in the Members who compoſe it, and relate to the particular perſons who are Members of the Society, whether it be to maintain them in the uſe and free poſſeſſion of their Goods againſt the attempts of thoſe who ſhould offer to moleſt them, or to revenge the Crimes and Offences committed againſt their Honour, their Life, their Eſtate, or to regulate the differences that ſet them at variance one againſt another, or for other uſes; and theſe Functions of this third ſort, which are chiefly exerciſed by the Officers of Juſtice, and thoſe of Policy, the Revenue, and others, have alſo ſome Juriſdiction over particular perſons, ſuch as the Officers of the King's Houſhold, the Officers of War, and others have [g].

[g] *Theſe Functions do ſtill leſs regard the Good of the State, than thoſe of the ſecond kind, but ſtill they have ſome relation to it; for what relates to the Members, relates to the Body.*

VIII.

8. Another diſtinction of four general kinds of Functions of Officers.

Since we have diſtinguiſhed in the firſt Article of the foregoing Section, four different ſorts of Offices; thoſe which the King diſpoſes of, thoſe of the Officers of Lords of Mannors, thoſe of the Officials or Eccleſiaſtical Judges, and thoſe which are called Municipal Offices; we may begin the diſtinctions of the Functions of Officers by four kinds, which comprehend them all: the firſt takes in all the Functions of the ſeveral ſorts of Officers named by the Sovereign, comprehending under them the Functions that have been explained in the third, fourth, and fifth Articles, and thoſe which ſhall be explained in the Articles which follow: the ſecond, is of the Functions of Officers belonging to the Courts of Lords of Mannors, which are the ſame with the Functions of the King's Judges who exerciſe the Ordinary Juriſdiction, of which we ſhall ſpeak in the fifteenth Article; for the Officers of Lords of Mannors take cognizance of matters of Policy, and of all other matters, except ſome that are reſerved to the King's Judges: the third is that of the Functions of the Judges of Eccleſiaſtical Courts [h], which have been explained in the ſixth Article of the preceding Section: and the fourth is that of the Functions of Municipal Officers, which have been explained in the ſecond Section of the ninth Title of the firſt Book.

[h] *See the other Articles quoted in this Article.*

IX.

9. Diſtinction of the Functions of Juſtice, of Policy, and of the Revenue.

As for the Functions of the different ſorts of Officers of the King's Nomination, ſeeing we have explained in the preceding Articles, thoſe which relate to the State and to the ſervice of the Perſon of the Prince; it remains only now that we ſhould explain the Functions which relate to particular perſons, as has been ſaid in the ſeventh Article; and theſe are the Functions which are commonly divided into theſe three kinds that are ſo well known, the Functions of Juſtice, thoſe of Policy, and thoſe of the Revenue [i].

[i] *Theſe three kinds comprehend all the Functions, of which the ſeveral ſorts remain yet to be explained in the Articles which follow.*

X.

10. All the Functions of Juſtice, relate either to the voluntary Juriſdiction, or to the contentious Juriſdiction.

We muſt comprehend under the Functions of Juſtice, all thoſe which are a part of the Adminiſtration of Juſtice, whether the ſaid Functions be exercis'd by a voluntary Juriſdiction, or by a contentious Juriſdiction. Thus the Regulations which many Judges have a right to make in things pertaining to their Cognizance, the admiſſions of Officers, and many others, are Functions of Juſtice, and of a voluntary Juriſdiction common to ſeveral ſorts of Officers; and the Adminiſtration of Juſtice for the contentious Juriſdiction between Parties, makes another kind of Functions of Juſtice which are common to all thoſe who have this kind of Juriſdiction [l].

[l] *All the Functions of Juſtice are Acts of Juriſdiction, and conſequently they belong either to the one or the other of the two ſorts of Juriſdiction. See the eighteenth Article of the firſt Section.*

It is neceſſary to diſtinguiſh in the Functions of Juſtice two kinds of Juriſdictions; one which is called voluntary, and the other that is called contentious. The voluntary Juriſdiction is that which is exerciſed when there is before the Judge no matter of diſpute or conteſt between the Parties, which the Judge has to determine: and the contentious Juriſdiction is that which regulates between particular perſons their differences which they bring into Judgment. Thus the Admiſſion of an Officer, his Examination, his Oath, his Inſtallation, the Nomination of a Guardian to Minors, an Order of Court containing ſome Regulation touching matters of Policy, either about the Highways, the Streets, or Market-places, the auditing the Accounts of a Receiver, the Aſſeſſment of particular perſons for their reſpective proportions towards the publick Taxes, the management of the publick Revenue, and many other ſuch like Acts, are of the voluntary Juriſdiction. Thus the Judgments given in Law-Suits, and in all differences between particular perſons, belong to the contentious Juriſdiction. The Reader will be able to judge of this diſtinction between the voluntary and contentious Juriſdiction by the Articles which follow.

XI.

11. *And likewiſe the Functions of Policy.*

The Functions of Policy are alſo of two ſorts; one of thoſe of the voluntary Juriſdiction, and the other of thoſe of the contentious Juriſdiction. Thus the Regulations which the Officers of Policy have a right to make in matters of that nature, the fining of particular perſons who have tranſgreſſed the Rules of Policy, ſuch as thoſe who have built a Houſe, or ſome other Edifice too far out into the Street, thoſe who do not keep the Street clean before their Houſes, and other Nuſances of the like nature, are Functions of the voluntary Juriſdiction: and the Judgments given between particular perſons upon diſputes ariſing about matters of Policy; as if one man complains of another for having thrown out of a window ſomething on him as he was paſſing in the Street, or for other matters, which are the occaſion of quarrels and diſputes; the proofs and the determination of theſe ſorts of differences, are Functions belonging to the contentious Juriſdiction [m].

[m] *Theſe Functions, in the ſame manner as thoſe of Juſtice, are Acts of Juriſdiction, and conſequently either of the voluntary, or of the contentious Juriſdiction.*

XII.

12. *Divers Officers who have a kind of Policy.*

Theſe two ſorts of Functions of Policy are common to ſeveral ſorts of Officers; for beſides the Officers of Juſtice who have alſo a Juriſdiction in matters of Policy, and the Officers of Lords of Mannors who have the ſame Authority within the bounds of their Mannors, and the Municipal Officers who have it likewiſe within their Diſtricts, there are alſo other Officers who have a kind of Policy, as the Treaſurers of *France*, in relation to the repair of the Highways, Bridges, and Cauſeys; and the Officers of War have likewiſe their Policy peculiar to them, for regulating what concerns the Proviſions and Forrage neceſſary for the ſubſiſtence of the Army, the Order and Cleanlineſs in the Camps, and other Functions of the Military Government. There are alſo other Officers, who in the matters belonging to their Cognizance have Functions of this nature [n].

[n] *As Policy is that part of Juſtice which regulates the ſeveral Functions of the publick Order, ſo there are many kinds of Policy exerciſed by different ſorts of Officers, as the ſame is regulated by ſeveral Ordinances touching the Policy of the High-ways, Bridges, and Cauſeys, and the Policy of the Army.*

XIII.

13. *There are in the Revenue Functions of two ſorts of Juriſdiction; voluntary and contentious.*

The Functions relating to the Revenue, in the ſame manner as thoſe of Juſtice and of Policy, are alſo of two ſorts; the one of thoſe of the voluntary Juriſdiction, and the other of thoſe of the contentious Juriſdiction. Thus the Regulations made by the Officers of the Revenue who have a right to make any, the auditing the Accounts of the Receivers, their admiſſion, and the ſwearing of them, and other acts of the like nature, are Functions of the voluntary Juriſdiction; and the judging of differences about matters of the Revenue, as between a Receiver general and a particular Receiver in things belonging to their Offices, between a Receiver and his Clerk, and other acts of the like nature, are Functions which belong to the contentious Juriſdiction [o].

[o] ☞ It is neceſſary to diſtinguiſh in the matters of the Revenue three ſorts of Functions of the Officers who are imployed about it. The firſt in order of time, is that of the Functions which relate to the impoſing and collecting of the ſeveral Branches of the Revenue, by what names ſoever diſtinguiſhed, whether it be the Tax on Real and Perſonal Eſtates, Subſiſtence, Tenths, Poll-Tax, Aids, Cuſtoms, the Duty on Salt, and all other Impoſitions whatſoever. The ſecond, is that of watching over the conduct of thoſe who are charged with the collecting of the Revenue, and who are to render an Account of what comes to their hands, of verifying the Accounts of their Receipts, and of the diſburſements which they are impowered to make, ſuch as Salaries to Officers, and other Payments, which they are charged to make out of the Monies belonging to their Receipt, and of auditing and examining their final Accounts. The third, comprehends the Functions which relate to differences between particular perſons in matters of the Revenue, whether it be between thoſe who are the Collectors of it, and the particular debtors, or whether it be in relation to Privileges and Exemptions, or otherwiſe.

The Functions which relate to the Impoſition and Collecting of the ſeveral Branches of the Revenue, are Functions of the voluntary Juriſdiction; and conſiſt in what relates to the execution of the Orders of the Prince for impoſing and levying the ſaid Duties, for ſettling the proportions that every one is to pay of

of the Land-Tax, or of the Poll-Tax, the Regulations touching the manner of recovering not only the Monies due by vertue of the ſaid Taxes, but likewiſe thoſe ariſing from the Duties on Salt, from the Exciſe, and the Cuſtoms, and in general every thing which any way concerns the direction and management of the Revenue, and the ſeveral Regulations which compoſe the Order thereof. The Adminiſtration of the chief and moſt important of theſe Functions is put into the hands of the firſt and principal Officers of the Treaſury, who have the direction of the Revenue, and of other perſons, whether they be Miniſters, or Officers, with whom the Prince adviſes touching theſe matters in his Council; and as for the detail of the manner of laying on and diſtributing the Taxes, the making the Aſſeſſments, and levying the Money, the Functions of this kind are executed by the Officers who are impowered to make a diſtribution of the Taxes, and the Aſſeſſments, and by the Receivers and other perſons who are appointed to collect them, as has been explained in its proper place.

The Functions which reſpect the duties of the Receivers, Collectors, or others appointed to receive or collect the ſeveral ſorts of Monies belonging to the Revenue, and the comptrolling of their Accompts, are alſo Functions of the voluntary Juriſdiction, exerciſed on the ſpot by the Treaſurers of *France*; and it is to the Chambers of Accompts that the Officers who are accountable are to deliver up their final Accompts. The third ſort of Functions, which relate to the differences ariſing between particular perſons upon occaſion of impoſing and collecting the Monies of the Revenue, belong to the contentious Juriſdiction, and theſe matters are cognizable, in the firſt inſtance, before the Officers of the Elections, and of the Duties upon Salt, according to their reſpective Juriſdictions, and from them there lies an Appeal to the Courts of Aids, who are Judges in the laſt reſort. Thus the Officers of the Courts of Aids are not only Officers of the Revenue, in reſpect of the nature of the matters belonging to the Revenue, which they have the cognizance of, but they are Officers of Juſtice, and judge of all matters of the ordinary Juriſdiction, which come in by way of Incident in the Affairs which properly belong to their Cognizance. Thus, for Example, although it naturally belongs to the ordinary Judges to determine diſputes that may ariſe touching the quality of a Gentleman, and if the matter in diſpute were concerning the Right to an Office, or to a Benefice appropriated to a Gentleman, or to one whoſe quality of Gentleman is called in queſtion, it is the Ordinary Judge who ought to decide it. But when the queſtion is touching an Exemption from Taxes, founded on the quality of Nobility claimed by the perſon who is aſſeſſed, and which is denied, it belongs to the Courts of Aids to decide that point. Thus in the Decrees or Orders made by the Courts of Aids, for the Sale of the Goods of Perſons who are accountable for the Publick Monies, they decide all queſtions touching Mortgages, Preferences, Legacies, Subſtitutions, Donations, and all others which ariſe as Incidents in the Matters which are before them in Judgment. For although the principal Functions of the Officers of the Chambers of Accompts, and of the Treaſurers of *France*, be part of the voluntary Juriſdiction, yet they have likewiſe ſome of the Functions of the contentious Juriſdiction which are incidental to the matters which are properly of their Cognizance.

XIV.

14. Other diſtinctions of Juriſdiction.

Beſides theſe general diſtinctions of the Functions of Juſtice, of Policy, and of the Revenue, there are other diſtinctions peculiar to the Functions of Juſtice, which are likewiſe of a much larger extent than thoſe of Policy and of the Revenue, and which are alſo of different ſorts, which it is neceſſary to diſtinguiſh; and becauſe that which makes the diverſity of thoſe Functions, makes at the ſame time the diverſity of Juriſdictions, we ſhall make uſe in the following Articles of the word Juriſdiction, in order to explain the diſtinctions of the ſaid Functions [P].

[P] *See the Articles which follow.*

XV.

15. Juriſdiction Ordinary and Extraordinary.

The firſt of theſe diſtinctions of Juriſdictions is, that of the Officers who take Cognizance of all matters Civil, Criminal, Beneficial, and all others without diſtinction, except ſome which have been appropriated to other Judges; and it is for this reaſon that this Juriſdiction is called Ordinary, to diſtinguiſh it from the Juriſdiction of thoſe other Judges, which is for this reaſon called Extraordinary. Thus the Parliaments in *France*, the Bailiffs, the Seneſchals, and the other Officers of this kind, exerciſe the Ordinary Juriſdiction; and the other Juriſdictions of Officers who have the

Cognizance in matters of the Revenue, the Land-Tax, the Aids, or Subſidies, the Duty upon Salt, the Mint, and other matters ſeparate from the Ordinary Juriſdiction, are in this ſenſe Juriſdictions extraordinary, diſtinguiſhed among themſelves according to the matters peculiar to every one of them, and which make ſo many different ſorts of Juriſdictions and Functions of Juſtice [q].

[q] ☞ It may be remarked here, that the firſt antient Judges, who had naturally the Cognizance of all theſe Affairs, were thoſe who exerciſed this general Juriſdiction, which is called at this day the Ordinary Juriſdiction, ſuch as is that of the Parliaments in *France*, and of the inferior Courts ſubordinate to them. This Juriſdiction is called by the name of Ordinary, to diſtinguiſh it from the other Juriſdictions which are eſtabliſhed to judge of ſome matters that are ſpecially aſſigned to them, and which without this ſpecial Aſſignment would have belonged to the Tribunal of this Ordinary Juriſdiction. Thus the Ordinary Judges are thoſe who have naturally the Cognizance of all matters, without any other exception beſides that of thoſe matters which have been expreſly appropriated to other Judges. Thus we muſt place in this rank the Bailiffs, the Stewards, the Provoſts, and others who adminiſter Juſtice within their reſpective Diſtricts, and exerciſe therein this general and Ordinary Juriſdiction, except in ſuch matters as have been diſmembred from their Juriſdiction. Theſe Juriſdictions are diſtinguiſhed by the different matters that belong to their Cognizance. Since the fulneſs of the Authority of Juſtice reſides in the Perſon of the Prince, and that he has alſo the plenitude both of the Ordinary and Extraordinary Juriſdiction, and likewiſe the Right to judge of all ſorts of Affairs without diſtinction; if there were in a Kingdom only one Order of Judges, veſted with both Juriſdictions for all matters, there would be only one kind of Tribunals, which would have every one within its own Precinct the entire Adminiſtration of Juſtice; and the firſt Judges which the firſt Princes eſtabliſhed may have had naturally this general Adminiſtration divided among them, not according to the ſeveral natures of Affairs, but according to the reſpective bounds of their Diſtricts. Thus *Moſes* having named Judges to adminiſter Juſtice to the people, gave to all of them indifferently a Right to judge of all ſorts of Affairs, reſerving to himſelf ſuch matters of all ſorts as might be of ſuch importance as to deſerve his taking Cognizance of them himſelf; but in proceſs of time, the extent of Dominions, and the multiplicity of the ſeveral kinds of Affairs has made it neceſſary to diſtinguiſh different Juriſdictions, voluntary as well as contentious; ſo that there has been taken off from the antient Juriſdictions divers Tribunals, to which has been aſſigned the Cognizance of Matters which might have been decided by thoſe firſt Judges who had Cognizance naturally of all matters whatſoever. It is not our buſineſs to explain here the Origin of thoſe antient Judges; that would be to exceed the bounds of this preſent deſign: we have thought that it would be ſufficient to make here theſe Remarks.

XVI.

16. *Juriſdiction in Civil and Criminal Matters.*

We may diſtinguiſh under another general view two ſorts of Functions of Juſtice, or Juriſdictions, which are exerciſed by the ſame Judges; one for Civil matters, and the other for Criminal [r]; and this Juriſdiction is veſted not only in all the ordinary Courts of Juſtice, but alſo in the others. For, as for inſtance, the Courts of Aids, the Court of the Mint, and other Tribunals have the cognizance of certain Crimes within their reſpective Juriſdictions; and the Chambers of Accompts have likewiſe a Juriſdiction in Criminal Matters which are there to be determined, as it is regulated by the Ordinances [f].

[r] *In the Courts which have the Ordinary Juriſdiction, the Civil and Criminal Juriſdiction have their different Functions: and there are even within the Diſtricts of Bailiffs and Stewards, Officers whoſe Juriſdiction is limited to Criminal matters, ſuch as that of the Lieutenant Criminals.*

[f] *See the Ordinances of* February *1566, Art. 4. and 5. and that of* May *1567.*

XVII.

17. *Diſtinction of Ordinary Judges from whom there lies an Appeal, and of thoſe from whom there lies none.*

It is neceſſary alſo to diſtinguiſh the Functions of Juſtice, or Juriſdictions, in another general manner into two kinds. One of the Juriſdictions from which there lies an Appeal; and the other of thoſe from which there lies no Appeal. Thus for Civil matters in *France*, there lies an Appeal from all the Sentences of Bailiffs, Seneſchals, and of all other Royal Judges; and there lies no Appeal from the Preſidial Courts, when the Sentences are within the caſes which the Ordinances give them power to decide finally without Appeal. Thus as for Criminal matters, the Bailiffs, the Seneſchals,

Seneſchals, and the Preſidial Courts judge without Appeal, when there is a certain number of Judges preſent, in certain Crimes, whether it be becauſe of the conſequence of a ſpeedy puniſhment, as in the caſe of a Riot, or becauſe of the quality of the perſons who are accuſed, as if they are Vagabonds, or perſons of no certain habitation, or upon other conſiderations of the quality of the crimes, as it is regulated by the Ordinances[t].

[t] *The uſe of Appeals makes two different diſtinctions of Juriſdiction; one, whereof mention has been made in this Article, which diſtinguiſhes among the firſt Judges between thoſe from whom one may appeal, and thoſe from whoſe Sentence there lies no Appeal: And the ſecond, which diſtinguiſhes between the inferior Judges, from whom there lies an Appeal, and the ſuperior Judges who determine Appeals, as ſhall be ſhewn in the nineteenth Article.*

XVIII.

18. *Other Officers, beſides the Ordinary Judges, from whom there lies no Appeal.*

It may be remarked concerning the Juriſdictions from which there lies no Appeal, that beſides that of the Ordinary Judges mentioned in the foregoing Article, there are other Officers who judge without Appeal; ſuch as the Officers of War, for matters relating to the War; and the Provoſts of the Mareſchals of *France*, who are the natural Judges of Crimes committed by perſons belonging to the Army, have likewiſe the Cognizance, which is granted to them, of ſeveral Crimes committed by other perſons beſides thoſe who belong to the Army, and which they determine finally without Appeal, as the ſame is regulated by the Ordinances[u].

[u] *The Provoſts of the Mareſchals of* France *do not take cognizance of theſe ſorts of Crimes by themſelves, but in conjunction with the Judges of the Preſidial Courts, and others of the King's Judges, conſiſting of a ſtated number, after their Juriſdiction therein has been allowed, purſuant to the Regulations made touching the ſame by the Ordinances.*

The Bailiffs and Seneſchals, and the Preſidial Courts in France *give final Definitive Sentences, from which there lies no Appeal, in many Crimes, which the Provoſts of the Mareſchals of* France *have likewiſe Cognizance of, and the Ordinances give unto all of them the Right of Concurrence and Prevention, or Priority of Suit; that is to ſay, that thoſe who have firſt taken cognizance of the Crime, exclude the others from meddling with it.*

XIX.

19. *Diſtinction between the Judges from whom there lies an Appeal, and thoſe who judge of Appeals.*

The Juriſdictions from which there lies an Appeal, make another diſtinction of thoſe which are inferior, and from which the Appeal lies, whether it be in Civil or Criminal matters; and of thoſe which are ſuperior, and who judge of Appeals: which goes ſometimes thro' ſeveral degrees of Appeals to ſeveral Tribunals which are ſuperior the one to the other; but the Judges of the laſt Reſort are the Parliaments in *France*, and the other Supreme Courts of Juſtice, from which there lies no Appeal[x].

[x] *It is juſt that there ſhould be leave for perſons to appeal, unleſs it be in caſes that are excepted; and it is juſt likewiſe that the degrees of Appeals be limited.*

['By the Conſtitution of our Government in 'Great Britain, the Houſe of Lords in Parliament 'are Judges in the laſt Reſort of all Cauſes that 'come before them either by Appeal, or Writ of Er'ror, from the Court of *Chancery*, or Court of *King's* 'Bench in *England*. *Coke* 4 *Inſtit. cap.* 1. As alſo of 'Appeals from the Decrees of the Lords of Seſſion 'in *Scotland*, ſince the Union of the two Kingdoms. 'But in Eccleſiaſtical matters, and in Cauſes Civil 'and Maritime, the Supreme Court of Appeals in 'England is a Court of Delegates, who are ap'pointed by a Commiſſion under the Great Seal to 'hear and to determine finally the reſpective Cau'ſes which are referred to them by the ſaid Com'miſſion. See *Stat.* 25 Hen. VIII. *cap.* 19. 8 *Eliz.* 'cap. 5. In matters relating to Prizes taken in 'time of War, the Appeal lies from the High Court 'of Admiralty in *England* to the King in Council, 'where all Cauſes touching Prizes are finally de'termined, the ſame being frequently interwoven 'with matters of State, which regard the Intereſts 'of Foreign Princes and States. *Stat.* 6 Annæ, 'cap. 37. § 8.]

XX.

20. *The Judges who hear and determine Appeals, have likewiſe another Juriſdiction.*

The Judges who have Cognizance of Appeals, have two Juriſdictions which may be likewiſe diſtinguiſhed, that of hearing and determining Appeals, and that of judging in the firſt inſtance of matters belonging to their Cognizance; for in *France* there are no Judges who have barely the Function of judging of Appeals. Thus the Parliaments in *France* have their proper Juriſdiction for Cauſes that are brought before them in the firſt inſtance, whether it be on account of the quality of the perſons, or becauſe of the nature of the matters; ſuch as for example, the Cauſes relating to Peers of the Kingdom, and to the Regale, of which the Parliament of *Paris* hath the ſole Cognizance[y].

[y] *All the Sovereign Courts of Juſtice have other Functions of Juriſdiction beſides the cognizance of Appeals; ſuch as the Regiſtring of the Ordinances, Edicts, and Declarations, and other Functions of the voluntary Juriſdiction; and likewiſe Functions of the contentious Juriſdiction in matters which they have cognizance of in the firſt Inſtance, whether it be on account of the quality of the Affairs, or becauſe of the Privileges of the Perſons.*

XXI.

21. *Judges of the Cauſes of privileged perſons.*

We may likewiſe diſtinguiſh the Juriſdictions of Judges who are appointed to hear and determine the Cauſes of perſons privileged, which diſtinguiſhes theſe Juriſdictions from all the others: Thus the Court of Requeſts of the Palace, that of the Requeſts of the *Hôtel*, and the other Tribunals, of which mention has been made in the ſixteenth and ſe-

venteenth Articles of the firſt Section, have their proper Juriſdiction, which is reſtrained within the bounds ſettled by the Ordinances to the Cauſes of ſuch perſons as have the privilege to have them for their Judges. But we muſt take notice, with reſpect to theſe Juriſdictions, of this difference between that of the Requeſts of the *Hôtel*, and all the others, that beſides the Cauſes of the perſons who have the privilege to have them tried in the Court of Requeſts of the *Hôtel*, that Tribunal has cognizance of ſome matters independently of all manner of privilege of the parties to the Suit; ſuch as are, for example, the Cauſes where the matter in diſpute is concerning the Title of Royal Offices which cannot be decided any where elſe, as it is regulated by the Ordinances [z].

[z] *Theſe Juriſdictions have been eſtabliſhed for the purpoſes here mentioned.*

XXII.

22. *Courts univerſal for the whole Kingdom.*

We may diſtinguiſh among all the other Juriſdictions, thoſe of ſome Tribunals which are the only Tribunals of the kind for the whole Kingdom; ſuch is the Privy Council for all matters of which it may take cognizance, which comprehends all ſorts of matters without diſtinction; for there is not any one matter but what may be brought before it, and of which it may not take ſome Cognizance, either to retain the Cauſe, or to remit it to other Judges; or to give Judgment in the Cauſes, where the queſtion is about the reverſal of Decrees of the Parliaments in *France*, and of the other Supreme Courts in all matters. The Great Council hath likewiſe its peculiar and univerſal Juriſdiction throughout the whole Kingdom touching matters which belong to its Cognizance [a]. The Court of the Mint hath likewiſe its Juriſdiction in the ſame manner [b]; and there are moreover ſome other Juriſdictions of Officers whoſe Functions extend to the whole Kingdom, ſuch as that of the Officers of War, and that of the Mines, and others.

[a] *See the ſeventh Article of the firſt Section.*
[b] *See the fifteenth Article of the firſt Section.*

XXIII.

23. *Offices of the King's Council.*

Beſides theſe diſtinctions of the different Functions of Officers, it is neceſſary to diſtinguiſh the Functions of the Advocates and Procurators General in the Supreme Courts of Juſtice, and the King's Advocates and Procurators in the Courts of Bailiffs, Seneſchals, Preſidials, and other Juriſdictions: theſe are the Officers who are called the King's Council in the Courts of Juſtice, and in all the King's Courts; becauſe their Functions are to take care of the publick Intereſt, which is that of the King, to bring Offenders to condign puniſhment, even when there is no Party appears to carry on the Proſecution, and when there is a Party that proſecutes, it is the buſineſs of the King's Council to ſee that every thing be done for the Good of the Publick, both in carrying on the Proſecution, and in obtaining Judgment, and to move the Court, that the Puniſhments which the Crimes deſerve may be inflicted; for the Parties having a right to demand only that they may be indemnified as to the damage which they have ſuſtained, and not to ſue for Vengeance of the Crimes; it is the Function of the King's Council to appear as Parties for the Publick Intereſt, both in theſe ſorts of Affairs, and in all others where the King and the Publick have any concern, as in the Cauſes where the intereſt of the Church is concerned, and in other Cauſes which it is not neceſſary that we ſhould enumerate here. And ſeeing this Function of the King's Council is neceſſary likewiſe in the Courts of Eccleſiaſtical Juriſdiction, and of Lords of Mannors, it is exerciſed in the Courts of Lords of Mannors, by Officers who are called Procurators Fiſcal, and in ſome places, Procurators of the Office; and in the Eccleſiaſtical Courts, by Promoters of the Office [c]. We may likewiſe diſtinguiſh in the Functions of the King's Council, thoſe of the Advocate General, from thoſe of the Procurator General; as alſo thoſe of the King's Advocate, from thoſe of the King's Proctor; and this diſtinction is ſufficiently known.

[c] *Seeing theſe Functions cannot be exerciſed by the Judges, it has been neceſſary to appoint other Officers for the diſcharge of them.*

XXIV.

24. *Functions of ſome Officers neceſſary in all the Juriſdictions.*

In all thoſe different Juriſdictions, there are other Functions diſtinct from thoſe which have been juſt now explained, and which are of neceſſary uſe therein; and the ſaid Functions, which are for different purpoſes, are alſo exerciſed by Officers of different Orders; which are the Regiſters, Proctors, Apparitors or Tip-ſtaves, and Bailiffs, whom we have diſtinguiſhed according

to the nature of their Offices in the preceding Section [d].

[d] *See the eighteenth, nineteenth, twentieth and twenty first Articles of the foregoing Section.*

XXV.

25. *Jurisdiction of the Chancellor of* France.

It is neceſſary in the laſt place to diſtinguiſh the ſingular Juriſdiction of the firſt of all the Magiſtrates, who is the Chancellor of *France*, the Head of Juſtice, who preſides in the King's Council, and in all the Sovereign Courts of Juſtice, where he ſits, who gives the Form, and puts the Seal to all Edicts, Declarations, and Ordinances, who gives Patents and Commiſſions to all Officers, and who exerciſes all the other known Functions of this firſt and moſt important of all the Offices [e].

[e] *See the ſeventh Article of the firſt Section.*

[' The Lord Chancellor of *Great Britain* is the ' firſt Officer of Juſtice, next unto the Prince, and ' has a very great extent of Power in matters of ' Juſtice. For whereas all other Juſtices are tied ' to the Law, and may not ſwerve from it in ' Judgment, the Chancellor hath in this the King's ' abſolute Power to moderate and temper the writ- ' ten Law, ſubjecting himſelf only to the Law of ' Nature and Conſcience, ordering all things ac- ' cording to Equity. And therefore *Stamford* in ' his Prerogative, *chap.* 20. *fol.* 65. ſaith, That the ' Chancellor hath two Powers; one Abſolute, ' the other Ordinary: Meaning, that tho' by his ' Ordinary Power, in ſome caſes, he muſt obſerve ' the Form of Proceeding, as other Ordinary ' Judges; yet that in his abſolute Power he is not ' limited by the written Law, but by Conſcience ' and Equity, according to the circumſtances of ' the Matter in queſtion. This High Office is an ' Office of great Antiquity in *England*; it being ' certain, that both the *Britiſh* and *Saxon* Kings ' had their Chancellors, and Court of Chancery. ' *Coke* 4 *Inſtit. cap.* 8.]

TITLE II.

Of the Authority, Dignity, Rights and Privileges of OFFICERS*.

* *See in relation to this Title, the ninth Title of the firſt Book.*

AS it is chiefly by the Functions of the Offices, that the Officers are diſtinguiſhed from other perſons, ſo they are diſtinguiſhed among themſelves by the differences of their Functions; and according as thoſe Functions are of more or leſs conſequence, have more or leſs of Dignity and Authority, the Offices are proportionably of greater or leſſer importance and conſideration.

According to this principle, the Offices of the Crown having Functions which regard directly the general Good of the State, they are the firſt, the moſt conſiderable, the moſt important; and all the others have their Rank after them, proportioned to the Order of their Functions; but in ſuch a manner, that altho' it be true that there are ſome kinds of Functions, which in their nature have more of Dignity than ſome other Functions have, yet it does not follow, that the leaſt of the Kind which has the greateſt dignity have their Rank above all thoſe of a Kind which has leſs dignity, and that, for example, all Officers of Juſtice have their Rank above all Officers of the Revenue: for when we deſcend from the firſt Officers of an Order, to thoſe who poſſeſs the middling places, and the loweſt places of the ſame Order, the conſequence, the extent and the dignity of the Functions diminiſh in proportion, and in ſuch a manner, that by comparing thoſe who exerciſe the middling or the loweſt Functions in one Order, with thoſe who exerciſe the firſt Functions in another inferior Order, there are formed combinations of differences of Dignity between Officers of divers Orders, which have occaſioned their Ranks to be regulated by other views than thoſe of the Dignity which every Order in general receives from the nature of its Functions which are ſuperior to the Functions of other leſſer Orders; and this is what makes theſe differences of Precedency between Officers of all Orders, and that we find in every Order ſome Officers who have the Rank before many Officers of the other Orders: Thus, the firſt Officers of the Revenue have the Precedency of an infinite number of Officers of Juſtice; and it is the ſame thing in general with regard to all the ſorts of Officers, not only of Juſtice, of Policy, and of the Revenue, but of thoſe of the King's Houſhold, of Officers of War, and of all others without diſtinction.

Beſides the diſputes which may happen about Precedency between Officers of divers Orders, the like diſputes happen alſo between Officers of the ſame Order, whether they be Officers of Juſtice, of the Revenue, or others; and the Precedency in theſe caſes is likewiſe determined according to the differences of the conſequence and extent of the Functions, and by the other diſtinc-

ons which may give ſome advantage to one Officer above another, as ſhall be explained in the third Section.

It is not our buſineſs here to explain the Order of Precedency among Officers; and it is ſufficient that we point out here the general Principles on which the Rules of Precedency depend, and that we obſerve, that as it is the Prince who creates Offices, and diſtinguiſhes the Functions thereof, and who has the nomination of the perſons who execute them, it is likewiſe the Prince who regulates the Precedency among Officers who have no other common ſuperior Judges, who can take Cognizance thereof. Thus the Precedency between Officers of Juſtice and of the Revenue, is properly cognizable by the King in Council; and the diſputes about Precedency between Officers of the ſame Order, who have common Superiors, ſuch as the Officers belonging to the Parliaments in *France*, and the Courts of Aids, are decided in the ſaid Courts.

No body is ignorant of the infinite multitude of diſputes of this kind that have ariſen, and of the Regulations which have been made for ſettling the Rank and Precedency of Officers: ſo that it would ſeem that there remain only a few queſtions of this nature undetermined; but there ariſes nevertheleſs daily new queſtions in the caſes wherein perſons can find any way to diſtinguiſh them from thoſe which have been decided; neither is it ſtrange that the diverſity and the great number of Officers has given occaſion to this multitude of diſputes, by the different combinations of the compariſons of one Office with another, and by the value which Men ſet upon the Rank of Honour which places ſome above others; as to which it muſt be confeſſed, that altho' ambition and vanity may have, and often have the greateſt ſhare in theſe diſputes; yet there may happen diſputes to perſons who have no other motive than the good of the publick Order, and ſolid conſiderations, which have in view the uſefulneſs of preſerving to their Offices the Authority which truly belongs to them, that they may be able to make the better uſe thereof.

One ſees by theſe Remarks on the Functions of Officers, that it is on the ſaid Functions that the Dignity, the Authority, and the other Characters which make the different Rights and Advantages that are annexed unto Offices, and which are the ſubject matter of this Title, do depend.

The Authority of Offices is nothing elſe but the Right which Officers have to exerciſe the Functions of their Miniſtry independently of the will of thoſe whom they concern, and to compel thoſe to Obedience who do not voluntarily ſubmit themſelves.

The Dignity of Offices is nothing elſe but the Rank of Honour which they give, and this Honour conſiſts in the Reſpect and Obedience that is due unto Officers according to the quality of their Miniſtry: for ſince they are eſtabliſhed for the exerciſe of Functions which no man would have right to exerciſe over another, if he had not a power ſo to do, implied in that which God gives to the Prince, and which the Prince communicates to his Officers; it is this Power that we are bound to revere in the hands of Officers by a ſincere reſpect to the Orders of God; and it is to theſe Orders that we owe the Obedience which we are bound to pay to thoſe who execute them [a].

[a] There is no power but of God; the powers that be, are ordained of God. *Rom.* xiii. 1.

For Power is given you of the Lord, and Sovereignty from the Higheſt. *Wiſd. of Sol.* vi. 3.

Submit your ſelves to every Ordinance of Man for the Lord's ſake, whether it be to the King, as ſupreme, or unto Governors, as unto them that are ſent by him for the puniſhment of evil doers, and for the praiſe of them that do well. 1 *Pet.* ii. 13, 14.

Whoſoever therefore reſiſteth the Power, reſiſteth the Ordinance of God: and they that reſiſt, ſhall receive to themſelves damnation. For Rulers are not a Terror to good works, but to the evil: wilt thou then not be afraid of the Power? do that which is good, and thou ſhalt have praiſe of the ſame. For he is the Miniſter of God to thee for good; but if thou do that which is evil, be afraid; for he beareth not the ſword in vain; for he is the Miniſter of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 2, 3, 4.

See in relation to this Title, and touching the Rank of Precedency, that of the ſeveral Orders of Perſons, in the firſt Book.

See concerning this matter, the Title of the ſeveral Orders of Perſons, where we have given the definition of Honour, of Dignity, of Authority, and of the reſt.

Seeing the Dignity and the Authority of Offices are conſequences of their Functions, every Office hath its Dignity, its Honour, and its Rank, according to the quality of its Functions, and the proportions that ought to be obſerved between the one and the other, whether it be in the ſame Order of Functions, or between thoſe of one Order, and thoſe of another, as has been already obſerved: which makes the different degrees of the Dignity and Authority of the ſeveral Offices which have both the one and the other; for

there are ſome Offices whoſe Functions are without Dignity, altho' there be none whoſe Functions do not imply the uſe of the Authority that is neceſſary in all of them for execution. Thus the loweſt Miniſters of Juſtice, of Policy, of Revenue, and of the other Orders of Offices, may perhaps have no degree of Dignity; but they have all of them this uſe of Authority, that altho' they cannot ordain any thing, yet they have power to execute the Orders that are put into their hands, whether it be by the Prince, or by his Officers: and it is upon the account of the ſaid Orders that people ought to conſider in the leaſt Miniſterial Functions of Officers, the Dignity and the Authority of Juſtice that arms them with its force, and the divine Providence which hath eſtabliſhed the ſaid Authority; which procures to thoſe Officers the conſideration which their Functions deſerve, which of themſelves, and of their own nature, command reſpect and obedience from thoſe on whom they are exerciſed: and this is ſo true, that even that Function which raiſes a contempt and an averſion againſt thoſe who exerciſe it, and who are called Hangmen, or Executioners of Juſtice, is nevertheleſs in reality ſuch in itſelf, and by its nature, that in the manner that it was exerciſed in the firſt Ages, it was ſo far from having any thing odious or contemptible in it, that it had a ſort of Honour or Dignity that accompanied it; for, it was either they themſelves who had the Power of Life and Death that took away the Lives of Offenders who might deſerve ſuch a Puniſhment, or it was done by Officers who had the honour to approach near the Perſon of the Prince, or the whole Body of the People armed themſelves with zeal, and ſtrove who ſhould be the firſt to execute Juſtice on the Offender. Thus *Moſes* animated with the Spirit of God killed the *Egyptian*[b]; thus *Phinehas* was the revenger of the crime of the *Iſraelite* with the *Midianitiſh* woman[c]; thus, after his example, the People, by the command of *Moſes* ſlew four and twenty thouſand of their brethren, who had joined themſelves unto *Baal-peor*[d]; thus *David* cauſed the perſon who gloried in his having killed *Saul*, to be put to death in his own preſence[e]; thus the whole Body of the People were Executioners of the Sentences of Death pronounced by the divine Law, and every one armed himſelf with a zeal for Juſtice to ſtone thoſe on whom the Law inflicted that puniſhment[f]. So that all theſe ways of executing Sentences of Death had nothing odious or deſpicable in them, but had on the contrary, the glory of the Zeal of God and of Juſtice, and the character of Works of Religion and Piety; and there have been ſome Governments in which, altho' they were ignorant of the true Religion, yet the bare conſideration of the Authority of Juſtice gave a Rank of Honour to thoſe who exerciſed this Function[g]; but when the perſons who exerciſe it have no other view in laying their hands on Criminals to make them ſuffer the Puniſhments to which they are condemned, than barely the reward which they receive for doing it, theſe Executions in their hands have neither the glory of a Zeal for Juſtice, nor the honour of Authority; but this is no hindrance why thoſe who exerciſe this Function, may not have other more generous motives than that of the ſmall profit which they make by being the Executioners of Juſtice.

[b] And it came to paſs in thoſe days, when *Moſes* was grown, that he went out unto his brethren, and looked on their burdens; and he ſpied an Egyptian ſmiting an Hebrew, one of his brethren. And he looked this way and that way, and when he ſaw that there was no man, he ſlew the Egyptian, and hid him in the ſand. *Exod.* ii. 11, 12.

And ſeeing one of them ſuffer wrong, he defended him, and avenged him that was oppreſſed; and ſmote the Egyptian. For he ſuppoſed his brethren would have underſtood, how that God by his hand would deliver them, but they underſtood not. *Acts* vii. 24, 25.

[c] And when Phinehas the ſon of Eleazar, the ſon of Aaron the Prieſt, ſaw it, he roſe up from amongſt the congregation, and took a javelin in his hand; and he went after the man of Iſrael into the tent, and thruſt both of them through. *Numb.* xxv. 7, 8.

[d] And Moſes ſaid unto the Judges of Iſrael, Slay ye every one his men, that were joined unto Baal-peor. *Numb.* xxv. 5.

And thoſe that died in the plague, were twenty and four thouſand. *Numb.* xxv. 9.

[e] And David called one of the young men, and ſaid, Go near, and fall upon him. And he ſmote him that he died. 2 *Sam.* i. 15.

[f] Bring forth him that hath curſed, without the camp, and let all that heard him, lay their hands upon his head, and let all the congregation ſtone him. And thou ſhalt ſpeak unto the children of Iſrael, ſaying, Whoſoever curſeth his God, ſhall bear his ſin. *Levit.* xxiv. 14, 15.

And thou ſhalt ſtone him with ſtones, that he die; becauſe he hath ſought to thruſt thee away from the Lord thy God, which brought thee out of the land of Egypt, from the houſe of bondage. *Deut.* xiii. 10.

Then ſhalt thou bring forth that man, or that woman, which have committed that wicked thing, unto thy gates, even that man or that woman, and ſhalt ſtone them with ſtones, till they die. *Deut.* xvii. 5.

Then they ſhall bring out the damſel to the door of

of her father's houſe, and the men of her city ſhall ſtone her with ſtones that ſhe die; becauſe ſhe hath wrought folly in *Iſrael*, to play the whore in her father's houſe; ſo ſhalt thou put evil away from among you. *Deut.* xxii. 21.

[z] *See Ariſtotle 6. Politic. cap. ult.*

It is in theſe two firſt characters of the Dignity and Authority of Offices, that the diſtinction between Officers and private perſons does chiefly conſiſt; for it is by the Authority and by the Dignity or Honour annexed to Offices, that they have a rank of Diſtinction, every one in his Order, in the manner that has been remarked, and which procures to them a reſpect proportionable to this Rank, and to the quality of their Functions, that they may be able to execute them with that power and liberty which the publick Order requires, and which ſubſiſts merely by the free exerciſe and right uſe of all the Offices.

Beſides theſe two firſt characters of Dignity and Authority which the Functions of Officers give to their Offices, they give them likewiſe Rights which are conſequences of them, and which may be reduced to two kinds; the one of the Recompences or Profits belonging to thoſe Functions; and the other of ſome Privileges, or other Advantages.

The Recompences or Profits are of two ſorts; the Salaries, and the Perquiſites. We give one or other of theſe names to the gains which Officers may make by their Functions; but theſe Profits, theſe Privileges, and theſe Advantages do not belong indifferently to all Officers in general; and it is neceſſary to make different diſtinctions of them according as they have theſe different Rights; for ſome of them have both Salaries, Perquiſites, and Privileges; others have neither Salaries, nor Perquiſites, nor Privileges; others again have Privileges without Salaries, or other Gains; there are ſome who have Perquiſites without Salaries, and without Privileges; and there are ſome who have Salaries and Privileges, but no Perquiſites. We ſhall ſee theſe different combinations in the ſecond Section of this Title, which ſhall be of the Rights and Privileges of Officers, and of their Rank; and we ſhall firſt explain in the firſt Section that which relates to the different ſorts of Dignity and Authority annexed to the ſeveral Offices.

SECT. I.

Of the different ſorts of Dignity and Authority annexed to Offices.

The CONTENTS.

1. *Definition of Dignity.*
2. *Definition of Authority.*
3. *Reſpect is due to Officers without any regard to their perſonal merit.*
4. *Different degrees of Dignity and Authority, and divers uſes both of the one and of the other.*
5. *Divers combinations of Dignity and Authority of the ſeveral ſorts of Offices.*
6. *Uſe of Dignity and Authority in Offices which ſeem to have neither of them.*
7. *The uſe of Authority demands the uſe of Force.*

I.

1. *Definition of Dignity.*

WE generally call by the name of Dignity of Offices the Honour which their Functions procure; and this Dignity may be conſidered, either in the perſons of the Officers who execute the Offices, or in the Offices themſelves, which are ſometimes called barely by the name of Dignities [a].

[a] *We ſay of an Office, that it gives a Dignity, and that the Officer hath the Dignity which his Office gives him; and it is likewiſe ſaid, that an Office is a Dignity; and ſometimes in Courts of Juſtice they diſtinguiſh by the name of Dignity certain Offices, which are above the others; ſuch as are in* France *in the Juriſdictions of Bailiffs and Seneſchals, the Offices of Lieutenant General, of Lieutenant Criminal, and others; in the ſame manner as in the Chapters of Churches, they give the name of Dignities to the firſt, and chief Titles of Dean, Provoſt, and others.*

II.

2. *Definition of Authority.*

The Authority of Offices is the Power which Officers have to exerciſe the Functions thereof, and to compel thoſe whom they concern to ſubmit to them, whether they will, or not [b].

[b] *It is a natural conſequence of the uſe of Offices, that thoſe who execute them ſhould have the Power and Authority to perform the Functions thereof.*

III.

3. *Reſpect is due to Officers without any regard to their perſonal merit.*

Seeing Authority and Dignity are annexed unto Offices without any regard to the perſonal qualities of the Officers, and that the ſame Reſpect and Obedience is due to their Functions that is due to the Orders of God, which they exe-

cute; this duty obliges us to reſpect and obey even thoſe Officers who have not the merit with which they ought to accompany the exerciſe of their Functions [c].

[c] *See the fourth and the ſixth Articles of the ſecond Section of the firſt Title of the firſt Book.*

IV.

4. Different degrees of Dignity and Authority, and divers uſes both of the one and of the other.

Dignity and Authority being annexed to the Functions of Offices, we ought to diſtinguiſh not only different degrees of Dignity and Authority, according to the differences of the Functions; but becauſe in ſome there appears neither Dignity nor Authority, it is neceſſary to diſtinguiſh in them the manner in which both the one and the other have their uſe: theſe two ſorts of diſtinctions will appear by the Articles which follow [d].

[d] *See the following Articles.*

V.

5. Divers combinations of Dignity and Authority of the ſeveral ſorts of Offices.

As for the diſtinction of the Dignity and Authority of Offices by the differences of their Functions, we may reduce to two general Views all the ways of making this diſtinction; the firſt, by conſidering the divers kinds of Offices, and their ſeveral Orders, and by comparing the Offices of one Order with thoſe of another; and the ſecond by comparing in each Order the ſuperior Offices with the inferior: Thus by the firſt of theſe Views, the Dignity and Authority of the firſt Magiſtrates of Juſtice is above thoſe of the firſt Officers of the Revenue, becauſe the Functions of Juſtice have by their nature more Dignity and more Authority than the Functions of the Revenue ought to have; and by the ſecond, the Officers of the Parliaments in *France* have more Dignity and Authority, than the Officers of the Juriſdictions of Bailiffs and Seneſchals: and it is by comparing under theſe two views every Office with all others, whether of the ſame Order, or of different Orders, that we ought to diſtinguiſh their Dignity and their Authority by the conſequence of their Functions, not only in Offices of Juſtice, of Policy, and of the Revenue; but alſo in Offices belonging to the King's Houſhold, in Offices of War, and in all others; obſerving the proportions between one Order and another, and between Offices of one and the ſame Order, and between the different degrees of one Order compared with the different degrees of other Orders; for all theſe proportions diverſify both the Dignity, the Authority, and the Rank of Offices, and of the Officers [e].

[e] *See the third Section of this Title. The Reader muſt conſult touching the differences of the Dignity of the Offices of the ſeveral Orders, what has been ſaid of them in the Preamble of this Title.*

VI.

6. Uſe of Dignity and Authority in Offices which ſeem to have neither of them.

In order to diſtinguiſh the ways in which Dignity and Authority have their uſe even in thoſe Offices and Functions which ſeem to have neither of them, it is neceſſary to remark that ſince all the Functions of all Offices have a relation to the publick Order, there is not any one of them of which the Miniſtry does not make a part of the general Adminiſtration of Juſtice, and of the Policy, which regulates every thing that compoſes the Order of the State; ſo that the leaſt of thoſe Functions have the characters of Dignity and Authority which ſuit with them, and which extend to all that the ſaid Adminiſtration may require, for inculcating reſpect and obedience on all thoſe whom the ſaid Functions may any way concern, and who on their part ought to reverence in all the ſaid Functions the divine Providence that ſubjects them thereto [f].

[f] *See concerning this Article that which has been ſaid of it a little before the end of the Preamble of this Title.*

VII.

7. The uſe of Authority demands the uſe of Force.

Since the uſe of the Dignity and Authority of Offices is to keep within bounds, by Reſpect and Obedience, all thoſe whom the ſeveral Functions of the Offices may any way concern, to the end that no body may tranſgreſs in any thing the Order which is to preſerve the publick peace and quiet; this Obedience and this Reſpect are duties independent of the will of thoſe whom they oblige; ſo that Dignity and Authority, which upon the good have of themſelves their entire effect, would be uſeleſs with regard to others, if Force were not joined to the one and to the other, to make them effectual againſt the rebellious; and every Office ought to have the uſe of the Force that is neceſſary for the exerciſe of its Functions, and even the uſe of Arms, if the reſiſtance to the Order be ſuch as that it is neceſſary to have recourſe thereto. Thus the Orders of Juſtice, as well as thoſe of War, are put in execution by force of Arms by the Miniſters, who exerciſe this Function againſt thoſe who by their diſobedience draw upon themſelves

ſelves this violence; and it is alſo the natural uſe of Arms, and of all Force on Men, to ſubject them to obedience in what relates to the external Order of the Society, and to repreſs every thing that diſturbs it; for Wars even againſt Enemies ought to be nothing elſe but Juſtice armed in order to compel them to ſubmit to its Rules [g].

[g] *See the firſt Section of the third Title of the firſt Book.*

SECT. II.

Of the Rights and Privileges of Officers.

The CONTENTS.

1. *The Right and duty of exerciſing the Functions of Offices.*
2. *The duty of Officers to execute their Offices, implies that of receiving a recompence for the ſame.*
3. *The Functions of the Offices of Towns, which are called Municipal Offices, are exerciſed without wages.*
4. *The Judges of differences among Merchants exerciſe their Functions without Salaries.*
5. *Officials exerciſe their Functions without Salaries.*
6. *Many Officers of Juſtice have not Salaries proportionable to their Functions.*
7. *Two ſorts of recompence which Officers have, the Profits and the Privileges.*
8. *The Privileges of Officers are different, according as the Prince has been pleaſed to grant them.*
9. *The Rights of the Veteran Officers.*
10. *Offices which entitle the Officers to have their Cauſes tried in certain Courts.*
11. *The Privileges of Officers conſiſt chiefly in divers Exemptions.*
12. *The Quality, the Rank, and the Privileges of Officers paſs to their Wives.*
13. *None of the Privileges of Officers go to their Children, except that of Nobility.*
14. *The Rights and the Privileges are differently diſtributed among the Officers.*

I.

1. The Right and Duty of exerciſing the Functions of Offices.

WE may conſider as the firſt of the Rights of Officers, that which they all have to exerciſe the Functions of their reſpective Offices; for it is for that end that they are eſtabliſhed; ſo that this Right is joined in them to the neceſſity of exerciſing it, and becomes a duty to them, of which we ſhall ſpeak in the following Title [a].

[a] *The Right which Officers have to exerciſe their Offices, is founded on the duty which obliges them to it; and that they may be able to execute this duty, the Publick ought to put into their hands this Authority.*

Cui juriſdictio data eſt ea quoque conceſſa eſſe videntur, ſine quibus juriſdictio explicari non poteſt. *l. 2. ff. de juriſd.*

Mandatam ſibi juriſdictionem mandare alteri non poſſe manifeſtum eſt. Mandata juriſdictione privato etiam imperium quod non eſt merum, videtur mandari, quia juriſdictio, ſine modica coercitione nulla eſt. *l. ult. ff. de off. ejus cui mand. eſt juriſdic.*

II.

2. The Duty of Officers to execute their Offices implies that of receiving a recompence for the ſame.

The right and the duty of Officers to execute their Offices for the good of the Publick, implies the right of reaping from thence the recompence which the Services that they render may deſerve [b]; and it is the duty of the Prince to put Officers in a condition to execute their Offices without rendring them burdenſome to themſelves and to their Families; and this is what makes the ſeveral recompences, which the Prince gives to the different ſorts of Officers, whether it by the name of Penſion, Salary, Stipend, or other fixed Revenue, or by rewards ſuited to the occaſions and to the ſervices; but this Rule hath its exceptions, which ſhall be explained in the following Articles.

[b] The labourer is worthy of his hire. *Luke* x. 7. 1 *Tim.* v. 18.

If thoſe who ſerve in the Miniſtry of the Prieſthood have a right to draw their Subſiſtence from it, much more may all thoſe do ſo who exerciſe other Functions. Matth. x. 10.

Have we not power to eat and drink? 1 *Corinth.* ix. 4.

Who goeth a warfare at any time at his own Charges? Who planteth a vineyard, and eateth not of the fruit thereof? Or who feedeth a flock, and eateth not of the milk of the flock? 1 *Cor.* ix. 7.

If we have ſown unto you ſpiritual things, is it a great thing if we ſhall reap your carnal things? 1 *Cor.* ix. 11.

Do not ye know, that they which miniſter about holy things, live of the things of the temple? and they which wait at the altar, are partakers with the altar? Even ſo hath the Lord ordained, that they which preach the Goſpel ſhould live of the Goſpel. 1 *Cor.* ix. 13, 14.

III.

3. The Functions of the Offices of Towns, which are called Municipal Offices, are exerciſed without wages.

Seeing the Functions of the Offices of Towns, which are called Municipal Offices, relate to the common good of the Inhabitants, and that they are called to the exerciſe of them, as if they were their own proper Affairs, every one in his turn, and for a ſhort time; this ſervice is due by the bare effect of the reciprocal duty that is between the ſaid Inhabitants to bear thoſe Offices for their common good, according as they are capable of them. Thus thoſe Functions

tions are exercised without wages [c], whether it be that they have any Dignity, any Authority annexed to them, as those of Sheriffs, Consuls, and others, or that they consist barely in collecting the publick Monies, or in other Functions of the like nature; but for the levying of the publick Monies, there is allowed, instead of Salary, so much in the Pound out of the Monies that are to be levied.

[c] *This is an exception to the preceding Article in respect of the Officers of Towns, who exercise their Functions without wages.*

IV.

4. The Judges of differences among Merchants exercise their Functions without Salaries.

The Judges appointed in *France* to determine differences between Merchant and Merchant, in relation to their mercantile affairs, have no Salary for the exercise of their Functions, and that for the same reason why no Salaries are appointed for Municipal Offices; for the said Judges are elected by the Company of Merchants, to exercise this Function in their respective turns, according as they are capable thereof, and to exercise the same only for a short time [d].

[d] *This is a consequence of the foregoing Articles.*

V.

5. Officials exercise their Functions without Salaries.

The Functions of Officials are exercised without Salaries; for as to what concerns the Spiritual Jurisdiction, the Church has no Exchequer out of which the said Salaries may be issued, and the Spiritual Functions are to be exercised without any fee or reward; and as for the Temporal Jurisdiction which the Kings have granted unto the Church over Ecclesiastical persons, the same is a privilege which does not extend so far as to set apart out of the Exchequer a Fund for the Salaries of Officials; but as for the other Ecclesiastical Officers who are Counsellors, or Judges [e] in the Ordinary Courts of Justice; of whom mention has been made in the foregoing Title; as they are Officers of the King, and Judges between Lay persons, and of temporal concerns; they have their Salaries in the same manner as the other Judges of the said Courts.

[e] *This is likewise another Exception with regard to Officials.*

VI.

6. Many Officers of Justice have not Salaries proportionable to their Functions.

We may likewise remark as a kind of exception to the Rule explained in the second Article, that many Officers, especially those of Justice, have not Salaries proportionable to their Functions, and that the greater part have them so very inconsiderable, that a very small share of their Functions might justly deserve them. But this exception is founded upon two reasons; one is, that the said Offices have their Salaries regulated upon the foot of the Revenue which they yielded to the King, and not on the foot of the Price which they are sold at; for that Price rises in consideration of the honour and other advantages which those who purchase the Offices regard in them; and the other is, that the permission which they have to take for the exercise of the Functions of the said Offices, those emoluments which are called Perquisites, is to them in lieu of a Salary [f].

[f] ☞ *It would be agreeable to the Order of Nature, that the Officers of Justice should administer it without any fee or reward from the parties, and that consequently they ought to have sufficient Salaries from the Publick which they serve; but the infinite multitude of Law-Suits, and the strange multiplicity of proceedings in every one of them having increased the number of Officers in Courts of Justice, or the multitude of Officers having multiplied Law-Suits and the Proceedings therein (for each of these multiplicities is naturally the cause and the effect of the other;) it is come to that pass by the present condition of things, that the Publick would be too much burdened, if it gave to all the Officers of Justice sufficient Salaries to oblige them to render it gratis, without taking any Fees or Perquisites: so that it seems to be for the good of the State, to continue the use thereof, but under three conditions, to be inviolably observed by all Officers of Justice. The first is, not to reckon that those Perquisites ought to be such, as to supply what they may judge to be wanting to make up their Salaries such as they may fancy their Offices to deserve upon the foot that they are sold at; but only such as their labour may seem reasonably to deserve, and that in proportion to the nature of the Affairs, and the circumstances of the Parties. The second is, not to omit the Functions which are part of the duty of the Officers of Justice, altho' they reap no benefit thereby; such as are, for example, the Functions of the King's Procurators, in cases where the Publick is concerned, and where they are the only Parties, and where the Judges have also on their part the duty of their Functions. And the third, that with regard to the Affairs in which there are Parties concerned, and of whom the Officers might lawfully take Fees and Perquisites, they do not refuse to render Justice to the Parties, who are poor and unable to pay the usual Fees of Court; for Justice is due to them as much, or rather more than to others, and they cannot expect it, unless it be from those who have the Administration of it.*

It is under these three conditions that the use of Fees and Perquisites is permitted, and the Publick may perhaps find its account better therein with respect to some Judges than if they had sufficient Salaries settled on them; for there are some who by reason of the facility of bearing Offices, and drawing from them the advantages which may be had without their giving themselves much trouble in executing them, would be soon wearied of the trouble of looking into Processes, and of giving a due attendance in Court, and to whom the allurement of profit is instead of a zeal to do Justice.

We may add here in relation to the use of Fees and Perquisites for Sentences in Causes, that the Emperor Justinian *allowed them to two sorts of Judges; to those who were called Defenders of the Towns, and to those who were called Pedaneous Judges, who were allowed to take to the amount of a certain Sum, in the same*

ſame manner as he had regulated it in favour of the Defenders of Towns.

Quia verò etiam defenſores civitatum extra omne commodum fiunt: & pro decretis eorum, ſi quidem civitates majores ſunt, quatuor ſolummodo dabuntur aurei foro tuæ ſublimitatis: ſi verò minores, tres: ſicut jamdudum noſtris conſtitutum eſt legibus. Si verò quædam ſalaria habent publica, etiam hæc ſecundùm conſuetudinem percipient. *Nov.* 15. *c.* 6.

Ne autem circa hæc labor ſine mercede noſtris fiat pedaneis, ſancimus eos in unaquaque dicta apud eos cauſa, vel ſi divinitus fuerit deputata, duos quidem aureos ab utraque parte in conteſtatione litis accipere, & duos in fine negotii, & ultra hoc nihil (quod etiam prædeceſſores noſtri definierunt) ſed his contentos eſſe ſolis: privilegiis quippe quæ in deminutione ſumptuum quibuſdam conceſſa ſunt, omnibus integris ſecundùm ſuum ordinem conſervandis. Hoc autem dicimus in litibus tranſcendentibus quantitatem aureorum centum. Si enim uſque ad hoc menſura fuerit litium: nihil eos audientiæ cauſa volumus exigi. Qui enim ita parvæ quantitati exactionem facit, pro maxima parte victoria ſic pauperem fraudat. Et neque in hoc ſolùm modo ſtamus, ſed etiam de proprio ipſi largimur. Volumus enim unumquemque iſtiuſmodi pedeanorum, annis ſingulis à menſa tuæ celſitudinis percipere duas libras auri, & his eſſe contentum ſolis, & neque redimi: & aurum omnino deſpicere. Propterea enim eligimus fiſcum minuere, quatenus horum unuſquiſque contentus noſtrâ largitate, & quaternis aureis puras & Deo & nobis & legi cuſtodiat manus, cogitans quæ à prioribus legiſlatoribus de his definita ſunt. *Nov.* 82. *c.* 9.

VII.

7. Two ſorts of recompence which Officers have, the Profits, and the Privileges.

Theſe Rights of Offices, to draw from them Salaries, Penſions, Perquiſites, or other Profits; for ſome Offices have other ſorts of Rights, and that by Law too, which are certain ſmall advantages which it would be needleſs to mention here, are the firſt kind of Recompence of the ſervice of Officers; and the Privileges which they enjoy are the ſecond kind; and we do not reckon here for a third kind the Honour which accrues to Officers from the exerciſe of their Functions: for if we underſtand by this Honour, Dignity and Authority, it is not a recompence of the Services of Officers; but it is on the contrary, an engagement which obliges them to it; and if we mean by Honour, the eſteem and the reſpect which Officers acquire by diſcharging worthily their Offices, this Honour is not ſo much a recompence of their Services, as the natural fruit of the merit of thoſe who diſtinguiſh themſelves by their capacity, their probity, and the other qualities which make this merit in them.

VIII.

8. The Privileges of Officers are different, according as the Prince has been pleaſed to grant them.

The Privileges of Officers are of many ſorts, according as the Kings have granted them differently to the ſeveral natures of Offices; thus ſome have the privilege of ennobling thoſe who enjoy them, if they keep them till their death; others do confer Nobility, but not on the firſt Poſſeſſor, but only on him whoſe Father or Grandfather died poſſeſſed of the Office, or have ſerved in it the time which gives the quality of Veteran, of which we ſhall take notice in the following Article; and there are even ſome Towns in *France* where the Office of Sheriff ennobles the perſons who ſerve in it [g].

[g] Charles VIII. *by an Edict dated at* Lyons, *in the Month of* December, 1495, *granted the Privilege of Nobility to twelve Sheriffs of the Town of* Lyons. Henry IV. *by an Edict of the Month of* December, 1595, *reduced them to the number of four. There are other Towns which have the ſame Privileges.*

IX.

9. The Rights of Veteran Officers.

We call thoſe Officers Veterans, who have ſerved twenty years in their Offices; and this conſideration entitles thoſe who after the ſaid Service lay down their Offices, to retain the Quality, and even the Rights, the Rank, and the Privileges annexed to them; which are confirmed to them by the King's Letters Patents; but they have neither Salary nor Perquiſites. Thus the Officers who are Veterans, have by reaſon of this quality a kind of Privilege, which hath this effect with regard to the Officers of Juſtice, that they may aſſiſt in giving Judgment on Law-Suits, and have their Votes therein, in the ſame manner as they had whilſt they were actual Judges; but they cannot preſide in that quality, altho' they retain the other Privileges of the Offices, according as the Uſage, and the Letters which they procure from the Prince, may regulate them [h].

[h] *This word* Veterans *hath its Origine in the* Roman *Law, where they gave the name of Veteran to Soldiers who had ſerved twenty years; which long Service was rewarded with ſome Exemption; as is to be ſeen in the Title of the Code* de Veteranis; *and the like Service acquired alſo to other Functions certain Privileges.*

Grammaticos tam Græcos quam Latinos, Sophiſtas & Juriſpetitos, in hac regia urbe profeſſionem ſuam exercentes, & inter ſtatutos connumeratos, ſi laudabilem in ſe probis moribus vitam eſſe monſtraverint, ſi docendi peritiam, facundiam dicendi, interpretandi ſubtilitatem, copiamque diſſerendi ſe habere patefecerint & cœtu ampliſſimo indicante digni fuerint æſtimati: cum ad viginti annos obſervatione jugi ac ſedulo docendi labore pervenerint placuit honorari, & his qui ſunt ex vicaria dignitate connumerati. *l. un. C. de Profeſſ. qui in urb. Conſt.*

Qui militiam vel advocationem impleverunt, præter ea privilegia quæ jam adepti ſunt, nec frumenti aut olei comparandi curam, vel inſpectionem operum, vel ratiocinium, vel defenſionem civitatis vel patris civitatis munus, vel curationem Reipublicæ, vel curationem annonæ exerceant, ſed & habitent ubi voluerint, nec Præſidibus, ultra portas occurrere

occurrere cogantur, nec ad curias ſive collegia vocentur inviti, vel nominentur, vel nominent, nec deſcriptiones præbeant conſuetudinum, vel ſpectaculorum nomine. Unam quoque domum habeant liberam onere ſuſcipiendorum militum ſuperveni-entium: iis qui in locis verſantur dignitate aliqua præditis ſuam immunitatem obtinentibus. Hæc enim conſtitutio priora beneficia auget non minuit. At fiſcalia tamen præbeant, & honorem præſides, ac viciſſim honorentur ab eis. *l. 1. c. quib. muner. excuſ. hi qui poſt impl. mit. V. T. C.* de Veteranis.

X.

10. *Offices which entitle the Officers to have their Cauſes tried in certain Courts.*

It is alſo a privilege of many Offices, to give to the Officers the Right to have the Cauſes in which they are concerned tryed in the Courts to which they belong, which is called the Right of *Committimus*, and of which mention has been made in the ſixteenth Article of the firſt Section of the foregoing Title[i].

[i] *See the ſaid ſixteenth Article.*

XI.

11. *The Privileges of Officers conſiſt chiefly in divers Exemptions.*

The other Privileges of Officers conſiſt principally of ſeveral Exemptions granted differently to divers Offices. Thus, ſome Offices give an exemption from the Tax on Real and Perſonal Eſtates; others from all the publick Duties, ſuch as that laid on Salt, the Exciſe, the Cuſtoms: ſome exempt perſons from Town Offices, and from Tutorſhips: others excuſe perſons from ſerving in the Militia, from the Watch, and from other Services: others entitle perſons to an exemption from the Fees of the Regiſtries in the King's Courts; and many have in this manner ſeveral Exemptions, but differently; for there are ſome which have all theſe ſorts of Exemptions, and others have only ſome part of them, more or leſs, according to the Grants which have been made thereof[l].

[l] *The greateſt part of thoſe who procure to themſelves certain Offices, do it only that they may enjoy the Privileges and Exemptions which are annexed to them.*

XII.

12. *The Quality, the Rank, and the Privileges of Officers paſs to their Wives.*

It is likewiſe a Right belonging to Offices, that the Quality, the Rank, and the Privileges of Officers go to their Wives, and remain with them whilſt they continue in the ſtate of Widowhood; for the Huſband and the Wife are only as it were one and the ſame Perſon, ſo that the Wife derives from her Huſband all that can go to her Sex; but the Widow who marries again follows the condition of the ſecond Huſband[m].

[m] *See the ſecond Article of the third Chapter of the Treatiſe of Laws.*

Conſulari fœminæ utique conſularem virum præferendum nemo ambigit. Sed vir præfectorius an conſulari fœminæ præferatur, videndum? Putem præferri: *quia major dignitas eſt in ſexu virili.* Conſulares autem fœminas dicimus conſularium uxores. Adjicit Saturninus etiam matres. Quod nec uſquam relatum eſt, nec unquam receptum. *l. 1. ff. de Senat.*

Fœminæ nuptæ clariſſimis perſonis, clariſſimarum perſonarum appellatione continentur. Clariſſimarum fœminarum nomine Senatorum filiæ, niſi quæ viros clariſſimos ſortitæ ſunt, non habentur. Fœminis enim dignitatem clariſſimam mariti tribuunt: parentes verò donec plebeii nuptiis fuerint copulatæ. Tamdiu igitur clariſſima fœmina erit, quamdiu Senatori nupta eſt, vel clariſſimo, aut ſeparata ab eo, alii inferioris dignitatis non nupſit. *l. 8. eodem.*

Mulieres honore maritorum erigimus, genere nobilitamus, & forum ex eorum perſona ſtatuimus, & domicilia mutamus. Si autem minoris ordinis virum poſtea ſortitæ fuerint: priore dignitate privatæ poſterioris mariti ſequentur conditionem. *l. 13. C. de dignit.*

Jubemus, ſalvo honore qui per revocationem ſacræ revocatoriæ defertur, durante, licere cunctis tam minoribus quam majoribus poteſtatem gerentibus, nec non etiam honorariis illuſtribus, ſive ex hac regia urbe, principali videlicet præcedente conſenſu, protecti fuerint, ſive in provinciis habitantes ſacratiſſimum (ſuis ſcilicet poſcentibus negotiis) petere maluerint comitatum: ſine ſacra quoque revocatoria ad hanc regiam urbem pervenire. *l. ult. C. eod.*

XIII.

13. *None of the Privileges of Officers go to their Children, except that of Nobility.*

Of all the Rights and Privileges of Officers, there is none that paſſes to their Children, except the Nobility which Offices may give; for Nobility is principally granted for the Deſcendants; and even the Children who were born before the Nobility was acquired, or even before the admiſſion to the Office, are made Noble as well as thoſe who are born afterwards; but the Children of other Officers may have the Quality which the Rank of their Fathers may give them[n].

[n] Nec intereſt jam in ſenatoria dignitate conſtitutus eum ſuſceperit an ante dignitatem ſenatoriam. *l. 5. in f. ff. de Senat.*

XIV.

14. *The Rights and the Privileges are differently diſtributed among the Officers.*

The Rights and the Privileges which have been juſt now explained, are differently diſtributed among the Officers, and in ſuch a manner, that ſome Officers have both Salaries, Perquiſites, and Privileges, as the Officers of the Parliaments in *France*, of the Chambers of Accompts, of the Courts of Aids, and of the other Courts of Juſtice, and many other Officers of Juſtice, and of the Revenue, the King's Secretaries and others; and there are ſome who have neither Salaries, nor Perquiſites, nor Privileges, ſuch as the Municipal Officers of Towns, excepting ſome Towns in which the Office of Sheriff confers Nobility;

Nobility; and thoſe have a Privilege without a Salary, or Perquiſites; and others have only Perquiſites without a Salary, and without Privileges, ſuch as Proctors, Regiſters, and Notaries Publick; and there are others who have Salaries or Penſions, and Privileges, without Perquiſites, ſuch as the Officers of the Crown, and ſome of the chief Officers of Juſtice[o].

[o] *One may eaſily judge of theſe different Rights and Privileges by the Examples which have been here mentioned.*

SECT. III.

Of the Rank of Officers.

The CONTENTS.

1. *Definition of Rank.*
2. *Definition of Precedency.*
3. *The Rank and Precedency are ſettled by different views.*
4. *Among Officers of the ſame Court, the Chiefs take place of the others.*
5. *The others take place according to the time of their Admiſſion.*
6. *The loweſt Officers of a ſuperior Court, take place of the firſt Officers of an inferior Court.*
7. *Order of Precedency between Officers of different Juriſdictions which are not ſubordinate to one another.*
8. *If the Ranks of Officers are not fixed, they ought to be regulated by the Dignity, the Authority, the Functions, and the Privileges of their Offices.*
9. *The Officer has the Rank which the King gives him.*

I.

1. *Definition of Rank.* BY the Rank of Officers is meant, their ſituation in the Order of the Places which every one has in vertue of his Office, either above or below others; for there cannot be two Perſons in the ſame Rank, no more than two Bodies in one and the ſame place; but every Officer being compared with all other Officers, has of neceſſity his Rank before or after the others, otherwiſe there would be a diſpute between them concerning the Precedency[a].

[a] *The Reader may conſult in relation to this Section, the third Section of the ninth Title of the Firſt Book, of the ſeveral Orders of perſons who compoſe a State.*

II.

2. *Definition of Precedency.* This Rank of Officers is called likewiſe by the name of Place or Seat; eſpecially among Officers who have their Seats in the ſame Court, or between Officers of different Courts, who meet in common Aſſemblies, or upon Functions of publick Ceremony; and the Right which one has to take place of the others, is called by the name of Precedency.

III.

3. *The Rank and Precedency are ſettled by different views.* The Rank or Place, and the Precedency among Officers are regulated by ſeveral views, according to the different ways of diſtinguiſhing them, as will appear by the Articles which follow[b].

[b] *See the following Articles.*

IV.

4. *Among Officers of the ſame Court, the Chiefs take place of the others.* Among Officers belonging to one and the ſame Court, thoſe who are Chiefs or Preſidents of the Court, or who are diſtinguiſhed by Titles of Dignity, take place of the others. Thus in the Parliaments, and other Courts of Juſtice in *France*, the Preſidents take place of the Counſellors or Judges; thus in the Juriſdictions of the Bailiffs and Seneſchals, the Lieutenants General and Lieutenants Civil are the firſt in Rank; the Lieutenants Criminal, the Particular Lieutenants, and the Aſſeſſors, come next in order, and take place of the Counſellors or Judges[c].

[c] *It is natural that in each Court the Chiefs ſhould take place of the others.*

Nihil eſt tam injurioſum in conſervandis & cuſtodiendis gradibus dignitatum, quam uſurpationis ambitio. Perit enim omnis prærogativa meritorum, ſi abſque reſpectu & contemplatione vel qualitate etiam provectionis emeritæ cuſtodiendi honoris locus præſumitur potius quam tenetur, ut aut potioribus eripiatur id quod eſt debitum, aut inferioribus proſit quod videtur indebitum. *Cod. Theod. ut dign. ord. ſerv.*

V.

5. *The others take place according to the time of their Admiſſion.* Among Officers of one and the ſame Court, who are not diſtinguiſhed by Dignities, and who have only the ſame Title, ſuch as the Counſellors or Judges of the Parliaments, and other Courts of Juſtice in *France*, their Seats or Places are regulated according to the time of their Admiſſion, and thoſe who are firſt admitted and inſtalled, that is to ſay, put into poſſeſſion, take place of the others; for it would not be juſt that the new comers ſhould make the others go back, and beſides there would be too great inconveniences in diſtinguiſhing them after any other manner[d].

[d] Antiquitùs ſtatutum eſt conſularibus viris cæ-

teros quidem honoratos ipsius trabeæ summitate, pares vero insulis, considerationе tantum temporis anteire. Quis enim in uno eodemque genere dignitatis prior esse debuerat, nisi qui prior meruit dignitatem? Cum posterior etiam si ejusdem honoris prætendat auspicia, cedere tamen illius temporis consuli debeat, quo ipse non fuerit: hoc observando & si iterata vice fastigia consulatus aliquis ascenderit repetiti etenim fasces, virtutes sæpe meriti comprobant, non augent, quia nihil altius dignitate. Quod si quis prior consul posteriori consuli eidemque patricio posthabitus, patriciatum postea consequatur: vinci eum oportet: qui prior meruit patriciatum, postquam iste honore patriciæ dignitatis decoratus est. *l.* 1. *C. de Conf. & non.*

VI.

6. The lowest Officers of a superior Court, take place of the first Officers of an inferior Court.

Among the Officers belonging to different Courts, which are subordinate the one to the other, the lowest Officers of the superior Courts take place of the first Officers of the inferior Courts; thus the lowest Officers of the Parliaments in *France* take place of the first Officers of the Presidials; and the lowest Officers in the Courts of Aids take place before the first Officers of the Elections[e].

[e] Potioris gradus judicibus ab inferioribus competens reverentia tribuatur. *l.* 5. *C. de offic. Rector. Prov.*

Altho' this text hath not a direct relation to this Rule, yet it may be applied to it, seeing it shews the Precedency of superior Judges before inferior ones.

VII.

7. Order of Precedency between Officers of different Jurisdictions which are not subordinate to one another.

Among Officers belonging to different Jurisdictions, which are not in a degree of subordination one to the other, the first Officers of the superior Jurisdictions, whose Functions have most Dignity in them, take place of the first Officers of superior Jurisdictions whose Functions have less Dignity in them; thus the first of the supreme Courts of Ordinary Justice, which are the Parliaments in *France*, take place of the first of the Chambers of Accompts, and of the Courts of Aids.

VIII.

8. If the Ranks of Officers are not fixed, they ought to be regulated by the Dignity, the Authority, the Functions, and the Privileges of their Offices.

Among all Officers of Justice, Policy, Revenue, and all others of what nature soever, whose Rank is not fixed by the Rules which have been just now explained, it is regulated by the different regards which ought to be had to the several causes which give the Rank; and seeing the said causes are the Dignity, the Authority, the Functions, the Rights and Privileges of the Offices, and seeing they fall in together differently, and in divers degrees in the different kinds of Offices, which makes an infinite number of combinations; it is by the views of these different combinations that the Precedency is settled. Thus, for example, altho' the Ordinary Justice hath in its own nature more Dignity than the other Jurisdictions have, the Officers of the Courts of Aids in *France* take place before the Officers of the Presidial Courts, because in their Order they have more Authority than the Presidial Courts have, and because they have likewise more Privileges; and it is by views of the like nature, and by the like proportions, that the Ranks of all the Offices are settled[f].

[f] *See what has been said concerning this subject, in the beginning of the Preamble of this Title.*

IX.

9. The Officer has the Rank which the King gives him.

If the Rank of an Office is regulated by the will of the King, the Officer is intitled to the Rank which the said Title gives him.

TITLE III.

Of the DUTIES in general, of those who execute OFFICES.

THE Dignity, the Authority, the Rights and the Privileges of Officers are given them only in consideration of the Service which they owe to the Publick; thus the general duty of all Officers, is to render that Service by a faithful discharge of their Functions.

This general duty, which is common to all Officers, obliges them to look upon themselves as placed in their Offices by the hand of God, that they may therein discharge the particular duties of their Functions towards the Publick, and towards the persons whom the said duties may any way concern; and to consider that their Offices oblige them to the performance of those Functions, and that they are tied by their Ministry to a faithful performance of them all: From whence it follows most evidently, that it is a gross and capital error to imagine, as many Officers are apt to do, that they have the said Rank only for themselves, and to direct their Functions only to their own proper benefit; so that they do not perform them but according as they find therein their own profit and advantage; or neglect their

Functions

Functions altogether, or diſcharge them with leſs care and exactneſs, if they perceive that no other advantage will accrue thereby, beſides what is for the Intereſt of the Publick, or that of other perſons.

This error, or abuſe, is more or leſs frequent, and of more or leſs importance in ſome Offices than others; for it is neceſſary to diſtinguiſh two ſorts of Offices, thoſe whereof the Functions are ſuch that the fortune of the Officer depends on his application to diſcharge them, and thoſe which the Officer may neglect, and yet find his account therein. Thus the Officers of the King's Houſhold, the Officers of the Army in time of War, Receivers, Proctors, Notaries Publick, and many other ſorts of Officers cannot, without prejudice to their Fortunes, abandon or neglect the exerciſe of their Functions; thus on the contrary, the Officers of Juſtice who are not concerned in the carrying on or management of Law-Suits, have Functions which they may neglect, and yet not ſuffer any prejudice thereby; and according to this difference of theſe two kinds of Offices, it ſeldom happens that the Officers of the firſt of theſe two ſorts, whoſe intereſt obliges them to be careful in the diſcharge of their Functions, fail to apply themſelves thereto, and they have only to take care that they do not prevaricate, or be guilty of any fraud or covin in the diſcharge thereof; but on the contrary, thoſe of the ſecond ſort not finding always in the exerciſe of their Functions the allurement of their own private gain, it is eaſier for them to be tempted to abandon and neglect their duty.

This firſt general duty of Officers, which obliges them to the exerciſe of their Functions, implies three duties, Capacity, Probity, and Application; for to execute any Office well, it is neceſſary to underſtand the Functions thereof, to have a ſincere intention to perform them faithfully, and to be aſſiduous and diligent whenever there is occaſion to exerciſe them. Without Capacity, one falls into faults that are often criminal, and which do prejudice to thoſe whom the Functions may concern; without Probity, one prevaricates and commits many injuſtices; and without Application, one runs the hazard of failing in his duty, and of making others ſuffer by his neglect.

Theſe three duties of Officers, Capacity, Probity, and Application, ſhall be the ſubject matter of three Sections of this Title, in which ſhall be comprehended all that remains to be explained of the ſaid Duties, excepting the duties of Officers of Juſtice, which ſhall be the ſubject of the enſuing Title: For as to the duties of all the other ſorts of Officers, the Rules relating to them will be found either in this Title, or in other preceding Titles: Thus the duties of Officers of War have been explained in the ſecond Section of the third Title of the firſt Book. Thus thoſe of Municipal Officers have been explained in the ſecond Section of the ninth Title of the ſame Book; and many Rules touching the duty of the Officers of the Revenue, and all others, have been explained in divers Titles of the firſt Book, according as the matters there treated of had any relation to them.

SECT. I.

Of the Capacity of Officers.

The CONTENTS.

1. *What is meant by the Capacity of an Officer.*
2. *He ought to have a ſound Judgment, enlightned with the knowledge of the Laws and Ordinances.*
3. *Wherein conſiſts the Capacity of Officers of Policy.*
4. *The Capacity of the Officers of the Revenue conſiſts chiefly in the knowledge of the Ordinances and Regulations touching that matter.*
5. *Capacity of Officers of the Army.*
6. *Wherein conſiſts in general the Capacity of all ſorts of Officers.*

I.

BY the Capacity of an Officer, is meant the qualifications that are proportionable to his Functions; ſo that the Capacity of Officers is different according to their different Functions.

1. What is meant by the Capacity of an Officer.

II.

The Capacity of an Officer of Juſtice conſiſts in a ſound Judgment, enlightned with the knowledge of the Laws [a] and Ordinances, and of the other Rules according to the quality of his Functions; thus Regiſters, altho' they be Officers of Juſtice, yet they are not obliged to know the Laws; and even among Judges, the inferior ſort of them who hold the Courts of Lords of Mannors, are likewiſe diſpenſed with in that

2. He ought to have a ſound Judgment, enlightned with the knowledge of the Laws and Ordinances.

that reſpect; for they are allowed, and not only ſo but enjoined to take counſel and advice in determining the Law-Suits, when the difficulties which ariſe therein require a more exact knowledge of the Laws.

[a] Turpe eſſe patricio, & nobili, & cauſas oranti, jus in quo verſaretur ignorare. *l.* 2. § 43. *ff. de orig. jur.*

III.

3. Wherein conſiſts the Capacity of Officers of Policy.

The Capacity of the Officers of Policy who are not Officers of Juſtice, conſiſts in a ſound Judgment inſtructed in the Regulations and Orders which they are to ſee put in execution.

IV.

4. The Capacity of the Officers of the Revenue conſiſts chiefly in the knowledge of the Ordinances and Regulations touching that matter.

The Capacity of the Officers of the Revenue is different according to the differences of their Functions; thus thoſe who have the direction of the Revenue ought to be well verſed in the Ordinances and Regulations relating to that matter; and thoſe who are intruſted with the Receipt of any part of the Publick Money, ought to know the Regulations which concern their Functions; and their being ſolvent, or able to pay, makes a part of their Capacity for the ſecurity of the Publick Money; and ſome of thoſe Officers are obliged to give Security before they are admitted to execute their Offices [b].

[b] Conſtitutiones principum nec ignorare quemquam nec diſſimulare permittimus. *l.* 12. *C. de jur. & fact. ign.*

V.

5. Capacity of Officers of the Army.

The Capacity of Officers of the Army conſiſts in Courage, and in Experience in Military Affairs.

VI.

6. Wherein conſiſts in general the Capacity of all ſorts of Officers.

The Capacity of all other ſorts of Officers, conſiſts in general in the knowledge of the things neceſſary to their Functions, and in the qualifications which are required for the due exerciſe of them.

SECT. II.

Of the Probity of Officers.

The CONTENTS.

1. *What is meant by the Probity of an Officer.*
2. *It ought to have more or leſs extent, according to the differences of the Functions of the Offices.*
3. *The Probity of the Officers of Juſtice ought to be of a diſtinguiſhed Character.*
4. *Probity of the Officers of Policy.*
5. *Probity of the Officers of the Revenue.*
6. *The Probity of Collectors and Receivers of the Publick Monies conſiſts chiefly in Humanity.*
7. *Probity of Officers of the Army.*
8. *Wherein conſiſts in general the Probity of all ſorts of Officers.*

I.

1. What is meant by the Probity of an Officer.

BY Probity of an Officer, is meant the diſpoſition of the Mind and Heart, in which he ought to be for acquitting himſelf worthily of his Functions, and a firm reſolution of putting the ſaid diſpoſition in practice whenever the occaſion offers.

II.

2. It ought to have more or leſs extent, according to the differences of the Functions of the Offices.

As the uſe of Probity is of more or leſs extent and conſequence, according to the differences of the Functions of the ſeveral kinds of Offices, ſo every Office demands a degree of Probity proportionable to its Functions, according to the order which ſhall be explained in the articles which follow.

III.

3. The Probity of the Officers of Juſtice ought to be of a diſtinguiſhed character.

The conſequence, and the importance of the Functions of Juſtice are ſuch, that they require a Probity of a diſtinct character from that which may ſuffice for the Functions of the other kinds of Offices; and it is to point out this diſtinction, that the names of Courage and Integrity are given to the Probity that is neceſſary to Officers of Juſtice; we ſhall ſee in the following Title wherein this Courage and Integrity ought to conſiſt.

IV.

4. Probity of the Officers of Policy.

The Probity of the Officers of Policy conſiſts in a ſteddy reſolution to enforce a ſtrict obſervance, without regard to perſons, of all the Regulations and Orders which they are impowered to put in execution.

V.

5. Probity of the Officers of the Revenue.

The Probity of the Officers of the Revenue, who have the direction of it, but do not touch any of the Monies, conſiſts in a Spirit of Equity to ſupport and maintain on one part the intereſt of

the

the Prince, and to proportion, on the other part, the Taxes to the Riches of the Provinces, the Towns, and the particular Persons in making the distribution of the Taxes and the Assessments, and levying the same in a manner easy to the Subject, by regulating the ways of enforcing Payment, and by applying suitable means to supply the exigencies of the State, and not to lay too heavy a burden on the Subject.

VI.

6. The Probity of Collectors and Receivers of the Publick Monies, consists chiefly in Humanity.

As to the Officers of the Revenue, who are imployed in collecting and receiving the Publick Monies, whether it be the Land-Tax, Customs, Excise, or any other Duties, their Probity consists in mixing all possible Humanity with the ways of constraint which their Functions may oblige them to have recourse to in levying the Publick Monies; in exercising their Functions at proper times and seasons, so as to facilitate on one part the recovery of payment, and on the other part to make it easy for those who are to pay; in exacting no more than what is due; in laying out no more Charges than what is absolutely necessary; in taking of every one no more than the share which they ought to contribute; and in general in abstaining from all manner of exaction, from all violence, and from all other unfair and unjust practices.

VII.

7. Probity of Officers of the Army.

The Probity of Officers of the Army, consists in using discreetly and moderately the Force which they have in their hands, and according as the Service of the Prince may require of them in their Functions; which implies the duty of abstaining from all manner of concussion, whether it be in their Marches, or in their Quarters, whether it be in Garrison or out of Garrison; as also the duty of paying an exact and faithful obedience to the Orders of the Prince, and of those who have the Command under him; and in general a punctual observance of all their several duties.

VIII.

8. Wherein consists in general the Probity of all sorts of Officers.

The Probity of all the other sorts of Officers consists in discharging their Functions, every one in its proper time, and according to the Rules prescribed for it; so as that they may do the Services which they are bound to by their Engagements, and without doing wrong to any person whatsoever.

SECT. III.

Of the Application of Officers to their Functions.

The CONTENTS.

1. *Application to the Functions of Offices.*
2. *There are some Functions which ought to be performed by the Officer himself, and others which he may commit to other persons.*
3. *What ought to be the Application of Officers who imploy others to officiate in their stead.*
4. *What ought to be the Application of those who are obliged to exercise their Offices themselves.*
5. *These Officers are bound to Residence.*
6. *They cannot dispense with their Residence, except for just causes.*

I.

1. Application to the Functions of Offices.

APplication to the Functions of an Office, consists in a disposition and readiness to exercise them in the place, and at the time, whersoever and whensoever the same is necessary to be done.

II.

2. There are some Functions which ought to be performed by the Officer himself, and others which he may commit to other persons.

The duty of the application of Officers to their Functions, is different according to two different kinds of Offices which it is necessary to distinguish; one, of those Offices whereof the Functions are to be performed by the Officer himself; and the other, of those Offices whereof the Functions may be delegated by the Officers to other persons to exercise them for them. Thus Judges ought to do the Functions of their Offices themselves; thus Receivers may substitute other persons to act for them.

III.

3. What ought to be the Application of Officers who imploy others to officiate in their stead.

The Application of Officers who may imploy others to execute their Offices for them, consists in taking care to imploy such persons as will discharge the Functions of the Office in the same manner as they would be bound to do if they executed the Office themselves; and they are answerable for the neglect and other faults of their Substitutes, as much as if it were their own act and deed.

IV. The

IV.

4. What ought to be the Application of those who are obliged to exerciſe their Offices themſelves.

The Officers who cannot depute others to execute their Offices for them, ought to be careful and diligent in performing the Functions thereof themſelves: which requires their preſence, and the actual exerciſe of their Functions, at the times, and in the places where the ſame is neceſſary.

V.

5. Theſe Officers are bound to Reſidence.

It follows from this duty of the Application of Officers to their Functions, that thoſe who are obliged to execute their Offices in perſon, are tied to Reſidence in the places, and during the time that their Miniſtry may require it.

VI.

6. They cannot diſpenſe with their Reſidence, except for juſt cauſes.

Since it is not poſſible for Officers to give ſo cloſe and diligent an attendance as never to be abſent from their duty, and that they cannot be always in a readineſs to perform their Functions on all occaſions that offer, ſeeing many juſt cauſes may ſometimes interrupt and hinder, not only their Application to ſome particular Functions, but likewiſe their Reſidence; this duty of Reſidence is confined to a reaſonable Attendance, ſuch as the Officer cannot diſpenſe with except for juſt reaſons, of which every one is to be judge himſelf, governing himſelf therein according to Prudence, which ought to determine between the regard that is to be had to the conſequence of the affairs which require the exerciſe of his Miniſtry, and to the conſequence of the cauſes which may require his preſence in another place; retaining always a diſpoſition to be as punctual in the diſcharge of this duty of Reſidence as is poſſible, and never to ſuffer himſelf to be diverted from it, except where there is juſt cauſe.

TITLE IV.

Of the Duties of OFFICERS of JUSTICE.

WE have explained in the foregoing Title the duties of Officers in general, and in other places the duties peculiar to ſome Officers in particular, as has been remarked at the end of the Preamble of the ſaid Title; and in this Title we conſider ſeparately the duties of the Officers of Juſtice, becauſe of the variety and conſequence of their Functions; for the duty of every Officer conſiſts in his acquitting himſelf diligently of his Functions.

As the duties of Officers in general are reduced to Capacity, Probity, and Application to their Functions, ſo the duties of Officers of Juſtice are divided after the ſame manner; ſo that theſe three ſorts of duties ſhall be the ſubject matter of three Sections.

Whatever ſhall be ſaid in this Title concerning the duties of Juſtice; muſt be underſtood of all ſorts of Officers who adminiſter Juſtice, whether it be in the Ordinary Juriſdictions, or in the Revenue, or in the Eccleſiaſtical Courts.

SECT. I.

Of the Capacity of Officers of Juſtice.

The CONTENTS.

1. *Capacity of Officers of Juſtice.*
2. *They ought to have a Capacity ſuitable to the extent of their Functions.*
3. *They ought to know the Laws, the Ordinances, and the Cuſtoms of the places where they are to exerciſe their Miniſtry.*
4. *Good Senſe and Learning are neceſſary to find out the true point of Juſtice.*
5. *Cauſes of difficulties which ariſe in all ſorts of Queſtions.*

I.

1. *Capacity of Officers of Juſtice.*

THE Capacity of Officers of Juſtice conſiſts in having a good Stock of Natural Senſe, together with the Knowledge of the Rules of their Functions; and as they are different according to the Offices, ſo the Capacity ought to be different alſo, as ſhall be explained in the Articles which follow [a].

[a] *See the ſecond Article of the firſt Section of the preceding Title.*

II.

2. *They ought to have a Capacity ſuitable to the extent of their Functions.*

The Officers of Juſtice whoſe Functions are of the largeſt extent, ought to have in proportion a greater degree of Capacity: Thus the Officers of the Courts belonging to the Juriſdiction of Bailiffs and Seneſchals, ought to have a greater degree of Capacity than the petty Officers of the inferior Juriſdictions, who are even diſpenſed with as to an exact Knowledge of the Laws, as has been already obſerved in the ſecond Article of the firſt Section of the preceding Title. Thus the Officials of Eccleſiaſtical Juriſdictions ought to have the Knowledge of the Spiritual and Temporal Matters which belong to their Cognizance; and it is the ſame thing with other different Offices in proportion [b].

[b] Give therefore thy ſervant an underſtanding heart, to judge thy people, that I may diſcern between good and bad; for who is able to judge this thy ſo great a people? 1 *Kings* iii. 9.

III.

3. *They ought to know the Laws, the Ordinances, and the Cuſtoms of the places where they are to exerciſe their Miniſtry.*

The Capacity of the Officers of Juſtice who are bound to know the Laws, conſiſts in a Stock of good Senſe, together with a degree of Underſtanding and a Genius that is capable of that Science, which conſiſts in a clear, ſolid and methodical Knowledge of the definitions of the Principles, and of the Rules relating to the ſeveral matters of the Law, that they may comprehend the connexion between the Rules and their Principles, and that they may know how to apply them to the Queſtions which are to be decided; and they ought likewiſe to have the Knowledge of the Ordinances which have relation to their Functions, as alſo that of the Cuſtoms of the Places where their Miniſtry is to be exerciſed; for without good Senſe, Underſtanding, and a proper Genius, one cannot have that true Knowledge, and what Knowledge they may chance to acquire would be only confuſion, which is often more hurtful than a total want of Learning; but without this Science the beſt Senſe would not be ſufficient for underſtanding and deciding the doubts which ariſe, or ſupplying the want of the Knowledge of many Rules, which being wholly arbitrary, muſt be learnt and preciſely followed; ſo that mere good Senſe can never teach us what is regulated by the ſaid Arbitrary Laws [c].

[c] Conſtitutiones Principum nec ignorare quemquam nec diſſimulare permittimus. *l.* 12. *C. de jur. & fact. ignor.*

Scire leges non hoc eſt verba earum tenere, ſed vim ac poteſtatem. *l.* 17. *ff. de legib.*

☞ *It may be remarked here, that what is eſtabliſhed by an ancient Cuſtom, and obſerved for a long tract of years, is as it were a tacit Agreement of the People, and ought to be maintained as much as a written Law; and that is even a conſiderable Authority of a Cuſtom, that it has met with ſuch an univerſal approbation, ſo that it was not neceſſary to eſtabliſh it by a written Law.*

Sed & ea, quæ longa conſuetudine comprobata ſunt, ac per annos plurimos obſervata, velut tacita civium conventio, non minus, quam ea, quæ ſcripta ſunt, jura ſervantur. *l.* 35. *ff. de leg. ſenat.*

Imò magnæ auctoritatis hoc jus habetur, quod in tantum probatum eſt, ut non fuerit neceſſe ſcripto id comprehendere. *l.* 36. *ibid.*

But if there ſhould happen any difficulty about the interpretation of a Law, we ought chiefly to conſider what has been determined in the like caſes in times paſt, and what has been the Uſage of the place; for Cuſtom is the beſt interpreter of the intention of the Laws; and the Emperor Severus *hath declared in a Reſcript of his, that in doubts which ariſe touching the true meaning of Laws, Cuſtom, and the Authority of Judgments which have been uniform, ought to ſerve as a Law.*

Si de interpretatione legis quæratur: in primis inſpiciendum eſt, quo jure civitas retro in ejuſmodi caſibus ipſa uſa fuiſſet; optima enim eſt legum interpres conſuetudo. *Ibid. l.* 37.

Nam imperator noſter Severus reſcripſit, in ambiguitatibus, quæ ex legibus proficiſcuntur, conſuetudinem, aut rerum perpetuo ſimiliter judicatarum auctoritatem, vim legis obtinere debere. *ibid.* 38.

When the queſtion is to know, whether a Cuſtom of a Town, or of a Province, which one party affirms and the other de-

nies, be in uſe or not, it is neceſſary in the firſt place to conſider whether there be any Judgments, in Caſes which were conteſted, confirming this Cuſtom, and declaring what the Uſage is.

Cùm de conſuetudine civitatis, vel Provinciæ confidere quis videtur: primum quidem illud explorandum arbitror, an etiam contradicto aliquando judicio conſuetudo firmata ſit. *ibid.* 34.

It may be remarked in the laſt place, that in matters concerning which there are no written Laws, it is neceſſary to obſerve that which Cuſtom and Uſage have eſtabliſhed therein; and if there fall out any Caſes which happen not to be determined by any Cuſtom or Uſage, it is neceſſary to regulate them by the conſequences which may be naturally drawn from eſtabliſhed Cuſtoms, and in caſe that even that gives no light towards ſettling the difficulty, recourſe ought to be had to what is obſerved in the Capital City of the Kingdom.

De quibus cauſis ſcriptis legibus non utimur, id cuſtodiri oportet, quod moribus & conſuetudine introductum eſt, & ſi qua in re hoc deficeret, tunc quod proximum & conſequens ei eſt; ſi nec id quidem appareat, tunc jus, quo urbs Roma utitur ſervari oportet. Inveterata conſuetudo pro lege non immerito cuſtoditur. *l.* 32. *ibid.*

IV.

4. Good Senſe and Learning are neceſſary to find out the true point of Juſtice.

It is by the uſe of good Senſe and Learning, that the Judges are to diſcern in queſtions which come before them, what it is that gives riſe to the difficulty, and to find out the cauſes of the doubts; for ſince each of the two contending parties hath ſome foundation which makes the doubt, and that this doubt cannot proceed from an equality of Juſtice and Truth on both ſides; ſeeing there cannot be two Juſtices, nor two Truths, contrary the one to the other, and that nothing puts the two parties in an equal balance with one another, but the want of the ſight of the true point of Juſtice and of Equity, which can be only in one of the two, it is by the diſcovery of this point that we ceaſe to doubt, and to be in ſuſpence; and in order to find it out, it is neceſſary to have both good Senſe and Learning, and to obſerve the Rule which follows.

V.

5. Cauſes of difficulties which ariſe in all ſorts of Queſtions.

Seeing the difficulties in all ſorts of Queſtions ariſe, either from the apparent oppoſition of one Rule to another, of a Principle of Equity to the literal meaning of a written Law, of the ſtrict Rigour of the Law, to a Temperament which Equity may ſeem to demand, of one general Maxim to another which may be an Exception to it, or from the application of a Rule peculiar to one matter, to another matter which hath other Rules altogether different, or from the favour which each party may draw from the conſiderations of Equity that may be on the one ſide and the other; whether it be on account of the quality of the parties, as in the caſe between a Donor and a Donee, a Father and a Son, or becauſe of the nature of the ſeveral oppoſite pretenſions, as for example, if the diſpute be in relation to a conſiderable loſs on one ſide, and only profit to be made on the other ſide, and becauſe of other the like combinations of oppoſite motives which create doubts and difficulties of ſeveral natures; there is no other way of deciding them, but by the different views of the ſeveral ſorts of Rules, in order to diſtinguiſh which are the Rules that agree to all matters, and which are thoſe that are confined to ſome particular matters, which are the Rules of Natural Equity, and which are thoſe that are called Arbitrary, what Rules are general, and if they admit of Exceptions, or not, and what are the Exceptions to thoſe Rules which admit of any, what are the caſes in which it is neceſſary to follow the Rigour of the Law, and when it may be mitigated by Temperaments of Equity, what is the effect of new Laws with reſpect to times paſt, and what are the caſes in which they regulate equally both the time paſt and that to come, and thoſe where they have their effect only for the time to come, what are the Rules and the different manners of interpreting obſcurities and other difficulties in Covenants, in Diſpoſitions made in proſpect of death, in the Favours and Grants of Princes: and in order to make a right uſe of the Knowledge of theſe ſeveral matters, which it is abſolutely neceſſary to know, it is neceſſary to have an Underſtanding of great capacity, and clearneſs of apprehenſion, in order to judge by all theſe views of the ſeveral regards that ought to be had to every one of them, and to know how to decide the matter in diſpute by the Principles and Rules which have the trueſt relation to the Facts, and to the circumſtances [d].

[d] *See the whole Title of the Rules of Law in general, in* The Civil Law in its Natural Order.

SECT.

SECT. II.

Of the Probity or Integrity of Officers of Juſtice.

IT is not without reaſon that we have diſtinguiſhed the Probity of Judges from that of the other ſorts of Officers, by the peculiar Name of Integrity, ſeeing in reality they ought to have a character of Probity ſo pure, ſo delicate, and ſo entire, that it ought to exceed far the character of Probity which may be required in all other ſorts of Offices; for whereas with reſpect to all other Offices, whether they be in the Army, or the Revenue, it ſufficeth that the Officer be a good man, that is, a man of a good and fair character with regard to the Functions of his Office, and that he diſcharge them faithfully, without doing wrong to any perſon: ſo that, for example, it ſufficeth for the Probity of a Receiver in what relates purely to the Functions of his Office, that he be guilty of no Extortion, that he execute his Office with that moderation which Humanity may require[a]; and it is enough for Officers of War, as to what relates to Probity, that they commit no Violence or Injuſtice, and that they content themſelves with the Allowance which they have from the King[b]. It is not the ſame thing with reſpect to Officers of Juſtice; for they are not only obliged to commit no Extortion or Violence, and to be contented with their Salaries, and the Perquiſites which are allowed them; but they ought moreover to have at leaſt the qualities that were required in thoſe whom *Moſes* made choice of to determine the moſt trivial differences of the People; that is to ſay, they ought to have the Reſolution and Courage neceſſary for their Functions, the fear of God, the knowledge and love of Truth, and ſuch an averſion to Avarice as even to hate it[c]; and we may ſay that theſe qualities comprehend every thing that may be neceſſary to make a good Judge, and that no perſon can be a good Judge who wants any one of them.

[a] *See the ſixth Article of the third Section of this Title.*

[b] Do violence to no man, neither accuſe any falſly, and be content with your wages. *Luke* iii. 14.

[c] Moreover, thou ſhalt provide out of all the people, able men, ſuch as fear God, men of truth, hating covetouſneſs; and place ſuch over them, to be rulers of thouſands, and rulers of hundreds, rulers of fifties, and rulers of tens. And let them judge the people at all ſeaſons: and it ſhall be that every great matter they ſhall bring unto thee, but every ſmall matter they ſhall judge. *Exod.* xviii. 21, 22.

Optamus ut omnes judices noſtri ſecundùm voluntatem & timorem Dei, & noſtram electionem atque ordinationem ſic ſuas adminiſtrationes gubernare ſtudeant, ut nullus eorum, aut cupiditati ſit deditus, &c. *l.* 1. §. 5. *C. de offic. præf. prat. Afr.*

It may be obſerved in relation to theſe qualities, that they conſiſt chiefly in the diſpoſition of the Heart, and that the Mind has the leaſt ſhare in them; and that altho' they comprehend equally that which relates to the Capacity of Judges, and that which regards their Integrity, yet they make the moſt eſſential of their duties to conſiſt in the diſpoſitions of the Heart, which make the Integrity, and reduce what concerns the Capacity, to their being *Men of Truth*; that is to ſay, Men having ſuch a fulneſs of Truth as that they may be always in a diſpoſition to practiſe it. As to which it is neceſſary to remark, that when *Moſes* choſe Judges to eaſe himſelf in his Miniſterial Function of Judge of the People, there were at that time no other Laws beſides the Laws of Nature, nor differences that required any other Rule for deciding them; ſo that the Capacity of thoſe Judges was to conſiſt in knowing that Equity, the knowledge and love of which makes this duty which is to be underſtood by that of being *Men of Truth*. But ſeeing now-a-days the multiplication of Laws obliges the Judges not only to have a Spirit of Truth, which the Judges choſen by *Moſes* were bound to have; but moreover the knowledge of all the particular Laws and Rules which are in uſe at this day; their capacity ought to be of a larger extent: and as for their Integrity, it ought to be at leaſt the ſame in theſe times, as it was in the days of thoſe Judges; and perhaps it may be neceſſary that it ſhould be greater, ſince the obſtacles to the duty of Integrity are now much greater than they were in thoſe days; for the Judges in thoſe times had neither a Fortune to make, nor had they occaſion to ſtand in awe or fear of any perſon, they having in their hands the Divine Authority, which diſplayed it ſelf viſibly in the Miniſtry of the Government, and the Adminiſtration of Juſtice, which *Moſes* ſhared with them.

It is therefore at leaſt to theſe qualities neceſſary to Judges of Affairs of the ſmalleſt conſequence, that the Integrity ſpoken of here ought to be reduced; and it is eaſy to perceive the reaſons thereof, and what are the cauſes which demand theſe diſpoſitions in the heart of a Judge; That he ſhould fear God; that he ſhould have Courage and Reſolution; that he ſhould love Truth, and that he ſhould abhor Covetouſneſs.

The firſt and chief of theſe Qualities is without doubt the fear of God, ſeeing it is the foundation of the others, and comprehends them all; for if the fear of God is a duty common to all perſons of all ſorts of conditions, no body is more ſtrictly obliged to it than thoſe, who being in his place over others, are to give him an account of the uſe which they ſhall have made of the power which he has intruſted to them; and it is to this Rank of Dignity and of Authority, that the duties of thoſe perſons who are the Depoſitaries thereof ought to be proportioned, whoſe Functions are to maintain the ſaid Dignity, and to exerciſe the ſaid Authority.

Seeing Judges are in the place of God, it is for this reaſon that he himſelf calls them Gods[d]. For ſince the Function of judging Men, whom Nature makes all alike equal, is not natural to any one of them, and that all Authority of one Man over another is a participation of the Authority of God, the Function of judging is a Function which in this ſenſe may be called Divine, ſeeing one exerciſes thereby a Power which is natural to none but God, and that we are taught by Scripture that the Judgment which Judges give, is not the Judgment of Man, but of God himſelf[e]; and if the Functions of the Prieſthood have a Dignity which for other reaſons is far above that of Judges, the Dignity of Judges has this advantage, that whereas the Function of making interceſſion for the People, which is eſſential to the Prieſthood, implies Subjection and Dependance, and cannot be lodged but in a nature inferior to that to whom the Prieſt or Pontiff makes interceſſion[f], that of judging implies a Superiority, and the character of Divine Authority, which alone has of it ſelf the Right of judging.

[d] God ſtandeth in the congregation of the mighty: he judgeth among the Gods. I have ſaid, Ye are Gods, and all of you are children of the moſt High. *Pſal.* lxxxii. 1, 6.

Is it not written in your Law, I ſaid, ye are Gods? If he called them Gods, unto whom the word of God came; and the Scripture cannot be broken. *John* x. 34, 35.

I have made thee a God to *Pharaoh*. *Exod.* vii. 1.

[e] And ſaid to the Judges, Take heed what ye do; for ye judge not for man, but for the Lord. 2 *Chron.* xix. 6.

[f] For every High Prieſt taken from among men, is ordained for men in things pertaining to God, that he may offer both gifts and ſacrifices for ſins. *Heb.* v. 1.

Since therefore the Function which Judges exerciſe is a Divine Function, and that it is the Judgments of God himſelf which they are to pronounce, it is a chief and principal duty incumbent on them, to fear leſt there ſhould be wanting to their Judgments any one of the eſſential characters which ought to render them worthy of this Name; and this is the firſt ſentiment which this fear of God ought to inſpire into them, and which ought alſo to engrave on their hearts a dreadful expectation of the weighty Judgment which God will paſs on theirs, and of the puniſhments which he prepares for thoſe who ſhall not have made that uſe of the Power he put into their hands which he required of them[g].

[g] Judices Romani juris diſceptatores, non aliter litium primordium accipere, niſi prius ante ſedem judicialem ſacroſanctæ deponantur ſcripturæ, & hæ permaneant non ſolùm in principio litis, ſed etiam in omnibus cognitionibus uſque ad ipſum terminum, & definitivæ ſententiæ recitationem. Sic etenim attendentes ad ſacroſanctas ſcripturas, & Dei præſentia conſecrati, ex majore præſidio lites diriment, ſcituri quod non magis alios judicant, quàm ipſi judicantur: cum etiam ipſis magis quam partibus terribile judicium eſt. Si quidem litigatores ſub hominibus, ipſi autem Deo inſpectore adhibito cauſas proferunt trutinandas. *l.* 14. *in fine*, *C. de jud.*

For ye judge not for man, but for the Lord, who is with you in the judgment. 2 *Chron.* xix. 6.

Give ear, you that rule the people, and glory in the multitude of nations. For power is given you of the Lord, and Sovereignty from the Higheſt, who ſhall try your works, and ſearch out your counſels. Becauſe being Miniſters of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the counſel of God. Horribly and ſpeedily ſhall he come upon you; for a ſharp judgment ſhall be to them that be in high places. For mercy will ſoon pardon the meaneſt; but mighty men ſhall be mightily tormented. *Wiſd. of Sol.* vi. 2, 3, *&c.*

The ſecond of theſe qualities which Judges ought to have, is Courage and Reſolution, which follow naturally from the firſt quality, which is that of the Fear of God; for the natural effect which this Fear produces is Firmneſs and Intrepidity with reſpect to every thing that may come from Man[h]; and the uſe of this Courage is to reſiſt all ſolici-

ſolicitations, recommendations, and other impreſſions from Men in power, or who are capable of doing harm, and to ſupport and protect Juſtice and Truth at the peril of every thing [i], and eſpecially on occaſions where Juſtice is to be rendred to thoſe who have no other recommendation beſides their lowneſs of Condition, or their Poverty [l]: it is becauſe of the neceſſity of this Courage and Reſolution for diſcharging the Functions of a Judge, that God forbids thoſe who have not theſe qualifications to engage in this Miniſtry, leſt their reſpect for any perſon in power ſhould byaſs them to do ſome Injuſtice [m].

[h] In the fear of the Lord is ſtrong confidence. *Prov.* xiv. 26.

Whoſo feareth the Lord, ſhall not fear nor be afraid, for he is his hope. *Ecclus.* xxxiv. 14.

The fear of man bringeth a ſnare. *Prov.* xxix. 25.

[i] Strive for the truth unto death, and the Lord ſhall fight for thee. *Ecclus.* iv. 28,

[l] Wo unto them that decree unrighteous decrees, and that write grievouſneſs which they have preſcribed. To turn aſide the needy from judgment, and to take away the right from the poor of my people, that widows may be their prey, and that they may rob the fatherleſs. *Iſaiah* x. 1, 2.

How long will ye judge unjuſtly, and accept the perſons of the wicked? Defend the poor and fatherleſs; do juſtice to the afflicted and needy. *Pſal.* lxxxii. 2, 3.

Let it not grieve thee to bow down thine ear to the poor, and give him a friendly anſwer with meekneſs. Deliver him that ſuffereth wrong from the hand of the oppreſſor, and be not faint-hearted when thou ſitteſt in judgment. Be as a father unto the fatherleſs, and inſtead of a huſband unto their mother; ſo ſhalt thou be as the Son of the moſt High, and he ſhall love thee more than thy mother doth. *Ecclus.* iv. 8, 9, 10.

Rob not the poor, becauſe he is poor; neither oppreſs the afflicted in the gate. For the Lord will plead their cauſe, and ſpoil the ſoul of thoſe that ſpoiled them. *Prov.* xxii. 22, 23.

Open thy mouth, judge righteouſly, and plead the cauſe of the poor and needy. *Prov.* xxxi. 9.

The righteous conſidereth the cauſe of the poor. *Prov.* xxix. 7.

[m] Seek not to be judge, being not able to take away iniquity, leſt at any time thou fear the perſon of the mighty, and lay a ſtumbling block in the way of thy uprightneſs. *Ecclus.* vii. 6.

The third quality which God requires in Judges, is to have in themſelves Truth, that is to ſay, to have it both in the Mind and in the Heart, to know it and to love it; for it is in the knowledge and love of Truth that the Wiſdom and principal Science of a Judge does conſiſt, and it is the Fear of God which gives this Science and this Wiſdom [n]. It is by the Light of Truth that a Judge diſcerns on every occaſion what is his duty, and it is by the Love of Truth that he is inclined to do his duty, and that he embraces it with all his force [o]; for every body knows that Love is the only Principle of our Motions, of our Actions, and of our Conduct; and that as we cannot act without ſome End or View that draws us, ſo it is towards this Object that all our Motions tend, as a Weight does to the Center, and it is the biaſs of this Weight which is called Love: ſo that if a Judge does not feel a charm or allurement in Truth and in Juſtice, and if his Weight hath its biaſs towards ſome other Object, he will be led by other charms to do acts of Injuſtice, and will be without any motion or diſpoſition to do Juſtice on occaſions where it is not accompanied with ſome charm to engage him.

[n] The fear of the Lord is wiſdom and inſtruction. *Ecclus.* i. 27.

The fear of the Lord is the beginning of wiſdom. *Pſal.* iii. 10.

[o] Love righteouſneſs, ye that be judges of the earth. *Wiſd. of Sol.* i. 1.

Give therefore thy ſervant an underſtanding heart, to judge thy people, that I may diſcern between good and bad. 1 *Kings* iii. 9.

Cui enim non eſt cognitum, antiquos judices non aliter judicialem calculum accepiſſe, niſi priùs ſacramentum præſtitiſſent, omnimodò ſeſe cum *veritate* & legum obſervatione judicium eſſe diſpoſituros? *l.* 14. *C. de judiciis.*

The fourth quality neceſſary to Judges is an averſion to Covetouſneſs; and this quality, as well as the others, is a conſequence of the Fear of God, who has declared that there is not a more wicked thing than a covetous man [p], and conſequently that nothing is more oppoſite to his Nature; for a covetous man plunges his heart into a Love that is directly oppoſite to the Love commanded by the two primary Laws, and which overthrows thoſe two Foundations of all manner of Juſtice, ſeeing it engages the covetous man in Idolatry, which is the Source of all Evils [q].

[p] There is not a more wicked thing than a covetous man. *Eccluſ.* x. 9.

[q] Covetouſneſs, which is idolatry. *Coloſſ.* iii. 5. *Epheſ.* v. 5.

But they that will be rich, fall into temptation, and a ſnare, and into many fooliſh and hurtful luſts, which drown men in deſtruction and perdition. For the love of money is the root of all evil. 1 *Tim.* vi. 9, 10. See *Col.* iii. 5.

☞ *If Covetouſneſs in the uſe of Temporal Goods be ſo great a Crime, that it is called Idolatry, and even the Source of all Evils, what name may one give to the Covetouſneſs of Judges in the Divine Miniſtry of the Diſpenſation of Juſtice; ſeeing*

ing this Crime with regard to them is not a bare violation of the common and mutual duties of Men towards one another, but moreover a prevarication againſt the univerſal Order of Society, and againſt the duty of that Service, and of that publick Miniſtry, to which Judges are particularly deſtined by their Functions? And this Avarice in Judges is ſo much the more criminal than the Avarice of particular perſons, in that particular perſons do not exerciſe their Avarice but by ways which carry the appearance and character of Iniquity, and which may be reſtrained by the Authority of the Judges; whereas the Avarice of Judges is exerciſed under the colour of Authority it ſelf, which eſtabliſhes Injuſtice by the Miniſtry of Juſtice.

We ſhall take notice here of two effects of Avarice, which are the moſt ordinary in the Miniſtry of Juſtice, and which appear to be the leaſt criminal.

The firſt is to take larger Perquiſites than ought to be taken, or to take any in caſes where none are due. People are apt to flatter themſelves in the commiſſion of this Injuſtice, and many circumſtances contribute to it; the ſmallneſs of each prevarication, and uſe make them inſenſible of it, and a real profit being joined with Impunity, Avarice extends it ſelf without bounds to all manner of unlawful and criminal advantages.

The ſecond of theſe two effects of Avarice in the perſon of Judges, is that of ceaſing to exerciſe the Functions of Juſtice, when there is no other party concerned but the Publick, and in the Cauſes of poor perſons, who ſue for Juſtice, and who are not able, becauſe of their poverty, to reward the Judges for their labour. We ought to place in the ſame rank the publick Intereſt, where no party is concerned, and the Intereſt of the poor, becauſe both the one and the other are of equal importance, and are equally abandoned.

See the Texts quoted in the beginning of this Preamble, in relation to the duty of Judges to adminiſter Juſtice to the poor.

Thus a covetous Judge extinguiſheth in his heart the love of Truth and of Juſtice, and is diſpoſed either to abandon it, or to neglect it, in caſe he does not find his own intereſt joined with it, or even to prevaricate, if his Avarice goes to that exceſs as to ſell Injuſtice for Money; but it is not enough that a Judge be free from ſuch an inclination to Avarice, as may tempt him to prevaricate; he ought moreover to have a hatred to the leaſt diſpoſition to this Vice, even to that degree as to make his own intereſt give way always to the Duties which may demand this preference; and one of the uſes of this hatred is that of never receiving Preſents of any kind whatſoever; for this meanneſs of Spirit can proceed from nothing elſe but Avarice, and it implies two Injuſtices directly oppoſite to the Integrity, which ought to reign in the Heart of a Judge; one, that it engages, or at leaſt endangers even the wiſeſt Judges, to favour the perſon of whom they receive the preſent, and conſequently to prevaricate, giving themſelves up to another Inclination than that of the Love of Truth and of Juſtice, which ought to be their only Principle; and the other, that they cannot receive a Preſent without approving the conduct of the perſon who offers it, nor conſequently without letting him ſee that by approving his view of mollifying them by the Preſent, they join therein, and in ſome meaſure countenance and encourage the Commerce which he pretends to carry on, by procuring the favour of the Judge as a Recompence for his Preſent[r].

[r] Thou ſhalt take no gift; for the gift blindeth the wiſe, and perverteth the words of the righteous. *Exod.* xxiii. 8.

Thou ſhalt not wreſt judgment, thou ſhalt not reſpect perſons, neither take a gift: for a gift doth blind the eyes of the wiſe, and pervert the words of the righteous. *Deut.* xvi. 19.

Preſents and gifts blind the eyes of the wiſe, and ſtop up his mouth that he cannot reprove. *Eccluſ.* xx. 29.

The Lord your God is God of Gods, and Lord of Lords, a great God, a mighty and a terrible, which regardeth not perſons, nor taketh reward. He doth execute the judgment of the fatherleſs and widow, and loveth the ſtranger, in giving him food and raiment. *Deut.* x. 17, 18.

A gift in ſecret pacifieth anger; and a reward in the boſom, ſtrong wrath. *Prov.* xxi. 14.

A wicked man taketh a gift out of the boſom to pervert the ways of judgment. *Prov.* xvii. 23.

Which juſtify the wicked for reward, and take away the righteouſneſs of the righteous from him. *Iſaiah* v. 23.

See in relation to Preſents the Remark at the end of this Preamble.

Since therefore it is only by this Courage and this Reſolution, by this Knowledge and this Love of Truth and of Juſtice, and by this averſion to Covetouſneſs, that one can be a good Judge, and that theſe qualities are not to be found in the degree that is neceſſary, unleſs they are accompanied with a fear of offending God by failing in our duty towards him; it is this fear which is the foundation of the integrity of Judges, and thoſe who have it not,

cannot

cannot but fall into Injuſtices; and it is for this reaſon that we ſee in the Goſpel, that the character of a bad Judge is, not to have the fear of God[f].

[f] There was in a City a Judge, which feared not God, nor regarded man. And there was a widow in that City, and ſhe came unto him ſaying, Avenge me of mine adverſary. And he would not for a while. *Luke* xviii. 2, 3, 4.

Some may be apt to think that there have been Judges among the Heathens, who without having the fear of God have rendred Juſtice, and that in the preſent Age many of thoſe who have the knowledge of God without the fear of him, are nevertheleſs reputed to be good Judges; and that there are ſome of them whom one would chuſe for Judges, even with this defect, rather than others who ſeem to have this fear of God. This objection deſerves undoubtedly an anſwer; for altho' it would be ſufficient to deſtroy the force of the objection by anſwering to it, that no reaſon can balance the Authority of the Word of God, even although the reaſons thereof do not appear, and that conſequently the Truths which we have juſt now explained being ſo expreſly declared in Scripture, we ought to be convinced of them. However, it is not difficult to make it appear, that they are ſo certain that nothing is more unqueſtionable.

We grant that there have been Judges and Officers in the time of Paganiſm[t], who were preferable to ſome of the Judges of the preſent times as well as of the times paſt; but there is no motive to induce us to believe, that during the time that people lived in ignorance of the true Religion, there were Judges who without the Light of the Goſpel had ſo perfect an integrity, as to render Juſtice in the manner that God is willing it ſhould be rendred, and with that uprightneſs and fidelity which he demands; for to render it in that manner, it is neceſſary to have an ardent and generous love of Truth and of Juſtice, a clearneſs of Underſtanding in order to find it out, an oppoſition to all manner of Injuſtice, to all unfair ways, to all manner of Deceit, a reſolution and firmneſs of mind to ſupport and protect conſtantly on all occaſions Juſtice and Truth againſt all obſtacles of what nature ſoever; a diſintereſtedneſs which prefers to all other conſiderations that of the duty of doing Juſtice; a diligent and faithful application to the diſpatch of Juſtice; and all theſe qualities preſuppoſe the Empire of Reaſon over Intereſt, over Paſſions, over Remiſneſs, over Negligence, and over all the other Frailties which may tempt Judges either to do ſome act of Injuſtice, or to omit ſome Duty that God requires of them; and it is not poſſible but that Judges will want ſome one of theſe diſpoſitions, if they have not engraven upon their hearts, as a Principle of their Conduct in their Duties, a love and a zeal for Truth, and for Juſtice founded upon the Fear of God. For unleſs this Principle be ſo rooted in them as it is not poſſible to make them depart from it, an Uniformity in all the duties cannot ſubſiſt; and the Judge who has not this Principle rooted in him, will fall either into a neglect of his duty, or into ſome weakneſs in the execution of it, or into ſome other much greater faults againſt his duty, according as his intereſt, his paſſions, and other different views which he may have may divert and diſtract him from it: and as it is well known that in the times of darkneſs under Heatheniſm, Mens Actions were influenced only by the motions of their Paſſions, and that the greateſt Virtues of the *Romans* themſelves were only Ambition and Vanity, of which Avarice is an Inſtrument; ſo theſe Vices were ſo common in *Rome*, and Avarice it ſelf ſo common among the Officers of Juſtice, that one of the firſt Fathers of the Church has remarked it as a certain proof of this Avarice, the exceſs of the Corruption and Extortions of the Officers of Juſtice, which gave occaſion for a Law to be made on purpoſe to reſtrain them[u]; but that very Law, which did not proceed from the Spirit of God, did not ſufficiently provide againſt this diſorder in a manner ſuitable to the dignity of true Juſtice, ſeeing it did not abſolutely forbid the Magiſtrates of the Town to take any Preſents at all, but forbid them only to take more than a hundred Pieces of Gold, which that Law allowed them to take in a year's time[x]; which it was very difficult to controul, and did not hinder an Officer who might be willing to keep within the bounds preſcribed, and yet not willing to loſe the advantage of a Preſent that was well concerted for his advantage, from taking all at once the hundred Pieces of Gold for an Injuſtice that might deſerve them: and as for the Magiſtrates in the Provinces, the Proconſuls and Preſidents who were the Governors thereof, and who exerciſed the Function of Judges in ſome

particular

particular affairs, they had had permiſſion by other Laws to take Preſents of Things which were eatable and drinkable, provided they were no more than what might be conſumed in a few days time[y].

[r] ☞ *It is neceſſary to diſtinguiſh between Judges and Officers in the* Roman *Law; the Officers, or Magiſtrates, were thoſe who had Authority and Juriſdiction, and they did not give to them the bare name of Judges, altho' they had the right of judging; but they had the power to delegate their Juriſdiction, and to name Judges for deciding the differences of particular perſons: Thus the Pretor and the Prefect of the Pretorium, the Proconſuls, and the Preſidents, who were the Governours of the Provinces, and other Magiſtrates, had their proper Juriſdictions, and might judge; but they had likewiſe the power of appointing Judges to decide the differences between particular perſons.*

Ad vicem magiſtri equitum Præfectos prætorio antiquitùs inſtitutos eſſe, a quibuſdam ſcriptoribus traditum eſt. Nam cùm apud veteres dictatoribus ad tempus ſumma poteſtas crederetur, & magiſtros equitum ſibi eligerent, qui adſociati participales cura (admilitiæ gratia) ſecundam poſt eos poteſtatem gererent: regimentis reipublicæ ad imperatores perpetuos tranſlatis, ad ſimilitudinem magiſtrorum equitum Præfecti prætorio à principibus electi ſunt. Data eſt plenior licentia ad diſciplinæ publicæ emendationem . . . . . credidit enim princeps, eos, qui ob ſingularem induſtriam, explorata eorum fide, & gravitate, ad hujus officii magnitudinem adhiberentur, non aliter judicaturos eſſe pro ſapientia ac luce dignitatis ſuæ, quam ipſe foret judicaturus. *l.* 1. *&* §. 1. *ff. de off. Præf. Præt.*

V. tot. hunc tit. & ſeq. de offic. Præf. urb.

V. tit. Cod. de offic Præf. Prætor. de offic. Præf. urb. &c.

[a] Lex Julia repetundarum pertinet ad eas pecunias, quas quis in magiſtratu, poteſtate, ratione, legatione, vel quo alio officio, munere, miniſteriove publico cepit, vel cum ex cohorte cujus eorum eſt. *l.* 1. *ff. ad leg. jul. repet.*

Eadem lege tenentur, qui ob denuntiandum, vel non denuntiandum teſtimonium, pecuniam acceperint. Hac lege damnatus, teſtimonium publicè dicere, aut judex eſſe poſtulareve prohibetur. *l.* 6. *&* §. 1. *ff. eod. V. hunc titul. & tit. C. de lege Jul. repet.*

It is of this Law that St. Jerome *hath ſaid in his Comment on the thirteenth Chapter of* Iſaiah, *that it was a moſt certain proof of the Avarice of the* Romans; *and it is obſervable on this ſubject, that the ſame Father hath ſaid in the beginning of his Commentaries on* Geneſis, *that* Cicero *had been accuſed by the* Greeks *of Extortion, he who is known to have ſaid of himſelf, that he was ſo ſtrict and punctual in the matter of Preſents, that he did not take even thoſe which the Law allowed him to take.* V. Cicer. 5. ad action. 20.

[x] Lege Julia repetundarum cavetur . . . utq; urbani magiſtratus ab omni ſorde ſe abſtineant: neve plus doni muneris in anno accipiant quam quod ſit aureorum centum. *l.* 6. *in f. ff. ad leg. Jul. repet.*

[y] Plebiſcito continetur, ut ne quis præſidum, munus donum caperet: niſi eſculentum, potulentumve, quod intra dies proximos prodigatur. *l.* 18. *ff. de off. Præſidis.*

Jubemus igitur, quoties apud quoſcunque judicantes aut adminiſtratores, lites aut appellationes examinantur: præ omnibus principales litigantium perſonas, aut illos ad quos in medium negotium ſorte migraverit, in præſentia judicum tangentes ſancta Evangelia, jurare, quod nihil penitus judicibus, aut patrocinii cauſa ipſis vel alii cuicunque perſonæ pro hac cauſa quolibet modo dederunt, aut promiſerunt, aut poſtea dabunt vel per ſe, vel per aliam quamcunque mediam perſonam: exceptis iis quæ propriis advocatis pro patrocinio præſtant, aliiſque perſonis quibus noſtræ leges dari diſpoſuerunt. *Nov.* 124. *c.* 1.

See the Remark which has been juſt now made on the Avarice of Judges in the Miniſtry of the Diſpenſation of Juſtice, and the texts of Scripture there quoted.

It appears from theſe Laws, that not only the Judges among the *Romans*, but even their Lawgivers themſelves, were far from having that Knowledge which the Chriſtian Religion gives us of the iniquity of thoſe Judges who take any ſort of Preſents, becauſe they had not ſufficiently enquired into the flexibility of the Mind to the Heart, and into that of the Heart to Preſents, and becauſe they had not even ſufficiently felt the natural effects which we have already obſerved to be made by Preſents, or if they were ſenſible thereof, they were very unjuſt in countenancing ſo licentious a practice by ſuch Laws.

We might make other Reflections, both on the Principles of Religion, and on other unjuſt Laws of the *Romans*, to ſhew that without the knowledge of the true Religion, there is no perfect Juſtice; and it was only by the Light of the Goſpel, and by the Knowledge of the Divine Law, that the practice of making Preſents to Judges was aboliſhed by a Law of the Emperor *Conſtantine*, who forbad even thoſe Officers of Juſtice whom the ſaid Laws allowed to take thoſe ſmall Preſents, called *Xenia*, to take any Preſent at all, upon pain of death[z]; and the Kings of *France* have in the ſame manner prohibited all Judges to take Preſents of any kind whatſoever, eatables and drinkables, and have prohibited under ſevere penalties the taking of any Preſents at all, let them be never ſo inconſiderable.

[z] Si qui eorum qui in diverſis agunt officiis principatus xenia aut munuſcula quæ canonica ex more fecerunt extorſerit, vel etiam ſponte oblata non

non refutaverit, ſublatis omnibus facultatibus ultimo ſubjugetur exitio. *Cod. Theod. ne dam. Provinc. inflig.*

☞ *It is obſervable that* Tribonian *has not inſerted this Law into the Code of* Juſtinian; *which may help to confirm what is ſaid of him, that he took Bribes, and committed greater Extortions, as has been taken notice of in another place*[a]. *By the doing of which he prevaricated, not only againſt the Divine Law, againſt the Law of Nature, and againſt this Law of the Emperor* Conſtantine; *but likewiſe againſt another Law of the Emperor* Juſtinian, *which is that of the ſeventeenth Novel directed to himſelf; ſeeing by that Law he was commanded to execute his Office with an integrity which might ſurpaſs that of all other Officers, and to keep his hands ſo clean with regard to God, to the Emperor, and to the Law, as to take no manner of profit, no gain, great or ſmall, but what he ſhould receive from the Prince out of the Publick Monies, and that in the Execution of his Office he ſhould be guilty of no miſdemeanour. If this Law was penned by* Tribonian *himſelf, as there is ſome ground to think that it was, it is hard to believe, if he was ſuch as he is repreſented, that he was ſerious in theſe laſt expreſſions.*

Oportet igitur, te purè ſumentem adminiſtrationem, & ſine omni ſuffragio, præ omnibus aliis mundas ſervare Deo nobiſque & legi manus, & nullum contingere lucrum, neque majus, neque minus: neque captioſum quiddam contra ſubjectos facere negotiatione: ſed contentum ſolis à fiſco miniſtratis, & tam per te quàm per eos qui circa te ſunt purum eis undique ſervare jus: & feſtinare, primùm quidem fiſcalia tributa exigi vigilanter, nihil diminuens circa publicam curam requirere, ne fortè fiſcus indè minuatur, & ſalvare ei undique quæ propria ſunt. Sicut enim privatos injuſtitiam paſſos adjuvamus, ſic & publicum illæſum manere volumus. Collatores namque omni aliâ calumniâ liberi conſervati, facile & in promptu ſolvent tributa: & qui in furta priùs dantes manebant debentes adhuc fiſcalia, ex nunc ipſis fiſcalibus exſolventes liberabunt facile ſe tributis. *Nov.* 17. *c.* 1.

[a] *See the Preamble of the third Title of the third Book of Succeſſions, in the firſt Tome of the Civil Law in its Natural Order.*

Cogitatio igitur nobis facta eſt, quòd agentes omnia quæcunque in noſtris provinciis ſunt, uno actu communi ad meliora migraremus. Hoc enim omninò eventurum credimus, ſi præſides gentium quicunque civiles adminiſtrationes provinciarum habent, puris procuremus uti manibus & ab omni abſtinere acceptione pro illis, ſolis contentos eis quæ à fiſco dantur. Quòd non aliter fiet, niſi & ipſi cingula ſine mercede percipiant, nihil omninò dantes nec occaſione ſuffragiorum, neque iis qui cingula habent, nec alii omnium ulli. Conſideravimus enim, quia licet quæſtus immodicus imminuitur imperio, attamen noſtri ſubjecti incrementum maximum percipient, ſi indemnes à judicibus conſerventur: & imperium & fiſcus abundabit utens ſubjectis locupletibus: & uno hoc introducto ordine, plurima rerum & innumera erit ubertas. An certè non omnibus manifeſtum eſt, quoniam qui aurum dat, & ita adminiſtrationem emit: non dat hoc ſolùm quantum occaſione adinventum eſt ſuffragiorum, ſed & aliud extrinſecùs addit amplius occaſione commodi adminiſtrationem aut dantibus aut ſpondentibus, & ſic uno principio illicito dato plurimas neceſſe eſt manus circumire eum qui donationem facit: & hoc non de ſuo fortè præbere, ſed mutuatum, & ut mutuare poſſit, damnificatum: & computare apud ſe, quia convenit eum tantum ex provincia percipere, quantum liberet quidem ei debita, ſortes & uſuras, & damna pro ipſo mutuo, computabit autem & in medio expenſas largiores, jam & judici, & qui circa ipſum ſunt, convenientes: & quemdam etiam ſibimet recondet quæſtum in tempore ſequenti, in quo fortè non adminiſtrabit. *Nov.* 8. *in Præfat.*

Altho' this Novel relates to the Venality of Offices, yet it may be applied here.

See the Ordinance of October 28th, 1446. *Art.* 6. *that of* April 1453, *Art.* 118, 119, 120; *that of* July 1493, *Art.* 16. *and the following Articles; that of* 1535, *Ch.* 1. *Art.* 53; *that of* Orleans, *Art.* 43, &c. *that of* Blois, *Art.* 114.

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I.

1. *Firſt Rule of the integrity of Judges.*

SEeing Judges derive their Power from God, thro' the hands of the Prince who intruſts them with it [a], and that it is the Judgment of God himſelf which they are to render [b]; the firſt Rule of their Integrity, is that it be proportioned to the divine Function of judging [c], and that they join to the qualification of Capacity, of which mention has been made in the foregoing Section, the other qualities which ſhall be explained in the Articles which follow; that not only they may avoid committing any ſort of miſdemeanor, but that they may adminiſter Juſtice in a manner ſuitable to a Function of this character.

[a] For power is given you of the Lord. *Wiſd. of Sol.* vi. 3.

Let every ſoul be ſubject unto the higher powers. For there is no power but of God: the powers that be, are ordained of God. Whoſoever therefore reſiſteth the power, reſiſteth the ordinance of God. *Rom.* xiii. 1, 2.

[b] And ſaid to the Judges, Take heed what ye do: for ye judge not for man, but for the Lord. 2 *Chron.* xix. 6.

[c] That ye might walk worthy of the Lord. *Col.* i. 10.

II.

2. *They ought to have a fear of not being faithful enough in the diſcharge of their Miniſtry.*

The firſt of the qualities which are required to compoſe the integrity of a Judge, is a faithful remembrance in all his Functions, of what may be juſtly expected from him in the exerciſe of a Miniſtry wherein he holds the place of God, and where every ſtep of his proceedings lays a duty on him, of which he muſt expect to give a ſevere account: which obliges him to take for the firſt Rule of all his duties, that of a fear of not being faithful enough in obſerving the divine will and pleaſure [d].

[d] For ye judge not for man, but for the Lord, who is with you in the judgment. Wherefore now, let the fear of the Lord be upon you. 2 *Chr.* xix. 6, 7.

For power is given you of the Lord, and ſovereignty from the Higheſt, who ſhall try your works, and ſearch out your counſels. Becauſe being Miniſters of his Kingdom, you have not judged aright, nor kept the Law, nor walked after the counſel of God. Horribly and ſpeedily ſhall he come upon you: for a ſharp judgment ſhall be to them that be in high places. For mercy will ſoon pardon the meaneſt: but mighty men ſhall be mightily tormented. *Wiſd. of Sol.* vi. 3, 4, &c.

See Pſal. cxix. 120.

Optamus, ut omnes judices noſtri ſecundùm voluntatem & timorem Dei, & noſtram electionem atque ordinationem ſic ſuas adminiſtrationes gubernare ſtudeant: ut nullus eorum aut cupiditati ſit deditus, aut violentias aliquas vel ipſe inferat, vel judicibus, aut officiis eorum aut quibuſcumque aliis collatoribus inferre permittat. *l.* 1. §. 5. *C. de offic. Præf. Prat. Afric.*

☞ *The fear which Judges ought to have, conſiſts in their looking upon themſelves to be Depoſitaries of the Power which is intruſted to them, and not to imagine that it is their own Power, that they may uſe it as knowing that they muſt one day give a ſtrict account of it. The Judges who have not this fear in them, make themſelves Maſters and Uſurpers of that Authority of which they are only Depoſitaries; and inſtead of maintaining among unjuſt men the intereſt of Juſtice, which is that of God himſelf who commits to them the diſpenſation of it, they imploy their Authority in the Adminiſtration of Juſtice, only to make it ſubſervient to their own intereſts and paſſions, and uſe it even againſt Juſtice it ſelf. And if Injuſtice and Oppreſſion in private perſons raiſe anger and indignation in thoſe who behold it, what can one ſay of ſuch an abominable perverting of Juſtice, when they ſee the Force that belongs to Authority and Juſtice imployed againſt it ſelf?*

III.

3. *They ought to have Courage and Reſolution to ſupport Juſtice and Truth.*

The ſecond quality of a Judge is Courage and Reſolution to maintain and to protect on all occaſions Juſtice and Truth [e], and eſpecially in the caſes where the Widow and the Fatherleſs, the poor and perſons of a low condition groan under Oppreſſion: ſo that if it depends on the Judge to put a ſtop to that Injuſtice, he ought to imploy his Authority for that end without

out any reſpect of perſons [f]; and in caſe his Miniſtry is not extenſive enough to reſtrain the ſaid Injuſtice, he ought to be careful not to take part in the Oppreſſion which he has not ſufficient power to conquer, and ought to ſhew by his Conduct that no conſideration whatſoever influences him againſt his duty, and that no power is capable of making him deviate from it.

[e] Seek not to be judge, being not able to take away iniquity, leſt at any time thou fear the perſon of the mighty, and lay a ſtumbling block in the way of thy uprightneſs. *Eccluſ.* vii. 6.

Strive for the truth unto death, and the Lord ſhall fight for thee. *Chap.* iv. 28.

[f] Defend the poor and fatherleſs, do juſtice to the afflicted and needy. Deliver the poor and needy; rid them out of the hand of the wicked. *Pſal.* lxxxii. 3, 4.

Hear the cauſes between your brethren, and judge righteouſly between every man and his brother, and the ſtranger that is with him. Ye ſhall not reſpect perſons in judgment, but you ſhall hear the ſmall as well as the great; you ſhall not be afraid of the face of man, for the judgment is God's. *Deut.* i. 16, 17.

When the ear heard me, then it bleſſed me, and when the eye ſaw me, it gave witneſs to me: becauſe I delivered the poor that cried, and the fatherleſs, and him that had none to help him. The bleſſing of him that was ready to periſh, came upon me; and I cauſed the widows heart to ſing for joy. I put on righteouſneſs, and it clothed me; my judgment was a robe and a diadem. I was eyes to the blind, and feet was I to the lame; I was a father to the poor, and the cauſe which I knew not, I ſearched out. And I brake the jaws of the wicked, and pluckt the ſpoil out of his teeth. *Job* xxix. 11, 12, &c.

☞ *Courage and Reſolution are neceſſary to Judges, that they may be able to ſurmount all the difficulties which they may meet with in their Adminiſtration of Juſtice; and likewiſe that they may deſpiſe all the evils that may happen to them after they have rendred Juſtice; for without this Courage and this Reſolution, it is viſible that they will yield to thoſe difficulties, and that they will abandon Juſtice in order to avoid them. This firmneſs of Reſolution ought to be accompanied with a divine Zeal, void of trouble and paſſion, always the ſame, and incapable of abating. This Courage and this Reſolution to ſupport the intereſt of Juſtice, are ſufficient to enable Judges to reſiſt all the efforts that may be made to corrupt them, without the aſſiſtance of any external Force to ſupport them; and even when their duty calls upon them to act and to exerciſe their Authority, they do all that is required of them, when they give proofs of their reſiſtance, and of their endeavours to ſuppreſs Injuſtice; and by preſerving by this conduct of theirs, the reſpect and dignity of their Miniſtry, they will by this means prevent many Injuſtices. But thoſe who are deſtitute of this Virtue, what Dignity and what external Force ſoever they may have otherwiſe, inſtead of being, as they ought to be, a living Image of the Divinity which they repreſent in their Functions, they will be, according to the ſaying of a Prophet, only a Statue without Arms, and without Eyes; and inſtead of gaining to themſelves reſpect, they will fall into ſcorn and contempt* [a].

[a] Zech. xi. 17.

It is not our buſineſs to enumerate here all the occaſions, in which Judges ſtand in need of Courage and Reſolution, to enable them to ſurmount all the difficulties they may meet with in the exerciſe of their Functions. It ſufficeth to remark, that all Judges ought to animate themſelves with this Virtue on all occaſions, where Juſtice is oppreſſed; when the rich oppreſs the poor, when the ſtrong oppreſs the weak, when Lords of Mannors abuſe the power which they have over their Vaſſals and Tenants, and on every occaſion, where the inequality and diſproportion between the condition of the Parties at variance may tend to ſupport Injuſtice againſt Juſtice.

And it is only for theſe ſorts of occaſions that Judges are eſtabliſhed, and God gives them his place, for no other end but to raiſe them above others by the Character and Authority which he communicates to them, that they may likewiſe by their Courage and Reſolution raiſe Juſtice above the force of Injuſtice.

Some may perhaps be apt to imagine, that this Courage is a Virtue not ſo very neceſſary to Judges of inferior Juriſdictions; but it may be ſaid on the contrary, that it is more neceſſary to them than to the other Judges who are in a higher Station, becauſe they meet frequently with difficulties and obſtructions; and they being deſtitute of that ſplendor and dignity which environs and ſupports the other ſuperior Judges, they are not able to ſupport by their Virtue the character of Dignity, which the Title of Judges gives them, and they ought at leaſt to diſplay their Courage, if they are not able to exert their Authority; and it is the duty of thoſe who are veſted with Authority, to protect theſe inferior Judges againſt the oppreſſion and violence of thoſe who ſhould attempt to diſturb them in the exerciſe of their Functions, that they may, by the means of their own Reſolution and Courage, backed with the protection of the ſuperior Judges, have all the Force and Authority that is neceſſary for the Adminiſtration of Juſtice.

It may not be amiſs likewiſe to obſerve here in relation to the Courage and Reſolution neceſſary to Judges, that by the Roman *Law one could not exerciſe the Functions of Juſtice in the Province where they were born; nay, not ſo much as the Function of an Aſſeſſor, whoſe buſineſs was to aſſiſt and give counſel to the Magiſtrates in giving Judgments, leſt the regard which they might have for Relations and Friends ſhould engage them to commit ſome Injuſtice.*

Si eadem provincia poſtea diviſa, ſub duobus præſidibus conſtituta eſt, velut Germania Myſia; ex altera ortus in altera adolebit. *l.* 3. *ff. de off. Adſeſſ.*

Ne quis ſine ſacrilegii crimine deſiderandum intelligat gerendæ ac ſuſcipiendæ adminiſtrationis officium intra eam provinciam in qua provincialis & civis habetur: niſi hoc cuiquam ultronea liberalitate per divinos affatus Imperator indulgeat. *l. ult. C. de crim. ſacr.*

Theſe Prohibitions not being in uſe with us, the liberty which people have of ſerving in Offices of Juſtice in their own native Country, makes it ſtill the more neceſſary for them to be armed with Courage and Reſolution; and it is in order to excite the Judges to this duty, that the Ordinances of France *have forbidden them to have any regard to the King's Letters Manual in the diſcharge of their Functions: which teaches them that no conſideration whatſoever ought to be put into the Scales with that of Juſtice, which they are obliged to render. See the eighty firſt Article of the Ordinance of* Moulins, *which contains the ſame prohibitions, excepting only the execution of the Orders of the Prince, which do not infringe the right of any perſon, or Pardons for Crimes.*

It may be obſerved in relation to the ſame ſubject, that it was heretofore one of the Rules and Orders of the Parliament of Paris, *for the more effectual preſerving this Courage and Integrity in the Judges, that none of the Officers belonging to that Body ſhould frequent the houſes of Princes, and that they ſhould not ſo much as go to the* Louvre, *the King's Palace, unleſs they were ſent for by the King.*

IV.

4. They ought to render Juſtice, without reſpect of perſons.

Seeing the firmneſs and reſolution of the Judge ought to be only for the ſupport of Juſtice, and without reſpect of perſons, he ought to conſider in the poor and in the needy, only the Oppreſſion which they may chance to labour under by reaſon of ſome Injuſtice, and to imploy his Authority for removing the ſaid Oppreſſion; but if the Cauſe of the Poor, of the Widow, and of the Orphan, be not accompanied with Juſtice, he ought not to let himſelf be overcome by tenderneſs and compaſſion, but he ought to adminiſter Juſtice impartially, without reſpect to thoſe perſons no more than to others [g].

[g] Neither ſhalt thou countenance a poor man in his cauſe. *Exod.* xxiii. 3.

Ye ſhall not reſpect perſons in judgment, but you ſhall hear the ſmall as well as the great; you ſhall not be afraid of the face of man, for the judgment is Gods. *Deut.* i. 17.

It is not good to have reſpect of perſons in judgment. *Prov.* xxiv. 23.

To have reſpect of perſons, is not good: for, for a piece of bread that man will tranſgreſs. *Prov.* xxviii. 21.

The King that faithfully judgeth the poor, his throne ſhall be eſtabliſhed for ever. *Prov.* xxix. 14.

Give the King thy judgments, O God, and thy righteouſneſs unto the King's ſon. He ſhall judge thy people with righteouſneſs, and thy poor with judgment. *Pſal.* lxxii. 1, 2.

V.

5. They ought to have in their hearts a love and a zeal for Truth and for Juſtice.

The third quality of a Judge is a love and a zeal for Truth and for Juſtice [h]; for the heart is flexible only to what it loves, and the heart of a Judge cannot be bent upon the performance of his duty, unleſs it be moved thereto by the weight and biaſs of the love of Juſtice; and very often the want of this love hinders Judges from diſcerning between what is juſt or unjuſt, and leads them to commit injuſtices which they would avoid if they had that light which the ardour of this love ought to give them [i].

[h] Love righteouſneſs, ye that be judges of the earth. *Wiſd. of Sol.* i. 1.

☞ *All the duties of Judges depend ſo much on this love and on this zeal for Juſtice and for Truth, that* Solomon *aſking of God the qualifications neceſſary for judging his People, aſked of him nothing elſe but a good diſpoſition of heart, becauſe he knew that he could not render juſtice, unleſs he had a love for it, and unleſs he had a heart flexible to all the motions of the love of Juſtice, and that the ſaid love was an univerſal Principle, which would lead him into the whole detail of his duties. The love of Juſtice is the principle of the Conduct of Judges; and conſequently it is alſo a divine Truth, that the moſt learned and the ableſt Judges are unworthy of this Rank, and that all their Learning is nothing but a faint and unprofitable Light, if it is not animated with an active Love, which engages them to apply themſelves to all their duties. There is nothing therefore of greater importance than to know thoroughly,*

and

and to obſerve diligently this Law that is ſo eſſential to the duties of Judges; and in order to comprehend this Law of the Love of Juſtice in its full force, and in its full extent, it is neceſſary to conſider it in its Foundations, which are the ſame with thoſe of the general Law, which commands Mankind to love one another reciprocally; and it is alſo the ſame Spirit which makes the force and the juſtice both of the one and of the other. See the ſecond Chapter of the Treatiſe of Laws, in the Civil Law in its Natural Order.

It is by this Love of Juſtice that the Judges apply themſelves to all the Functions of their Miniſtry; it is this Love that makes them diligent in ſearching out and puniſhing Crimes and Offences, which diſturb the Order of the Society of Mankind; it is by the means of this Love for Juſtice that they prefer Juſtice to all other conſiderations whatſoever, and that the intereſt of their Friends, and of their Relations, and even their own intereſt, does not any ways biaſs them when they are contrary to their duties: it is this Love for Juſtice that makes them deſpiſe preſents, promiſes, threatnings, and all ſorts of events, and makes that nothing can hinder them from doing Juſtice: it is by virtue of this Love that they render Juſtice equally on all ſorts of occaſions without reſpect of perſons, and with a zeal ſuitable to their Functions, and ſuch as the ſtate of things may demand; and laſtly it is by this love that Judges apply themſelves diligently to the Study that is neceſſary for their acquitting themſelves worthily of their Miniſtry; and it is that which makes them careful and exact in examining all the facts, and all the circumſtances of the Affairs which come before them in Judgment.

[i] Give therefore thy ſervant an underſtanding heart, to judge thy people, that I may diſcern between good and bad. 1 *Kings* iii. 9.

O ye kings of the people, honour wiſdom. *Wiſd. of Sol.* vi. 21.

Wiſdom is eaſily ſeen of them that love her, and found of ſuch as ſeek her; ſhe preventeth them that deſire her, in making her ſelf firſt known unto them. *Wiſd. of Sol.* vi. 12, 13.

As it is in general the Love of the End which one propoſes to himſelf, which is the Principle of all the Actions and of all the Duties of Mankind, ſo it is the Love of Truth and of Juſtice that is the Principle of the Duty of Judges, and that Love ought to mount to the degree of Zeal; for ſeeing the Functions of Juſtice which they exerciſe in the Body of the Society, are intended to reſtrain injuſtices, violences, oppreſſions, to maintain Juſtice, to puniſh Crimes, and for the diſcharge of other Duties, which require the uſe of Authority, of Courage, and of Reſolution, they cannot diſcharge them aright, unleſs they have in their hearts a love and a zeal for Truth and for Juſtice, which is the Principle of that Reſolution and of that Courage which is more eſpecially neceſſary to Judges and Magiſtrates, and of which notice ſhall be taken in the following Article.

VI.

This zeal for Juſtice that is ſo neceſſary to all Judges without diſtinction, is more eſpecially requiſite in Officers whoſe Functions do not conſiſt barely in rendring Juſtice to the Parties who demand it of them; but who are obliged moreover to render it on occaſions where the Publick Intereſt may require it, and where no party appears to pray it. Thus the Officers who have the direction of the Policy, and the puniſhment of Crimes, owe thoſe Functions to the Publick, altho' there be no party to demand Juſtice, and altho' they may reap no profit by it themſelves: ſo that there is nothing but a love and a zeal for Juſtice, that can engage them to embrace always all occaſions of this ſort, and to act in every one of them with all that diligence, with all that application, and with all that fidelity which God requires of them[l].

6. The Judges who have the care of the Publick Good, ought to have the ſame zeal for Juſtice, altho' there be no party who demands it.

[l] *Judges being chiefly inſtituted for the defence of the poor and needy, who are moſt expoſed to violence and injuſtice, it follows that the Judges are obliged not only to render Juſtice to the poor, but that they ought alſo to diſpenſe it to them gratis; for otherwiſe it might be pretended that Juſtice is not due to the poor, ſeeing it may be ſuppoſed that being poor they have not the means to demand it unleſs it be freely granted them. And beſides, there is no excuſe to palliate ſo crying an injuſtice as that of denying Juſtice to the poor.*

VII.

Seeing the Adminiſtration of Juſtice in the Affairs of Policy, and the puniſhing of Crimes require two ſorts of Functions; one of thoſe who are to give Judgment, and the other of thoſe who are to appear as Parties to pray Judgment againſt thoſe who tranſgreſs the Rules and Orders of Policy, and commit Crimes, and that the Judges cannot exerciſe both theſe Functions, that of taking care that the Rules and Orders of Policy be duly obſerved, and that Offenders be brought to condign puniſhment, is the duty of thoſe Officers who are called the Kings Council, of whom mention has been made in the proper place; and this duty obliges them particularly to have ſuch a zeal for Juſtice, as may animate them againſt Injuſtice, and may ſtir them up to a continual vigilance in the diſcharge of all their Functions, without neglecting any one of them, and engage them to perform their Functions without any biaſs to intereſt, and with a reſolution and

7. Vigilance of the Officers who are called the King's Council.

and ſtedfaſtneſs ſuitable to their Miniſtry [m].

[m] *See the twenty third Article of the ſecond Section of the firſt Title of this ſecond Book.*

Juſtinian *has made many Laws, to exhort Judges to apply themſelves with great care and diligence to the puniſhing of all Crimes which go to that exceſs, as to diſturb the publick Order of the Society, and the intereſt of particular perſons.*

Ad hæc diligenter ibi ipſum locorum proſpicere volumus, ut omnes qui latrocinia exercent, qui alienas ſubſtantias, aut etiam uxores rapiunt, qui alia denique patrant crimina perſequatur, comprehendat, & competentibus ſuppliciis ſubdat, & omnem prorſus injuſtitiam reprimat: neque committat ut in aliquo probiores & manſuetiores injuriis afficiant, ne aliis denuo talium perſecutoribus opus habeamus, cogamurque rurſus violentiarum repreſſores, latrunculatores, & alia id genus tolerare nomina, ſimul & negotia quæ nos averſati ipſum ad hunc ordinem produximus. *Nov.* 29. *c.* 5.

Adulteria vero & raptus virginum, & immoderatas illicitaſque, & augendæ rei ſuæ cauſa comparatas circumſcriptiones, neque non homicidia, & ſi quid ejuſmodi delictorum eſt, ita acerbe punito, ut paucorum hominum ſupplicio omnes reliquos continuè caſtiges: eſtoque ſecundùm legem exquiſitus delinquentium caſtigator: neque enim inhumanitas hoc, ſed potiùs ſumma quædam humanitas eſt, cum multi paucorum animadverſione ſalvantur. Quod ſi quem hoc nomine in crimen vocatum ſuſtineat, qui vel cinguli vel dignitatis, vel ſacerdotii, vel ejuſmodi alio prætextu ſperet ex illius ſe manibus ereptum iri: certo ſciat quod noſtro judicio indignus videbitur: nemo enim quacunque potentia ſua fretus quodcunque alienum prætendens patrocinium in talibus delictis ſeveritatem legis effugiet. *Nov.* 30. *c.* 11.

VIII.

8. *Diſintereſtedneſs enjoined to Judges.*

The fourth qualification which God enjoins to Judges is, a diſintereſtedneſs and an averſion to Covetouſneſs; for this paſſion alienates mens affections ſo much from God, that in ſtead of a Fear of him, it ſubſtitutes Idolatry [n], and is the root of all evil [o]; and when it reigns in the heart of a Judge, it is there a principle of a thouſand injuſtices, as will appear from the Articles which follow.

[n] Covetous man who is an idolater. *Epheſ.* v. 5.

[o] The love of money is the root of all evil. 1 *Tim.* vi. 10.

Eſt quoque hoc ſacrorum eloquiorum mirabile & verum, quòd avaritia omnium ſit mater malorum, maximè quando non privatorum, ſed judicum inhæret animabus. Quis enim ſine periculo non furetur, quis non latrocinabitur ſine reatu ad adminiſtratorem reſpiciens? Illum namque videns omnia auro vendentem, & præſumens quia quicquid egerit illicitum, hoc pecunias dando redimet: hinc homicidium, & adulterium, & invaſiones, & vulnera, & raptus virginum, & commerciorum confuſio, & contemptus legum & judicum, omnibus hæc venalia præpoſita eſſe putantibus, tanquam aliquod vilium mancipiorum. *Nov.* 8. *in Præfat. in fine.*

IX.

9. *They ought to reſtrain the proceedings in a Cauſe to that which is neceſſary to prepare it for Judgment.*

The Judges whoſe buſineſs it is to regulate what relates to the inſtruction of Cauſes, ought to have no other views beſides that of directing the proceedings therein after ſuch a manner as that the truth may be ſet in a clear light, and that the Rights of the ſeveral parties may be known; which makes it a duty incumbent on them to reſtrain the ſaid proceedings to what is neceſſary for that end according to the direction of the Ordinances, or according as Equity may require in particular circumſtances: but ſeeing it depends on the Judges to ſhorten or to lengthen the proceedings, and that they have Perquiſites ariſing from the greateſt part of the Decrees which they give, thoſe who ſet their hearts on nothing but Covetouſneſs, commit on ſuch occaſions two ſorts of injuſtices; one is, that of multiplying the proceedings in a Cauſe without neceſſity; and the other is, that of taxing their Fees or Perquiſites beyond what they may lawfully take; and by theſe two Injuſtices they become guilty of two Extortions; one, in that they take more than what is juſt for the proceedings that ought to be in the Cauſe; and the other is, in the profits which accrue to them from the proceedings which they ordain without neceſſity; and beſides, by this means they render themſelves accountable before God for the conſequences of the delay of Juſtice that is due to the parties.

X.

10. *The Officers who by their Offices are bound to perform Functions of Juſtice for the ſervice of the Publick, ought carefully to perform them altho' they reap no profit thereby.*

The Officers who by their Offices are obliged to perform Functions of Juſtice for the ſervice of the Publick, in caſes where there is no party to carry on the Suit, whether it be for the execution of the Orders of Policy, or for the puniſhment of Crimes, altho' they have in theſe caſes no perquiſite for the diſcharge of their Functions, yet they ought carefully to perform them merely out of regard to their duty, and in conſideration of the intereſt which the Publick has that Juſtice be adminiſtred; but if they are of a covetous temper, the want of the allurement of profit will make them faint and languid in the diſcharge of their Functions, and they will be apt to abandon or neglect their duty in proportion to the degree of their Avarice, and according as it may counter balance the ſhame and the other conſequences which they may have reaſon to fear if they ſhould fail in the diſcharge of Functions of this kind. The Reader may conſult on this Article what has been already ſaid in the ſixth Article of this Section [p].

[p] *See the ſixth Article of this Section.*

XI.

11. *Judges in the exerciſe of their Functions are reſtrained to the giving of Judgment in Cauſes.*

The Judges whoſe Functions are reſtrained to the deciding of Law-Suits, whether it be that they report the Cauſes to the other Judges, or that they only aſſiſt in giving their opinion upon the deciſion of the Cauſe, and who, either for the Report which they make, or for their preſence, have the Fees which are allowed them, are obliged to perform the ſaid Functions, and to tax moderately their fees, perquiſites, or other dues which the Reporters may be entitled to for reporting the Cauſe; but if they happen to be of a covetous temper, they will not fail to tax at an immoderate rate the ſaid perquiſites and other dues.

XII.

12. *Covetous Judges are apt to neglect the Functions from which they reap no profit.*

It is likewiſe another Injuſtice in Judges who are of a covetous temper, that they abandon or neglect the Functions from which they reap no manner of profit; and altho' they are obliged by vertue of their Offices to the Application which ſhall be ſpoken of in the following Section, nevertheleſs covetouſneſs makes them neglect thoſe Functions from which there accrues no manner of profit: thus covetous Judges diſpenſing with their duty to render Juſtice to the poor, are careleſs in attending when their Cauſes are to be decided, becauſe they expect no profit from thence; and they likewiſe neglect to attend at the Informations in Cauſes, unleſs they be drawn thither by ſome other view; and ſome of them are even ſo great ſlaves to Avarice, as to hinder parties from adjuſting their differences in a friendly way [q].

[q] *See the texts cited on the following Article.*

XIII.

13. *Preſents corrupt Judges.*

Avarice diſpoſes Judges to ſuffer themſelves to be corrupted by preſents, and this paſſion is ſo ſtrong in ſome, that it blinds them to that degree, that they do not comprehend that every preſent hath this effect on the heart of a Judge, that it extinguiſhes the zeal or indignation which he may have againſt Injuſtice, that it captivates the ſoul of him who receives it, that it engages him to favour the perſon who gives it, that he deceives him if he does otherwiſe, and whatever uſe he may make of it, he prevaricates againſt Human Laws, and commits a capital crime againſt the Laws of God [r].

[r] *Avarice in taking bribes has nothing in it that appears outwardly to be contrary to Humane Nature; it finds there its Object, without any pains or toil, and without violence it offers it ſelf ſecretly full of charms, and in a manner ſo ſurprizing, that the Scripture ſays, that the wiſe themſelves are blinded by it.*

Thou ſhalt not wreſt judgment, thou ſhalt not reſpect perſons, neither take a gift: for a gift doth blind the eyes of the wiſe, and pervert the words of the righteous. That which is altogether juſt ſhalt thou follow. *Deut.* xvi. 19, 20.

Preſents and gifts blind the eyes of the wiſe, and ſtop up his mouth that he cannot reprove. *Ecclus.* xx. 29.

A gift in ſecret pacifieth anger: and a reward in the boſom, ſtrong wrath. *Prov.* xxi. 14.

A man's gift maketh room for him, and bringeth him before great men. *Prov.* xviii. 16.

And thou ſhalt take no gift: for the gift blindeth the wiſe, and perverteth the words of the righteous. *Exod.* xxiii. 8.

Thy Princes are rebellious, and companions of thieves: every one loveth gifts, and followeth after rewards; they judge not the fatherleſs, neither doth the cauſe of the widow come unto them. *Iſai.* i. 23.

See what has been ſaid of Preſents in the Preamble of this Section, and the Ordinances quoted at the end of the ſaid Preamble.

XIV.

14. *They ought to abſtain from hearing certain Cauſes.*

The moſt perfect integrity that can be in Judges, is no hindrance why the Parties who have Cauſes depending before them, may not challenge them, or except againſt them, and why they ought not of their own accord to abſtain from hearing Cauſes in which they may have ſome intereſt, or where there may be ſome juſt ground for ſuſpecting them; and they themſelves are obliged to declare the cauſes which may render them ſuſpected, if the Parties are ignorant of them: for altho' a Judge may be above the weakneſs of ſuffering himſelf to be biaſſed or corrupted, and may have reſolution enough to render Juſtice againſt his own Relations, and in the other caſes where it may be lawful for the Parties to except againſt the Judges, yet they ought to miſtruſt themſelves, and not draw upon themſelves the juſt reproach of a raſh proceeding, which would in effect be a real miſdemeanor [s].

[[s] *By the Civil Law the Parties are at liberty to challenge or except againſt the Judges, when there is juſt reaſon to ſuſpect their partiality to one ſide more than the other.* Apertiſſimi juris eſt, licere litigatoribus judices delegatos, antequam lis inchoetur, recuſare. *l.* 16. *Cod. de judiciis. But according to the Law of* England, *Judges or Juſtices cannot be challenged.* Coke 1 Inſt. fol. 294. [a].]

SECT.

SECT. III.

Of the Application of Officers of Juſtice in the diſcharge of their Functions.

THere is no Condition whatſoever, without excepting even thoſe of the higheſt Rank, which hath not for its eſſential character, and for its chief and indiſpenſible duty, an Application to the Functions for which it is eſtabliſhed: and thoſe who ſhould pretend to an exemption from this engagement, would ſubvert the Order of Society, and tranſgreſs both the Law of Nature, and the Law of God. For it is equally true both according to Religion, and according to the Law of Nature, that Man is born unto Labour, and that it is for Labour [a] that this Life is given unto him. Since therefore it is true, that an Application to ſome Function is the eſſential duty of every Condition of Life, Judges who are in an Imployment of a very great conſequence, are bound to give ſuch an Application as a Profeſſion of that importance does deſerve; and in order to be fully convinced of the neceſſity of this Application, it behoveth us only to make reflection on what the Holy Scripture teacheth us of the grandeur and of the importance of the Miniſtry of Judges, of the exactneſs and diligence with which they ought to diſcharge their Functions, and of the account which they muſt give of all the faults which they commit in the exerciſe of their Functions, as alſo of all thoſe faults into which they fall by reaſon of their not having acquired by their application the Knowledge that is neceſſary for their acquitting themſelves worthily of their Miniſtry.

[a] Man is born to trouble, as the ſparks fly upwards. *Job* v. 7.

One ſingle paſſage in the Holy Scriptures informs us of all theſe Truths, which are ſcattered up and down in all the other places which teach us what are the duties of Judges; it is an inſtruction which the Holy Ghoſt gives by the mouth of a holy King to all the Judges of the Kingdom of *Juda:* Take heed of the holineſs and of the grandeur of the Miniſtry which you exerciſe; for it is not the Judgment of Man that you are to render, but it is the Judgment of God[b]; remember that you are to give an account of all that you ſhall have judged, and that your faults will light upon your own heads, and bring you your ſelves into Judgment; frame therefore all your Judgments in the preſence and in the fear of the Lord, for whom you judge, and who will himſelf paſs judgment on all the Sentences which you ſhall give; and therefore in order to prevent his enquiry and his juſt ſeverity, be careful to judge with ſo great exactneſs, diligence, and application, that your Judgments may be free from all iniquity, becauſe there is no iniquity in God, in whoſe ſtead you are, and that they may be full of the light of Equity and of Juſtice as God's Judgments are; becauſe it is the Judgments of God that you ought to render. Every body ſees that this is the true ſenſe and meaning of that inſtruction, reduced into a few words according to the admirable force of the divine and inimitable Eloquence of the Holy Scripture, which by teaching us that the people were to ſeek the Law at the mouth of the Prieſt[c], informs us at the ſame time, that the people ought to ſeek for the judgment of God at the mouth of the Judge: This is what *Moſes* taught, when, as he was judging the ſmalleſt differences of the people, he ſaid that the people came to him to aſk of him the Judgments of God[d]; it was for this reaſon that *David* aſked of God for himſelf and for *Solomon* his Judgment and his Juſtice, to enable them to judge his people, and *Solomon* aſked of him Wiſdom; becauſe he knew that he could not render the Judgment of God without that Wiſdom, and that it is Wiſdom which is the only Principle of Juſtice and of the knowledge of the Laws, and of Equity, as he has obſerved in the ſame place; and that without it, the moſt able and learned Judges cannot avoid falling into error, and going aſtray out of the paths of Juſtice; and ſeeing the ſaid Wiſdom is not given to all perſons in the ſame meaſure and fullneſs, the only way that is common and neceſſary to all Judges, for acquiring the ſaid Wiſdom according to their wants and the extent of their Functions, is to apply themſelves to the ſearch of it in the manner and degree that is proportionable to their wants.

[b] And he ſet judges in the land, throughout all the fenced cities in *Judah*, city by city. And ſaid to the judges, Take heed what ye do: for ye judge not for man, but for the Lord, who is with you

you in the judgment. Wherefore now let the fear of the Lord be upon you, take heed and do it: for there is no iniquity with the Lord our God, nor reſpect of perſons, nor taking of gifts. 2 *Chron.* xix. 5, 6.

[c] The law of truth was in his mouth, and iniquity was not found in his lips: he walked with me in peace and equity, and did turn many away from iniquity. For the prieſts lips ſhould keep knowledge, and they ſhould ſeek the law at his mouth. *Malach.* ii. 6, 7.

[d] The people come unto me to enquire of God. When they have a matter they come unto me, and I judge between one and another, and I do make them know the ſtatutes of God and his Laws. *Exod.* xviii. 15, 16.

It is neceſſary therefore that Judges ſhould labour, and that with diligence and care, to underſtand their Profeſſion well; and their Application to this labour conſiſts in the actual exerciſe of all their Functions, which are different according to the Offices; ſome ought to apply themſelves to the puniſhing of Crimes and Offences, others to the judging of Law-Suits, and ſome to both theſe Functions together; but they are all of them equally bound to apply themſelves to all their reſpective Functions, and to attend them with that diligence and application which this divine Imployment requires; and it is of importance to ſhew what is the motive which ought to induce Judges to give this application to their Functions, and what are the cauſes which divert them from it.

In order to undertake any Work, it is neceſſary to love it, becauſe the heart, which is the principle of all our actions, cannot act but for what it loves; as has been already obſerved in the Preamble of the foregoing Section; and in order to have a love for the Work, it is neceſſary that there ſhould be ſome charm to attract and engage us to it; and becauſe we ought always to be in a diſpoſition to apply our ſelves on all occaſions to the Work which Juſtice demands of us, it is neceſſary that the charm which allures us to it, ſhould be a perpetual charm which laſts always, and which draws us on all occaſions; and there can be no other charm of this nature beſides Juſtice, ſhe is immortal, as the wiſe man ſaith [e]; and it is ſhe who preſents her ſelf on all occaſions where the duty of Judges calls upon them, and it is likewiſe Juſtice which is the ſole and natural end that God has preſcribed to the labour and work of Judges. Thoſe who love Juſtice, and who propoſe to themſelves no other end beſides it, are always in a readineſs to apply themſelves to render Juſtice, becauſe this charm never fails to engage them; but on the contrary thoſe who act upon other views, are always in a diſpoſition, or in hazard, to deviate from Juſtice, and to neglect the application which they owe to the Functions of their Miniſtry.

[e] *Wiſd. of Sol.* i. 15.

The love of eaſe, which makes people idle, hinders ſome from giving this application; others neglect it becauſe of the allurement of pleaſure which carries their thoughts to other objects; many grow weary of it becauſe they ſee no profit attend it, which is the chief thing that allures them; and when Juſtice alone is on the ſide of the Widow and the Orphan, they are abandoned and left under oppreſſion. The greater part apply themſelves to the Functions of Juſtice; but with other views than that of promoting Juſtice; there are ſome who apply themſelves with vigour to the puniſhing of Crimes, when they meet with a convenient opportunity to revenge themſelves, or find ſome other particular advantage therein, but they ſit ſtill when the buſineſs is barely to render Juſtice; ſome exerciſe their Authority that they may have a free ſcope for their ambition, and they ſhamefully abandon the moſt eſſential duties, if Juſtice is oppoſite to their own proper intereſts; it is upon theſe and other the like motives that many Judges neglect the attendance and application which they owe to their Offices.

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1. *Officers of Juſtice ought to join to capacity and integrity, application to their Functions.*
2. *They ought to reſide in the place where their Functions are to be exerciſed.*
3. *They ought not to abſent themſelves, except when there is juſt cauſe.*
4. *Reſidence is one of the principal duties of thoſe who have the direction of the Proceedings in Cauſes.*
5. *They ought to join to Reſidence a diligent attendance on their Functions.*
6. *Other duties of Officers of Juſtice.*
7. *One Officer may diſcharge the Functions of another in caſe of abſence.*

I.

CApacity and Integrity in Officers of Juſtice would be altogether uſeleſs, if they did not apply themſelves to the exerciſe of their Functions; for if it is an indiſpenſible duty incumbent on them

1. *Officers of Juſtice ought to join to capacity and integrity,*

application to their Functions.

them to discharge their Functions according to the Rules prescribed to them by the Laws of God and Man, most certainly it is a duty required of them, and that in the first place too, to exercise their Functions, which implies a diligent and faithful application to their Functions, and an obligation to perform every one of them.

II.

2. They ought to reside in the place where their Functions are to be exercised.

The first Rule of this Application which Officers of Justice owe to their Offices, is that which obliges them to residence in the place where their Functions are to be exercised; and as there are some Courts of Justice in *France*, where the Officers do the duty by turns, for the space of six months at a time, so the Officers appointed for each six months ought to be personally resident during that time.

III.

3. They ought not to absent themselves except when there is just cause.

Residence consists in a continual abode in the place where it is due; so that the Officer give diligent attendance there, and do not absent himself except for some just cause, of which he himself is to judge, and which he ought to weigh in the balance of the account which God will require at his hands of the discharge of his Office.

IV.

4. Residence is one of the principal duties of those who have the direction of the Proceedings in Causes.

This duty of Residence is more especially incumbent on those whose business it is to regulate the proceedings in Causes, and this duty being strongly enough recommended to them by their interest not to lose the perquisites which may accrue to them by the said attendance, it is but seldom that they fail in that duty; but they who are obliged to be present only at the time of giving Sentence in Causes, not finding the same advantage therein, have no other motive that obliges them to a constant attendance, besides the indispensible engagement they are under to be present, altho' they reap no manner of profit or other advantage thereby; so that it is in order to acquit themselves of this obligation that they are induced to be punctual in their Residence.

V.

5. They ought to join to Residence, a diligent attendance on their Functions.

Seeing Residence is necessary only to facilitate a diligent attendance on the several Functions wherein the presence of the Officer is necessary, the duty of Application obliges him to join to his Residence a diligent attendance on every one of his Functions; and even those Judges who are not to give Sentence singly by themselves, such as the Judges of the Courts of Justice which consist of several Members, and who may therefore fancy that their absence will be no hindrance why Justice may not be very well rendred by the other Judges, are not for all that dispensed with from being present at the Report and final Decision of Causes; for this duty is common to them all, and every one of them ought to fear lest his absence should be prejudicial to a good Cause: so that every one ought to contribute with his skill and knowledge to the rendring of Justice impartially, and ought not to excuse himself from this duty by relying on the integrity and capacity of the other Judges; for, without entertaining any bad thoughts of them, he may be allowed to fear lest Justice and Truth should not be sufficiently defended, seeing very often the ablest and the cleerest sighted persons may be mistaken, either in the facts, or in the reasoning, and that the views and notions which other less skilful persons have of the matter, do sometimes bring them over to sentiments which before they did not approve of: Thus, every Judge ought to give a diligent attendance to his Function, for the discharge of which it is to be presumed that he is capable; for if he wanted capacity, it would be his duty to betake himself to some other Profession rather than that of a Judge. *tendance on their Functions.*

VI.

6. Other duties of Officers of Justice.

Besides the Residence and diligent Attendance which Judges are obliged to on account of their Functions, they are bound to apply themselves with great exactness to the performance of every one of them in particular, so as to discharge them in the manner that their duty requires of them: which consists in general in a right understanding of the facts of which they are to judge, in weighing the circumstances, in balancing the reasons on one side and on the other, and in giving that attention and patience in the discharge of their Functions which the duty of rendring Justice demands of them. This vigilance, this attention, and this patience, are more especially necessary to those who are the Reporters of Causes; for they are obliged to look into all the Writings and Papers exhibited in the Cause, and

to inform themſelves exactly of the rights of the parties; and in fine they ought to be careful never to do any thing that may be of prejudice either to the intereſt of particular perſons, or to that of the Publick [a].

[*For explaining what is mentioned in this Article of Reporters of Cauſes, it is neceſſary to obſerve, that in the Courts of Juſtice in* France, *which conſiſt of many Judges, it is the practice, for the greater diſpatch of Juſtice, for the Judges to appoint one of their number to examine the proofs that have been made on both ſides, in a Cauſe depending before them, and to report the merits thereof to the whole Bench, that they may give a Definitive Sentence thereon. And the Judge who is ſo appointed, is called the Reporter of the ſaid Cauſe. This practice is in uſe in the ſupreme Court of Juſtice in* Scotland, *which conſiſts of fifteen Judges, and which in its firſt Inſtitution was modelled much after the manner of the Courts of Juſtice in* France. *So that the Cauſes depending before the Court of Seſſion in* Scotland, *are diſtributed among the Lords of Seſſion, who have their ſeveral Cauſes to report to the whole Bench. Stairs* Inſt. of the Law of *Scotland*, lib. 4. tit. 2.

[a] Omnis cujuſcumque majoris vel minoris adminiſtrationis univerſæ noſtræ reipublicæ judices monemus, ut nullum reſcriptum, nullam pragmaticam ſanctionem, nullam ſacram adnotationem, quæ generali juri vel utilitati publicæ adverſa eſſe videatur, in diſceptationem cujuſlibet litigii patiantur proferre: ſed generales ſacras conſtitutiones modis omnibus non dubitent obſervandas. *l. ult. ff. ſi contr. juſ.*

VII.

1. One Officer may diſcharge the Functions of another, in caſe of abſence.

Since it often happens that Judges cannot attend punctually on all their Functions, and that they may be hindered from it by a neceſſary abſence on ſome other occaſion, and by other lawful impediments, the Laws have therefore taken care to have their abſence ſupplied; for there is no Officer whoſe Functions another perſon may not exerciſe in his abſence, according to the Order and Regulations that are preſcribed in ſuch caſes: and as for the cauſes which may ſerve as a lawful excuſe, either for Non-Reſidence, or for the non-performance of ſome Functions, the Reader may conſult the Rule explained in the ſixth Article of the third Section of the foregoing Title.

TITLE V.

Of the FUNCTIONS and DUTIES of ſome other Officers of Juſtice, beſides JUDGES, whoſe Miniſtry is a part of the Adminiſtration of Juſtice.

THE Adminiſtration of Juſtice implies the uſe of many ſorts of Functions beſides thoſe of Judges; for what they decree would be to no purpoſe, if there were not Miniſters to put their decrees in execution: and in order to have them executed, it is neceſſary that they ſhould be taken down in writing, and that they ſhould be depoſited in the hands of other perſons than the Judges themſelves. Thus as to the Voluntary Juriſdiction, whatever is ordained for regulating the Adminiſtration of Juſtice, the Policy, and other Matters, requires the uſe of theſe two ſorts of Functions; and they are alſo neceſſary for what relates to the Contentious Juriſdiction, and to Decrees and Sentences between parties. It is for this Function of taking down in writing, and of keeping the Orders, the Decrees and Sentences, and other Acts of Courts of Judicature, which are to be preſerved, that Regiſters have been eſtabliſhed; and in order to put them in execution, it was neceſſary to have Apparitors and Bailiffs: And ſeeing both in the voluntary and contentious Juriſdiction, there was occaſion for publick Priſons for the keeping of Priſoners, whether they were arreſted for Debt, or for Crimes, or Offences; it was likewiſe neceſſary that there ſhould be perſons charged with the cuſtody of the Priſoners; and this is the Function of thoſe Officers called Jailers. But as for the contentious Juriſdiction, ſeeing Juſtice is rendered only to thoſe who deſire it, and that it is for the dignity thereof that the demands, the defences, and the other proceedings, which are to be made in the

preſence of the Judges, be made with that order and reſpect that is due to their character, and which would be often violated by the parties themſelves, who beſides are generally ignorant of the method of Judicial Proceedings, Proctors have been eſtabliſhed, who repreſent the Parties in Judgment, make prayers and requeſts in their names, carry on the proceedings in the Cauſe, and perform the other Functions belonging to their Offices.

Beſides theſe Functions which are neceſſary for the Adminiſtration of Juſtice in all ſorts of Affairs, ſmall or great, without diſtinction, there are other Functions, whereby the Rights of the Parties are to be deduced, and ſupported by Principles of Law, whether it be by Argument at the Bar, or Pleadings in writing, which Functions have required the Miniſtry of perſons capable thereof, and are exerciſed by Advocates. But there is this difference between this Miniſtry and all the others of the ſeveral Functions of the Adminiſtration of Juſtice, that whereas for the diſcharge of the other Functions particular Officers have been eſtabliſhed, that of Advocates has been left free for all perſons who have obtained the Degrees of Batchelor and Licentiate in the Civil and Canon Law, and who have taken the Oath of an Advocate in a Sovereign Court of Juſtice; for, as ſhall be hereafter explained in the ſixth Title, the Functions of Advocates are of ſuch a nature, that their Miniſtry could not be erected into an Office.

It is in conſideration of this peculiar quality of the Function of Advocates, which does not require that their Profeſſion ſhould be erected into an Office, as it is neceſſary for all the other Functions which are required in the Adminiſtration of Juſtice, that we have not inſerted in the foregoing Titles, and that we ſhall not put down in this Title, that which relates to the Miniſtry and Functions of Advocates, and that we have reſerved them for a Title apart, which is the Title that immdiately follows.

Beſides theſe ſorts of Functions of Regiſters, of Proctors, of Apparitors, of Bailiffs, and of Jail-keepers, which are neceſſary in the Adminiſtration of Juſtice, there is another ſort of Functions which belongs to the Order of this Adminiſtration, but in a manner altogether different; and that is the Functions of Publick Notaries, who are eſtabliſhed for two principal uſes which the Acts that are paſſed before them have; one is, that their Signature ſerves as a proof of the truth of the Acts which they ſign; and the other, that their Preſence and their Signature gives to thoſe to whom others oblige themſelves by Acts ſigned by them, a Right of Mortgage; which they would not have by a private Act or Writing, ſigned only by the Party: and this makes a Function of Voluntary Juriſdiction which is annexed to their Offices, as the ſame has been explained in the twenty third Article of the firſt Section of the firſt Title.

Seeing theſe Functions of Publick Notaries are a matter of too narrow an extent, to require a diſtinct Title to themſelves; and that, as we have juſt now obſerved, they are a part of the Order of the Adminiſtration of Juſtice; we ſhall explain them under this Title, together with the Functions of Regiſters, and other perſons, whoſe Miniſtry makes a part of this Adminiſtration. So that this Title ſhall be divided into five Sections: the firſt, ſhall be of Regiſters; the ſecond, of Proctors; the third of Apparitors, and Bailiffs; the fourth, of Jailers; and the fifth, of Publick Notaries.

SECT. I.

Of the Functions and Duties of Regiſters.

OF all the Functions which belong to the Order of the Adminiſtration of Juſtice, there are none which have ſo great a connexion with thoſe of Judges, as the Functions of Regiſters; for it is their buſineſs to write down what is dictated or pronounced by the Judges, and to be Depoſitaries of the Decrees, Sentences, and other Acts, which are to be preſerved, and to give Exemplifications of them to the parties; and it is their Signature that is the proof of the truth of what they ſign. So that next to the Functions of Judges, thoſe of Regiſters are the firſt in the Order of the Adminiſtration of Juſtice.

We ſhall not here give the definition of the Office of a Regiſter, that we may avoid repeating what has been ſaid thereof

thereof in the eighteenth Article of the first Section of the first Title; neither shall we attempt to explain all the several Functions of Registers which are different according to the different Offices, and which in *France* are distributed among several Offices, and among several Registers, such as those for Presentations, for the Distribution of Causes, those where the Minutes of the Court are deposited, those which have the custody of the Decrees, Sentences, and other Acts of Court, the Registers of Deeds, and others; which detail is sufficiently known and regulated by the Ordinances, and does not come within the design of this Book: and we shall confine our selves in this Section, to the general Rules of their Functions, and the Duties which are consequences thereof.

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1. *Definition of Registers.*
2. *The chief duty of Registers.*
3. *They are obliged to secrecy.*
4. *It is their duty to take care of the things deposited in their hands.*
5. *Other duties of Registers.*

I.

1. Definition of Registers.

REgisters are Officers appointed to take down in writing, by the direction of the Judges, the Decrees, Sentences, Judgments, and the other Acts which are sped Judicially, to remain Depositaries of that which ought to be preserved, and to give out Exemplifications thereof to such as have an interest therein[a].

[a] *See the eighteenth Article of the first Section of the first Title.*

II.

2. The chief duty of Registers.

Seeing the principal Function of Registers is to set down in writing that which is pronounced, or dictated by the Judges, their principal duty is to write the same exactly and faithfully: for altho' what they write ought to be revised by the Judges, who ought to sign it, yet for want of due exactness, and much more for want of fidelity in the writer, some words may be easily altered, expressions may be added or left out, and by errors of this kind, or surprizes, occasion may be given to injustices, which may escape being taken notice of by such Judges, as happen to be either not very clear sighted, or not very attentive.

III.

3. They are obliged to secrecy.

The Registers having often knowledge of what is transacted privately in the Courts of Justice, before the final Resolutions be taken; and being the Depositaries of what is decreed, and which ought not to be made known to the parties till the due time, they are obliged to the duty of secrecy, not only as to what passes before Judgment, and which requires secrecy, but also as to what is decreed, until the time comes that it is to be made known to the parties.

IV.

4. It is their duty to take care of the things deposited in their hands.

The Function of Registers, which makes them Depositaries of the Decrees, Sentences, and other Acts, and of the Register-Books which are to remain in the Office, makes it a duty incumbent on them to be careful in preserving those Records whilst they continue in their hands, and till they are removed from their Office into the publick Archives, where they are to remain for ever.

V.

5. Other duties of Registers.

The other duties of Registers are reduced in general to a capacity for their Functions, to probity in the discharge of them, integrity and fidelity which are required in every one of them, to be guilty of no manner of Extortion, and to be contented with the common and ordinary Fees.

SECT. II.

Of the Functions and Duties of Proctors.

WE give the general name of Procurators or Attornies, to those who manage some affairs for other persons, having a power from them so to do; and the reciprocal Engagements between the said Procurators and those who constitute them, that is to say, who nominate them, and commit their Affairs to them, have been explained in the Title of Proxies in the Civil Law in its Natural Order. Thus it is not of

thoſe Procurators in general that we treat here, but of thoſe who have this quality under the Title of an Office, that they may exerciſe that Function in Law-Suits for the Parties who impower them. For it is the uſage with us, that whereas it was naturally lawful for the Parties themſelves to explain to the Judges their Rights and their Pretenſions, or to chuſe, in their abſence, Proctors who ſhould perform that office for them, and that this was alſo the uſage in the *Roman* Law; one is obliged in *France* to have a Proctor in all ſorts of Cauſes, and they can chuſe only out of the number of thoſe who have this quality under the Title of an Office; and this uſage hath had its Origine from two cauſes, which rendred it neceſſary, as has been obſerved in the Preamble of this Book: For on one part, the liberty which the Parties themſelves had to explain their Rights before the Judges, was attended with paſſion, confuſion, noiſe, and with an irreverent behaviour, which violated the reſpect due to Juſtice, and diſturbed the Order thereof: And on the other part, the proceedings neceſſary for the carrying on of Cauſes to a final Sentence have made it neceſſary to make uſe of Proctors who underſtand them, and who may be obliged to obſerve the Order of Judicial Proceedings, which the greateſt part of Parties are ignorant of, and which cannot be obſerved without the aſſiſtance of ſuch perſons as are daily converſant in thoſe matters. Thus for example, it is neceſſary for carrying on a Law-ſuit, that he who is ſummoned ſhould appear to the Citation, and that he and his adverſe Party ſhould explain to one another their mutual demands and pretenſions, and communicate to each other their Proofs, their Writings, and their Exhibits; which makes it neceſſary that Proctors ſhould be reſident in the place where the Law-ſuit is to be carried on, for otherwiſe it would be neceſſary that for every Aſſignation, or Act ſped in the Cauſe, the Parties who may chance to live in places remote from the ſeat of Juſtice, ſhould be put to great charges, and ſuffer great delays, in ſummoning and warning each other to give their preſence at the ſpeeding of the ſeveral Acts; and this would likewiſe be attended with many other inconveniencies, which it is not neceſſary to mention here.

One may be able to judge by this general Idea of the Miniſtry of Proctors, what their Functions are, and at the ſame time what their Duties likewiſe are, ſeeing they ought to be proportioned to the uſe for which they are eſtabliſhed, as will appear by the Rules which follow.

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1. *Definition of Proctors.*
2. *The uſe and primary duty of Proctors.*
3. *They ought to abſtain from all unfair practices, which the intereſt of their Clients may ſtand in need of.*
4. *They ought to exerciſe their Miniſtry with moderation, and to abſtain from all manner of ſurprize.*
5. *They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.*
6. *The Office of Proctors implies Functions, which in the Order of the Adminiſtration of Juſtice are to be performed even in unjuſt Cauſes.*
7. *Sequel of the foregoing Article.*
8. *Proctors are not allowed to draw up the Writings which ſerve to eſtabliſh and found the Right of their Clients.*
9. *Other duties of Proctors.*

I.

1. *Definition of Proctors.*

PRoctors are Officers eſtabliſhed to repreſent in Judgment the Parties who impower them to appear for them, to explain their Rights, to manage and inſtruct their Cauſe, and to demand Judgment [a].

[a] *See the nineteenth Article of the firſt Section of the firſt Title.*

II.

2. *The uſe and primary duty of Proctors.*

Seeing the uſe of Proctors has been eſtabliſhed in order to remove from Tribunals the liberty which parties had to vent their paſſions, their anger, and to commit irreverences and other abuſes, which are conſequences of the want of the reſpect that is due to Judges, the primary Function of Proctors, and their chief duty is, to look upon themſelves as having eſpouſed the intereſt of their Clients, in order to defend them ſo far as Juſtice may demand, and as if they themſelves were the Parties concerned, but free from their paſſions, and capable of demanding Juſtice with that reſpect and decency that is due to the Tribunal thereof [b].

[b] *See*

[b] *See what has been ſaid touching this uſe of Proctors in the Preamble of this Section.*

III.

3. They ought to abſtain from all unfair practices which the intereſt of their Clients may ſtand in need of.

It follows from this firſt duty of Proctors, that ſeeing they are bound to defend their Clients only in what is juſt, and without paſſion, they ought to abſtain from all unfair practices which the intereſt of their Clients may perhaps ſtand in need of; and if their Clients ſhould require ſuch aſſiſtance from them, the quality of being their Proctor would be ſo far from obliging them to render them ſuch ſervices, that it obliges them on the contrary to gainſay and oppoſe ſuch practices, and rather to abandon the defence of their Clients than to be aiding to them in any unlawful courſes, which they ought to hinder by all ways that Juſtice and Prudence may require [c].

[c] *See the Ordinances of* Charles VII. *in* 1446. *Art.* 34. *and of* Francis I. *in* 1355. *Art.* 10. *and others relating to this matter.*

IV.

4. They ought to exerciſe their Miniſtry with moderation, and to abſtain from all manner of ſurprize.

This duty of Proctors to eſpouſe the intereſt of their Clients without their paſſions, obliges them to exerciſe their Miniſtry with that moderation, that mildneſs, and that civility, which is reciprocally due among perſons whoſe Profeſſion is to demand only Juſtice, without any private Intereſt; and this duty implies with much more reaſon that of an upright fidelity in abſtaining from all manner of ſurprize [d].

[d] *See the Ordinance of* Charles VII. *in* 1446. *Art.* 18. *quoted on the laſt Article of this Section. Altho' this Ordinance hath not a direct relation to this Rule, yet it may be applied to it.*

V.

5. They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.

If Proctors, in the exerciſe of their Office, are obliged to abſtain totally from the paſſions and injuſtices of their Clients, much more are they obliged not to ſubſtitute their own paſſions in the room of thoſe of their Clients, and not to deprave the integrity of their Miniſtry, by mixing with it views of their own proper intereſt, which it is eaſy for them to favour in the exerciſe of their Functions, whether it be by protracting the Law-ſuits, that they may reap the advantage of a ſuperfluous number of Proceedings and Writings, or by uſing other unfair means which we ſee practiſed by ſome, and which are of greater or leſſer conſequence, and more or leſs criminal, according to the nature of the Affairs, the variety of Incidents which may happen to be joined with them, and the occaſions given thereto by the confuſion which follows from that multiplicity of proceedings, ſuch as in Seizures of Goods, Decrees and Orders touching the Sale of them, and the ſtating the claims of Creditors, and in other affairs of the like nature; where the injuſtices of multiplying and protracting the proceedings, and other acts of greater oppreſſion, do often end in nothing leſs than the ruin of many Families, both on the part of the Debtors, and on that of the Creditors [e].

[e] Nemo ex induſtria protrahat jurgium. *l.* 6. §. 4. *Cod. de poſtul.*

It is in order to prevent the multitude of proceedings, that they are expreſly prohibited to make any new Writings, or to add any thing to the Proceſs after the Cauſe is determined.

We forbid Proctors and all others to make any new Writings, or to augment the Rolls therewith after the cauſe has been adjudged, under the penalty of four times the value, to be paid by him who tranſgreſſes the ſaid Order; which Penalty it ſhall not be in the power of our Judges to mitigate, and the Offenders ſhall moreover be ſuſpended from the execution of their Offices, *&c.* *Ordinance of* Lewis XIV. *in* 1667. *Art.* 11. *of Coſts.*

See the tenth Article of the ſame Title.

VI.

6. The Office of Proctors implies Functions, which in the Order of the Adminiſtration of Juſtice are to be performed even in unjuſt Cauſes.

Altho' it be the duty of Proctors not to eſpouſe the injuſtice of their Clients, and that it would ſeem for this reaſon that a Proctor ought not, no more than an Advocate, to engage in the defence of an unjuſt Cauſe, yet nevertheleſs their Office implies Functions which in the Order of the Adminiſtration of Juſtice are neceſſary to be performed even in unjuſt Cauſes. Thus for inſtance, it is a Rule in the Order of Judicial Proceedings, that thoſe who are cited to appear ought to give an appearance, and to conſtitute a Proctor with whom the Plaintiff may carry on his Cauſe, and bring it to Judgment; and if he who is cited does not appear, a default is decreed againſt him, whereof he muſt pay the coſts: which obliges the Proctor who is imployed by a Defendant againſt a demand that is highly juſt to preſent himſelf in Judgment, that is, to appear for his Client, that he may prevent the taking of a default againſt him; and how unjuſt ſoever the Cauſe of this Defendant may be, yet the Proctor, who ſhould know it to be ſuch, would nevertheleſs be obliged to appear [f];

pear[f]; for his appearance may perhaps produce a very good effect, by putting an end to the Law-Suit.

[f] *See the Ordinance of 67, Title 4. of Preſentations.*

VII.

7. Sequel of the foregoing Article.

Beſides the Functions of the nature of thoſe which have been explained in the foregoing Article, Proctors may likewiſe exerciſe the Functions of their Office in behalf of unjuſt Cauſes in another ſenſe, and that even in caſes where it would not be juſtifiable for Advocates to exerciſe theirs. For whereas the Function of Advocates being to give counſel to the Parties, it obliges them to diſcern between pretenſions that are juſt, and thoſe that are not, and not to undertake the defence of unjuſt Cauſes, Proctors may be ignorant of the Rights of the Parties, and are not bound to examine into the Queſtions of Law. Thus they are not bound to abſtain from ſerving their Clients, except in caſes of a crying injuſtice, or where the injuſtice is known to them; for in theſe caſes they would make themſelves accomplices in an Injuſtice, by praying or ſoliciting for their Clients, what they are perſuaded their Clients themſelves ought not in conſcience to demand, and what it would be unjuſt to grant them[g].

[g] *See the preceding Article.*

VIII.

8. Proctors are not allowed to draw up the Writings which ſerve to eſtabliſh and found the Right of their Clients.

Seeing the Functions of Proctors are limited to what relates to the Proceedings or Aſſignations in Court, and the inſtruction of the Cauſe, and that it is no part of their Miniſtry to write, or to argue at the Bar for their Clients, except in ſo far as relates to their Functions; they are prohibited by the Ordinances of *France*, to draw up Writings which may ſerve to eſtabliſh and found the Rights of their Clients; and theſe ſorts of Writings ought to be drawn up and ſigned by Advocates[h].

[h] *See the Ordinance of* Francis I. *of the twelfth of* February 1519. *Art.* 19.

Altho' it is not neceſſary that Proctors ſhould have a capacity to eſtabliſh and found the Rights of their Clients, yet they ought to have a capacity for their Office that is publickly approved of.

No perſon ſhall be admitted a Proctor in our Court, until he has been duly examined by our ſaid Court, and found capable. *Ordinance of* Charles *the Seventh in* 1446, *Art.* 47.

IX.

9. Other duties of Proctors.

The other duties of Proctors conſiſt in acquiring a thorough Knowledge of the Rules of their Profeſſion, in applying themſelves to the Affairs committed to their charge, with ſuch a vigilance, diligence, and care, as that their Clients may not be any way ſurprized, and that their Cauſes be carried on without any delay; and likewiſe on their part that they obſerve with reſpect to the adverſe Party every thing which the Order of Juſtice and a fair upright dealing may require. They are to content themſelves with the ordinary Fees and Perquiſites of their Office, without exacting any more than what is ſettled by the Rules and Orders of the Court; they are to ſerve the poor for nothing, as they are required to do by Law; they are to ſerve thoſe who by reaſon of their poverty, or becauſe of the power of their adverſaries, are forced to apply to the Judge to have a Proctor aſſigned them: they are obliged to abſtain from all manner of Extortion, and to beware eſpecially of the crime of compounding with their Clients for what may be made of the Cauſes with which they are charged, or for a ſhare of it, and of treating with them in any manner, which may directly or indirectly have the like effect[i].

[i] Præterea nullum cum litigatore contractum quem in propriam recipit fidem ineat advocatus, nullam conferat pactionem. *l.* 6. §. 2. *C. de poſtul.*

See the fifth Article of the ſecond Section of the following Title.

See in relation to the capacity required in thoſe perſons who exerciſe theſe Functions, the Ordinance of Charles *the Seventh in* 1446. *Art.* 47, *quoted on the foregoing Article. See that of* Lewis XII. *in* 1507, *Art.* 118. *and of* Henry II. *in* 1551. *Art.* 9.

See the Ordinance of Charles V. *in* 1364. *Art.* 7.

See the Ordinance of the 30th *of* Auguſt 1536, *Chap.* 1. *Art.* 38.

SECT. III.

Of the Functions and Duties of Apparitors and Bailiffs.

ALtho' Bailiffs have not altogether the ſame Functions as Apparitors or Tip-ſtaves, and that for inſtance, the Intimations touching the proceedings in a Cauſe are made to the reſpective Proctors by the Apparitors, and not by Bailiffs; and that it is the Apparitors who

who call the Cauſes at the time of Hearing; yet ſeeing Apparitors do likewiſe exerciſe ſeveral Functions in common with Bailiffs, as for example, Executions, Orders of Court, Seizures of Goods, Impriſonments, and others; it was proper to comprize under one and the ſame Section the Rules which are common to theſe two ſorts of Officers, to avoid the making two Sections of Rules that are altogether the ſame: which will be of no manner of prejudice to the diſtinctions which are made between them on account of their Name, their Rank, and of ſome other Functions which may diſtinguiſh them, ſuch as thoſe of Apparitors for the ſervices which they do about the perſons of the Judges, whether it be in the Court where they adminiſter Juſtice, or on occaſions of Ceremony, or otherwiſe.

[*We muſt obſerve here, that the word* Apparitor, *in its proper Acceptation in* England, *is meant only of ſuch Officers as attend the Spiritual Courts, to ſerve the Proceſſes thereof, and to perform the other inferior Miniſterial Acts which are requiſite for the due Adminiſtration of Juſtice therein. The Officers who attend the Execution of Juſtice in the Temporal Courts in* England, *are diſtinguiſhed by the names of* Bailiffs, Sergeants, *or* Tip-ſtaves.]

The CONTENTS.

1. *Definition of theſe two ſorts of Officers.*
2. *Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.*
3. *Intimations.*
4. *Executions.*
5. *Other duties of Apparitors and Bailiffs.*

I.

1. *Definition of theſe two ſorts of Officers.*

Apparitors are Officers appointed for executing the Orders of the Courts of Juſtice; which implies the Functions of making the neceſſary intimations, either for carrying on the Cauſes, in order to obtain Sentence, or for putting the Sentence in execution, and compelling the ſeveral perſons that may be any way concerned, by the uſual ways, to a compliance with whatſoever the Order of the Adminiſtration of Juſtice may render neceſſary; and Bailiffs are alſo Officers, who under another Title exerciſe the ſame Functions as Apparitors[a].

[a] *See the twentieth and twenty firſt Articles of the firſt Section of the firſt Title.*

II.

2. *Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.*

Theſe Functions of Apparitors and Bailiffs may be reduced to two principal Functions; one, of Intimations, or Citations; and the other, of Executions and Conſtraints; and each of theſe ſorts of Functions obliges them to the duties which are ſuited to them, and which ſhall be explained in the Rules which follow[b].

[b] *See the following Articles.*

III.

3. *Intimations.*

As for Intimations, or Citations, the duty of this Function conſiſts in giving to the perſons to whom the Intimations are made, Copies of the Orders or Acts of Court which they intimate to them; for it is in order to let them know the tenour of them that the intimation is neceſſary; and they ought to leave the ſaid Copies either with the perſons themſelves, or in their abſence with ſome of their ſervants, and to return a Certificate of the day on which they ſerved the Proceſs, and to mention therein the very hour of the Service, in ſuch caſes wherein that exactneſs is required[c].

[c] *The Returns, or Certificates, made by Sergeants, in relation to any Execution, Seizure, or Arreſt, ſhall mention the days and the time of the day, whether before or after noon, that the ſame have been made; and the ſaid Sergeants ſhall ſet down at the bottom of their Returns what they took for their Fees, and ſign the ſame,* &c. The States of *Blois*, Art. 173.

See touching this matter the Ordinance of Francis I. *Art.* 12.

IV.

4. *Executions.*

As to Conſtraints, Seizures, Executions, Impriſonments, and other the like Functions, the duties thereof conſiſt in exerciſing them with the neceſſary force, but without violence, and with that moderation and humanity which the Miniſtry of Juſtice does demand[d], in ſeizing only the Moveables which are liable to be attached, leaving to the Debtors ſuch things as the Law does not allow to be taken from them by Execution, in making an exact Inventary of the Goods which they ſeize, and in not charging the perſons into whoſe hands the things are depoſited with more than what is really delivered to them; and when there is any reſiſtance made to them in the execution of their Office, either by the Parties themſelves,

or other perſons, they ought to make a faithful Report thereof without adding any thing to the truth.

[d] *As to the moderation and humanity which thoſe perſons ought to have who execute theſe ſorts of Offices, ſee the Edict of* Amboiſe, *art. 6. which ſtrictly prohibits Sergeants to uſe any arrogant or inſolent language in the Executions wherein they happen to be imployed, upon pain of Corporal Puniſhment to thoſe who diſobey.*

V.

5. Other duties of Apparitors, and Bailiffs.

All the other duties of Apparitors and Bailiffs are reduced to their being well inſtructed in the duties of their Functions, and the executing them with that uprightneſs and fidelity which the Order of Juſtice requires, not to be guilty of any Extortion, and to reſt ſatisfied with what may be lawfully due to them according to the Uſages and Regulations of the ſeveral Courts, and in doubtful caſes, with what the Judges ſhall order them for their labour and pains [e].

[e] *We enjoin our Sovereign Courts of Juſtice, as well as all other inferior Courts, to regulate the Fees of Regiſters and Sergeants, and other Miniſters of Juſtice.* States of *Blois*, Art. 159, 160.

This Order does likewiſe carry, that if they take greater Fees than thoſe which have been regulated by the Judges, they ſhall be puniſhed with death.

As to all the other duties of Apparitors or Sergeants, ſee the Ordinances of Philip IV. *in* 1302. *art.* 18. *art.* 27. *of* Francis I. *in* 1535. *chap.* 6. *art.* 10. *and in* 1536. *chap* 20. *art.* 3. *and that of* Charles VIII. *in* 1490. *art.* 3.

SECT. IV.

Of the Functions and Duties of Jailers.

The CONTENTS.

1. *Definition of Jailers.*
2. *They ought to be appointed by Authority of Juſtice.*
3. *Two different ſorts of duties of Jailers.*
4. *They ought to have a watchful eye on the priſoners.*
5. *They ought to be more particularly watchful over Criminals.*
6. *Beſides the care of watching the priſoners, they ought to treat them with as much humanity as it is lawful for them to ſhew them.*

I.

1. Definition of Jailers.

JAilers are the Keepers of the perſons of Priſoners, whether they be committed for Crimes, or for other cauſes.

II.

2. They ought to be appointed by Authority of Juſtice.

The intereſt which the Publick hath in the ſafe cuſtody of Priſoners, does not allow that there ſhould be any other Priſons beſides thoſe in publick places, which are ſet apart for that uſe; and this charge of Priſoners is a publick Function which a bare private perſon cannot exerciſe. Thus the Keeper of the Jail ought to be nominated to this Function by the Authority of Juſtice; and it is an Office which the King has the diſpoſal of [a].

[a] Jubemus nemini penitus licere per Alexandrinam ſplendidiſſimam civitatem vel Ægyptiacam diœceſim, aut in quibuſlibet imperii noſtri provinciis, vel in agris ſuis aut ubicumque domi privati carceris exercere cuſtodiam. *l. C. de priv. carc. inhib.*

[*In* England, *the Cuſtody of the County Jails is incident to the Office of the Sheriff, and inſeparable from it, except in ſome particular caſes, as in the Priſons of the* King's-Bench, *and* Marſhalſea *in* Surrey; *the Cuſtody whereof is particularly excepted from the Sheriff, and reſerved to the proper Officers who have the Grant thereof. And altho' the Jail it ſelf does belong to the King, and is to be repaired at the common charge of the County, yet it belongs to the Sheriff to put in ſuch Jaylers or Keepers as he will anſwer for, and from whom he ought to take good Security to indemnify him.* Stat. 14 Ed. 3. ch. 10. 19 H. 7. ch. 10.]

III.

3. Two different ſorts of duties of Jailers.

This Function of Jailers implies two different ſorts of duties; the one is of thoſe which reſpect the Publick, and the perſons who are intereſted in the ſafe cuſtody of the Priſoners; and the other of thoſe which relate to the Priſoners themſelves; and theſe two ſorts of duties are reduced to the following Rules.

IV.

4. They ought to have a watchful eye on the priſoners.

The duty of Jailers towards the Publick, and the perſons who are intereſted in the ſafe cuſtody of priſoners, conſiſts in having a watchful eye over them; ſo that they are to be anſwerable for the Eſcapes of the Priſoners, except where they are reſcued by force, which cannot be imputed to them.

V.

5. They ought to be

Beſides the care of watching the Priſoners, to prevent their eſcape, for what

more particularly watchful over Criminals.

what cauſe ſoever it be that they are committed to priſon, the care of Priſoners accuſed of Crimes obliges moreover the Jailers to keep the ſaid Criminals in Irons and Dungeons, when it is ſo ordered by a Court of Juſtice. They ought further to take care that thoſe Offenders, and all others who are charged with Crimes, for whoſe Trial and Conviction it may be neceſſary that no perſon ſhould have any acceſs to them, be kept ſtrictly purſuant to the Order that is given, and that nothing be delivered into their hands until it be firſt duly viſited and examined, whether it be any thing that may ſerve as an Inſtruction to the Criminals, to help them to elude the proofs of the truth, or ſome inſtrument of death, or poiſon, to thoſe of whom there may be ground to fear leſt deſpair ſhould move them to anticipate their Condemnation by a voluntary death.

ſecum criminoſos includit: hac lege ſancimus, ut etiam ſi pœnæ qualitas permixtione jungenda eſt, ſexu tamen diſpares diverſa clauſtrorum habere tutamina jubeantur. *l.* 3. *C. eod.*

VI.

6. Beſides the care of watching the priſoners, they ought to treat them with as much humanity as it is lawful for them to ſhew them.

The duty of Jailers towards the priſoners, obliges them to join to the ſafe cuſtody of their perſons, all manner of humanity [b] that is conſiſtent therewith, whether it be in what relates to their Lodging [c], and the Furniture thereof, their Diet, if they have the charge of it, the receiving viſits from their Friends, when that may be granted them, and the other civilities and kindneſſes of the like nature.

[b] In quacunque cauſa reo exhibito, ſive accuſator exiſtat, ſive eum publicæ ſollicitudinis cura produxerit, ſtatim debet quæſtio fieri, ut noxius puniatur, innocens abſolvatur. Quod ſi accuſator aberit ad tempus, aut ſociorum præſentia neceſſaria videatur: id quidem debet quàm celerrimè procurari. Interea vero reum exhibitum non per ferreas manicas & inhærentes oſſibus mitti oportet, ſed prolixiores catenas, ſi criminis qualitas etiam catenarum acerbitatem poſtulaverit, ut & cruciatio deſit, & permaneat ſub fida cuſtodia. Nec vero ſedis intimæ tenebras pati debebit incluſus, ſed uſurpata luce vegetari, ac ſublevari: & ubi nox geminaverit cuſtodiam, in veſtibulis carcerum, & ſalubribus locis recipi: ac revertente iterum die, ad primum ſolis ortum illico ad publicum lumen educi, ne pœnis carceris perimatur: quod innocentibus miſerum noxiis non ſatis ſeverum eſſe dignoſcitur. Illud etiam obſervabitur, ut neque his qui ſtratorum funguntur officio, neque miniſtris eorum liceat crudelitatem ſuam accuſatoribus vendere: & innocentes intra carcerum ſepta letho dare, aut ſubtractos audientiæ longa tabe conſumere, non enim exiſtimationis tantum, ſed etiam periculi metus judici imminebit, ſi aliquem ultra debitum tempus inedia, aut quocunque modo aliquis ſtratorum exhauſerit, & non ſtatim eum penes quem officium cuſtodiæ eſt, atque ejus miniſtros capitali pœnæ ſubjecerit. *l.* 1. *C. de cuſtod. Reor.*

[c] Quoniam unum carceris conclave permixtos

SECT. V.

Of the Functions and Duties of Publick Notaries.

THE Functions of Regiſters and Proctors, and thoſe of Apparitors and Bailiffs, are exerciſed either for the Adminiſtration of Juſtice in the Supreme Courts of Juſtice, or elſewhere, for executing the Orders thereof, and are thereby diſtinguiſhed from the Functions of Notaries, which are exerciſed out of the Courts of Juſtice, and without any neceſſity of their having a particular order or warrant for executing them: but their Miniſtry is exerciſed voluntarily, to engage either by Covenants, or otherwiſe, thoſe who are willing to give to their Obligations, or other Acts, the publick Form which renders them authentick; which is the proof of their truth, and which gives to them a full and perfect execution, as has been already remarked at the end of the Preamble of this Title, and which ſhall be hereafter explained in this Section.

The CONTENTS.

1. *Definition of Notaries.*
2. *Different ſorts of Functions of Notaries.*
3. *They ought not to go beyond the bounds of their Function.*
4. *They are obliged to keep carefully and diligently the Original Minutes which are depoſited with them.*
5. *The conſequence of the Acts which they ſpeed obliges them to great ſecrecy.*
6. *Other duties of Notaries.*

I.

1. Definition of Notaries.

NOtaries are Officers eſtabliſhed, to give to Acts which are ſped in their preſence the character of the publick form, and of the Authority of Juſtice, which makes that thoſe Acts carry along with them the proof of their truth; for whereas private Acts which are ſigned only by the parties themſelves, are liable to be called in queſtion, un-

til they be verified, and proof made that they have been ſigned by the perſons whoſe names they bear; and altho' the truth of the ſaid private Acts ſhould be confeſſed or proved, yet they do not give a Right of Mortgage on the Eſtates of thoſe who bind themſelves; whereas the ſame Acts ſped before Notaries, whether there be only one Notary with Witneſſes, or that there be two Notaries without Witneſſes, according to the different Uſages of places, are Authentick, and have this effect, that their truth is proved by the Signature of the Notaries, and that they give a Right of Mortgage. Thus the Function of Notaries implies a kind of Authority, and voluntary Juriſdiction, which they have by vertue of the Title of their Offices for theſe two effects.

II.

2. Different ſorts of Functions of Notaries.

Seeing it is neceſſary in an infinite number of divers Acts, that they ſhould be Authentick, and that they ſhould have this character of the publick Form for either of the effects mentioned in the preceding Article, the Functions of Notaries extend to all ſorts of Acts, where this formality may be neceſſary, ſuch as Contracts of Marriage, Teſtaments, Deeds of Gift, Partnerſhips, Sales, Exchanges, Contracts of hiring and letting to hire, Leaſes, Tranſactions, Compromiſes, Obligations, Proxies, or Letters of Attorney, Aſſignments, Delegations, Acquittances, Tenders of Money for a Payment that is refuſed, or for a Power of Redemption, and all other Acts. Notaries may alſo make Inventaries of the Goods of Succeſſions, where the Heirs are Minors, or where the Heirs are deſirous to enjoy the benefit of an Inventary, or in the caſes of Succeſſions that are abandoned, of the Effects belonging to Bankrupts, or others, according as they may be called to the ſaid Functions by the Parties concerned, or may be appointed to do it by an Order of the Judge, as ſometimes Regiſters are; for this Function is a part of the Miniſtry of Juſtice, and the Judges themſelves do often exerciſe it.

III.

3. They ought not to go beyond the bounds of their Function.

Theſe different Functions of Notaries, and whatever elſe may belong to their Office, oblige them in the firſt place to have a capacity for exerciſing them, and to know how to diſtinguiſh in the Acts, where there may be occaſion for their Miniſtry, between thoſe whereof the forms are ſufficiently known to them, and thoſe which are of ſuch conſequence as to demand more ſkill and learning than is requiſite in their Profeſſion, eſpecially in places where Notaries are leſs ſkilful, and in affairs where the difficulties require the advice of Advocates; for altho' it is the buſineſs of the Parties themſelves to take good advice, yet it is prudent for Notaries not to undertake a thing that is beyond their capacity, and at leaſt to acquaint the Parties of the difficulties which they are not able to underſtand, and which it is neceſſary to have adjuſted, as in Tranſactions and other Treaties.

IV.

4. They are obliged to keep carefully and diligently the original Minutes which are depoſited with them.

Seeing there are many Acts paſt before Notaries, of which the Originals, which are called Minutes, ought to be preſerved for ever, ſuch as Contracts of Marriage, Deeds of Gift, Contracts of Sale, Teſtaments which Teſtators leave in their cuſtody, or which after their death are depoſited in the hands of a Notary, and divers other acts; it is the duty of Notaries to preſerve carefully, faithfully, and in good order all thoſe Original Minutes, and to grant Exemplifications of them to the Parties, and other perſons who ought to have them, or who have a right to demand them; and they ought to take for drawing up the Acts, and for delivering out authentick Copies of them, no more than what is due by Law.

V.

5. The conſequence of the Acts which they ſpeed obliges them to great ſecrecy.

The conſequence of keeping ſecret many Acts which are paſt before Notaries, makes it a duty incumbent on them to keep inviolably the ſecret, not only of what paſſes between the Parties before the Acts are ſigned, but alſo of the Acts themſelves after they are finiſhed; for if Notaries are bound to ſecrecy even in relation to Acts which in their own nature are ſuch, that the keeping of them ſecret is of no great importance, ſeeing they owe this fidelity to the intention of the Parties, which they cannot violate without prevaricating: the want of this ſecrecy in Teſtaments, and other Acts of all kinds, would tend to diſturb the peace of Families,

milies, and would occaſion other great Inconveniencies, for which their infidelity or indiſcretion would make them anſwerable, both towards God and towards the Publick, according to the quality of the facts and the circumſtances.

VI.

6. Other duties of Notaries.

All the other duties of Notaries are reduced to the having ſuch an entire fidelity, and taking all poſſible care to avoid in the diſcharge of their Functions every thing that may be contrary to Juſtice and to Truth, ſo that not only they may commit on their part nothing againſt either of them, for that would be to violate in the higheſt degree their firſt and chief duty; but that they have no hand in any fraud, in any ſurprize, and that they even oppoſe all ſuch ways if the Parties ſhould offer to make uſe of them; and that in fine they make themſelves inſtruments of promoting Juſtice and Peace between the Parties, on which depends the quiet of Families, the ſecurity of their Eſtates, the validity of Engagements, the ties of Partnerſhips, and of all ſorts of Commerce of the greateſt moment; and that they mediate and negotiate affairs of the greateſt conſequence to all perſons, in a manner that is ſuitable to Functions that are ſo neceſſary and of ſo great importance; and they ought to proportion the profits or recompence which they may pretend, not to this great conſequence of their Miniſtry, but to that which Uſage, the Regulations of the places, and an upright integrity altogether void of intereſt will allow them to take, and moderating even the Fees which they may juſtly claim with reſpect to perſons who are not able to pay them according to their labour; and that in conſideration that they receive frequently Gratuities from other perſons far above what they could reaſonably expect for their labour.

TITLE VI.

Of ADVOCATES.

ALtho' Advocates are not of the number of Officers, as all thoſe are who exerciſe in the Order of the Adminiſtration of Juſtice the Functions which we have been ſpeaking of hitherto; yet ſeeing the deſign of this Book is to explain the Functions and Duties, not only of the Officers, but alſo of the other perſons who partake in the publick Functions; and that thoſe of Advocates reſpect the Publick, and are a part of the Order of the Adminiſtration of Juſtice; they are likewiſe a part of the ſubject matter of this Book: ſo that it is neceſſary to explain here what are the Functions of Advocates, and what are the duties which are conſequences thereof.

The profeſſion of Advocates, is to give counſel in Affairs that are propoſed to them, and to plead and write for the Parties who intruſt them with the management of their Cauſes, if they find them to be juſt. And ſeeing there are few perſons who do not ſome time or other ſtand in need of the aſſiſtance of thoſe Functions, that many are obliged to have frequent recourſe to them, and that often for Affairs which concern their Honour, their Eſtates, the ſtate and condition of their Perſons, the peace and quiet of their Families, and where their deareſt and moſt important intereſts are at ſtake, the conſequence of this Miniſtry of Advocates gives them in the Publick ſo conſiderable a Rank of Honour, that we know that at the time that the Commonwealth of *Rome* was in its moſt flouriſhing condition, the perſons who occupied the firſt Dignities in the State diſtinguiſhed themſelves likewiſe by the Function of defending in Courts of Juſtice the Cauſes of thoſe who made choice of them for their Patrons and Defenders, and whom they called their Clients; and they embraced that imployment, that they might thereby have an occaſion to give proof on one hand of their Courage in Cauſes which engaged them to ſtand up in defence of Juſtice oppreſſed

oppreſſed by perſons in Power and Authority; and on the other hand to diſplay their Learning and their Eloquence; and by theſe two ways they endeavoured to acquire at the ſame time the univerſal eſteem of the whole Republick, and the love and affection of all thoſe who had been their Clients. It was becauſe of this ſingular Honour annexed to a Profeſſion which had all theſe advantages, that it was exerciſed without any fee or reward, and that ſome Advocates having begun to take of their Clients, either preſents, or ſome other payments, one of the Tribunes of the people, *Cincius* by name, cauſed a Law to be made, which was called after his name the *Cincian* Law, by which this Commerce was prohibited; but in proceſs of time people began to think, that ſuch a Commerce was juſt and reaſonable; and it certainly is ſo according to the general reaſon, that every Service deſerves a Recompence, either from the Publick, if the Functions which are exerciſed regard the Publick, or from particular perſons, if the Services which are rendred be of ſuch a nature, as that they would be chargeable to thoſe who render them, when the perſons who receive them would reap a conſiderable profit thereby, without making a grateful return for them: and ſince it is juſt that the Miniſters of the Goſpel, who are bound to ſerve the Church without Covetouſneſs, and upon other views than that of their private intereſt, ſhould not be without a Subſiſtence[a], and that care ſhould be taken to give it them, altho' they ſhould be negligent in demanding it; it is likewiſe juſt that every lawful Profeſſion ſhould yield to him who exerciſes it a recompence ſuitable to his labour, and to the ſervice which he renders. So that altho' the Profeſſion of Advocates be not exerciſed now-a-days without a recompence, and that it hath not that dignity annexed to it which it had at *Rome* when it was there exercis'd *gratis*, and by the chief perſons in the Republick; yet it has ſtill the eſſential characters of Honour annexed to Functions, which in their nature imply the uſe of the firſt qualities of the Mind, and of the chief vertues of the Heart. For as to the Faculties of the Mind, it is requiſite that an Advocate ſhould have them in perfection, and that he ſhould join to a clear Underſtanding and a ſolid Judgment the Knowledge of the Sciences of his Profeſſion, and the Art of writing and ſpeaking well: And as for the Heart, he ought to have it upright, and to join to the uprightneſs of his intention a charitable diſpoſition to defend his Clients, and eſpecially the Poor, the Widows, the Orphans, and other perſons who groan under oppreſſion, and he ought to be armed with a Reſolution, a Courage, and a Zeal that may animate him againſt Injuſtice, and ſtir him up to defend Juſtice and Truth againſt all perſons whatſoever without diſtinction. It is by the help of theſe qualities that an Advocate may acquire an Honour far ſuperior to that which thoſe perſons acquired who exerciſed this Profeſſion at *Rome*, who had nothing elſe in view beſides their own glory, and whoſe merit was chiefly owing to their Ambition.

[a] If we have ſown unto you ſpiritual things, is it a great thing if we ſhall reap your carnal things? 1 *Cor.* ix. 11.

Do ye not know, that they which miniſter about holy things, live of the things of the temple? and they which wait at the altar, are partakers with the altar? Even ſo hath the Lord ordained, that thoſe which preach the goſpel, ſhould live of the goſpel. *Ibid.* ver. 13, 14.

It is becauſe of the nature of theſe Functions of Advocates, which are ſo frequent and ſo neceſſary to all perſons, and which are of ſo great conſequence, that it is reaſonable that every one ſhould chuſe an Advocate according to his mind, who may have the endowments which he deſires; and the importance of this Profeſſion makes it neceſſary that there ſhould be Advocates of a great capacity, and of a long experience, and who may be endowed with ſingular talents for Cauſes of the greateſt moment, eſpecially in the ſupreme Courts of Judicature, which afford frequent occaſions of ſpeaking in publick of other matters beſides Law, where their Miniſtry is neceſſary, and where they ought to diſplay the ornaments of Learning and Eloquence. Thus it was juſt to leave all perſons at liberty to engage in a Profeſſion of this nature, according as they find that they have talents for ſucceeding in it, and in which thoſe who are inferior to others in riches and wealth, may ſtrive to outdo them by an improvement of their natural parts; which makes it reaſonable that the Profeſſion of Advocates ſhould be open to all perſons who have the neceſſary qualifications for being admitted into it, and not confined

to any particular ſet of Officers, who ſhould have the ſole right of exerciſing the Functions thereof, excluſive of others. Thus in *France*, for exerciſing the Functions of an Advocate, the only qualification that is required, is that of having the Degrees of Batchelor and Licentiate in the Faculties of the Canon and Civil Law in ſome Univerſity, and of taking an Oath in a proper Court of Juſtice to execute faithfully and diligently the Functions of his Profeſſion.

It is upon theſe grounds of the Nature of the Miniſtry of Advocates, that we muſt judge of the detail of their Functions, and of their ſeveral Duties: which ſhall be the ſubject matter of two Sections; one relating to their Functions, and the other concerning their Duties.

SECT. I.

Of the Functions of Advocates.

The CONTENTS.

1. *The firſt Function of Advocates.*
2. *The ſecond Function of Advocates, to undertake the defence of Cauſes, if they find them to be juſt.*
3. *The third Function of Advocates, to draw up the Writings.*
4. *Particular Functions of Advocates in certain Courts.*
5. *Affinity between the Functions of Advocates and Proctors.*

I.

1. *The firſt Function of Advocates.*

THE firſt Function of Advocates, is to give their advice concerning affairs, about which they are conſulted; ſuch as to know if he who aſks counſel ought to undertake a Law-Suit; if he ought to ſubmit to a demand that is made to him, or if he ought to defend himſelf againſt it; if he ought to appeal from a Sentence, or acquieſce in it; if he ought to preſent a Requeſt or Petition againſt a Decree, or comply with it; how he ought to regulate the diſpoſitions of his Teſtament, the conditions of a Marriage Settlement, of an Agreement; and how he ought to carry himſelf in other difficulties of the like nature, in affairs of all kinds [a].

*

[a] *The conſequence and dignity of this Function was formerly ſo great that it was exerciſed by perſons of the higheſt Rank in the Commonwealth of* Rome, *at the time that it was in its greateſt ſplendor; and even at this day it procures a very great Honour to all thoſe who exerciſe it purſuant to the Rules which ſhall be explained.*

II.

2. *The ſecond Function of Advocates, to undertake the defence of Cauſes, if they find them to be juſt.*

The ſecond Function of Advocates, is to undertake the defence of Cauſes that are put into their hands, if they find them to be juſt, in order to plead them in the Courts where they exerciſe their Profeſſion, whether it be the merits of the Cauſe it ſelf, if it is ripe for Sentence, or the Incidents which may deſerve to be argued by Council [b].

[b] Qui laborantium ſpem, vitam, & poſteros defendunt. *l.* 14. *C. de advoc. diver. judicior.*

This duty of Advocates to undertake the defence of Cauſes which they find to be juſt, implies that of abandoning them, if afterwards they ſhould happen to diſcover any injuſtice in them.

The Miniſtry of Advocates implies two different Functions, which are the foundations both of the dignity of their Profeſſion, and of the Rules of their duties; that of the Counſel or Advice which they ought to give to the Parties who conſult them, and that of the defence of the Cauſes which they have adviſed to be undertaken. In giving Counſel or Advice, they perform the Function of Judges towards their Clients; and in the defence of Cauſes they repreſent their Clients before the Judges. As Judges, and the firſt Judges which their Clients have, they are bound to declare unto them Juſtice and Truth, as pronouncing to them the Judgment of God himſelf; and as their Defenders, they ought to repreſent their Clients diveſted of all their paſſions, and to defend them before the Judges as in the preſence of God. So that Advocates are as it were the Mediators of Truth and Juſtice between the Judges and their Clients; for they are the diſpenſers of Truth and Juſtice in reſpect of the Clients, and they are the defenders thereof with regard to the Judges. It is this dignity of their Miniſtry which gives them this advantage, that as the Holy Scripture hath given the name of God to thoſe to whom God commits this Authority, by making them Judges of other Men, ſo it has given the name of Advocate to him who has been made choice of to be both the Mediator towards God, and the Judge of all Men.

III.

3. *The third Function of Advocates, to draw up the Writings.*

The third Function of Advocates, is to draw up the Writings that are neceſſary for carrying on the Cauſe, in order to eſtabliſh the pretenſions of their Clients, whether it be by Arguments deduced from the Law, or proofs of Facts, ariſing from Deeds, or the examination of Witneſſes, or otherwiſe, and to confute the contrary pretenſions of the adverſe Party by the ſame ways, and in general, to draw up all the ſeveral Writings, Demands, Defences, Replications,

plications, to prepare Arguments on points of Law, and others, which may require the assistance of their Ministry [c].

[c] *By the Ordinance of* Charles V. *in* 1364, *art.* 3. *of* Charles VII. *in* 1446. *art.* 24. *and* 37. *and by that of* Charles VIII. *in* 1490. *art.* 92. *they are required to draw their Writings in as concise a manner as is possible.*

IV.

4. Particular Functions of Advocates in certain Courts.

There are other Functions of Advocates, which are peculiar to some Courts of Justice, and not common to all. Thus in *France*, in some Courts it is the business of an Advocate to pray that Letters Patents or Commissions for the principal Offices in the State be there registred, and to make an Harangue on that occasion. Thus in the Royal Courts, where there is not a sufficient number of Judges, to try Offenders, who are to be there tried without Appeal, by the Provosts of the Mareschals of *France*, the Ordinances direct Advocates to be taken, to supply the number of the Judges [d]. Thus in the same Courts, and other inferior Courts, the senior Advocate, in the absence of the Judges, sits upon the Bench, and performs the other Functions of a Judge, as the same is likewise directed by the Ordinances [e]. Thus in the Jurisdictions of some Seneschals, and in some Presidial Courts, the Advocates exercise the Profession of Proctors, and perform the Functions both of an Advocate and of a Proctor [f].

[d] *See the Ordinances of the* 20th *of* March, 1533. *of the* 5th *of* February, 1549. *art.* 2. *and others.*

[e] *See the Ordinances of the* 11th *of* April, 1519. *art.* 2. *and of* December, 1540. *art.* 19. *in default of Advocates, the senior Proctor exercises the Function of Advocate in the small Jurisdictions.*

[f] *The Usage of the Towns where the Advocates do the business of Proctors, is approved of by the* 58th *Article of the Ordinance of* Orleans, *which permits Advocates to exercise the Function both of Advocate and Proctor.*

V.

5. Affinity between the Functions of Advocates and Proctors.

All the Functions of Advocates in the Ministry of Justice, and which are exercised for the support and defence of the interests of their Clients, have this in common with the Functions of Proctors, that they represent their Clients divested of their passions. Thus it is essential to those Functions, that they be exercised only in the defence of Justice, and that they defend it only by ways that are worthy of it: which obliges Advocates to the duties which shall be explained in the following Section [d].

[d] *See the following Section.*

SECT. II.

Of the Duties of Advocates.

The CONTENTS.

1. *First duty of Advocates.*
2. *Advocates who are named Arbitrators, ought to have the capacity of Judges.*
3. *They ought to defend their Causes by the force of Truth and Justice, and not by falshood, transports of passion, injurious words,* &c.
4. *They are prohibited to maintain or defend unjust Causes.*
5. *They ought not to exercise their Functions out of a motive of Gain.*

I.

1. First duty of Advocates.

THE first duty of Advocates, is to render themselves capable of their Profession [a], not in such a manner as that they should be obliged before they enter upon the exercise of their Profession to be capable of all the Functions of it, of pleading all sorts of Causes, and of giving counsel and advice; but they ought not to undertake any Function, unless they have a capacity for it, nor engage themselves any farther than in proportion to the Experience which they have acquired; for there is this difference between the capacity of Advocates, and that which is necessary to Judges, that Advocates engage themselves voluntarily in their Functions, according as they are willing to embrace the occasions thereof; but Judges cannot enter upon the exercise of their Office, until they have first acquired a capacity for it; so that they ought from the very first beginning, to have a degree of capacity answerable to their Ministry.

It is for this reason that the Kings of France *have made Ordinances, which prohibit those to exercise the Function of an Advocate, who have not taken the proper Degrees, which are a proof of their capacity for the said Profession.*

See

See the Ordinance of Francis I. *in* 1535. *art.* 1.

[*In* England, *no perſon is admitted to practice as an Advocate in the Court of Arches, and other ſupreme Courts of Eccleſiaſtical Juriſdiction, or in the High Court of Admiralty, until they have regularly taken the Degree of Doctor of the Civil and Canon Law in one of the Univerſities.*]

II.

2. *Advocates who are named Arbitrators, ought to have the capacity of Judges.*

In the caſes where Advocates are called to exerciſe the Functions of Judges, as has been ſaid in the fourth Article of the preceding Section, they are obliged to the ſame duties of capacity, integrity, and application, as Judges are, according as has been explained in the fourth Title[b].

[b] *See the fourth Article of the preceding Section.*

III.

3. *They ought to defend their Cauſes by the force of Truth and Juſtice, and not by falſities, tranſports of paſſion, injurious words,* &c.

As Advocates are to repreſent their Clients without their paſſions[c], ſo they ought to imploy in the defence of the moſt juſt Cauſes, nothing elſe but Juſtice and Truth, and to abſtain not only from advancing untruths in matters of fact, from all diſingenuity, from all manner of ſurprize in their reaſonings, and from all other unfair practices, but likewiſe from giving ill language, from tranſports of paſſion, and from every thing which may be inconſiſtent not only with Juſtice, but even with the decorum and reſpect that is due to the Seat of Judgment[d].

[c] *See the laſt Article of the foregoing Section.*

[d] Ante omnia autem univerſi advocati ita præbeant patrocinia jurgantibus: ut non ultra, quàm litium poſcit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant. Agant, quod cauſa deſiderat, temperent ſe ab injuria. Non ſi quis adeò procax fuerit, ut non ratione, ſed probris putet eſſe certandum: opinionis ſuæ imminutionem patietur. Nec enim conniventia commodanda eſt: ut quiſquam, negotio derelicto, in adverſarii (ſui,) contumeliam aut palam pergat aut ſubdolè. Prætereà nullum cum eo litigatore contractum, quem in propriam recipit fidem, ineat advocatus: nullam conferat pactionem. *l.* 6. §. 1. *&* 2. *C. de poſtul.*

The Ordinances of France *contain the ſame prohibitions both to Advocates and Proctors, upon pain of ſuſpenſion from their Office, and of a Fine at diſcretion.* See the Ordinance of *Charles* VII. in *April*, 1453. art. 54.

IV.

4. *They are prohibited to maintain or defend unjuſt Cauſes.*

If it is not lawful for Advocates to defend Juſtice by any unfair means, much leſs is it lawful for them to maintain or defend unjuſt Cauſes; and thoſe who tranſgreſs this duty render themſelves accomplices of the injuſtice of their Clients, and guilty of perjury by breach of their Oath; for by their Oath they ſwear to obſerve the Ordinances, and they prohibit them to maintain or defend bad Cauſes; enforcing the ſaid prohibition under the penalty of making good to the Parties all their Coſts and Damages[e].

[e] *See the fifty eighth Article of the Ordinance of* Orleans.

It would be very ſtrange if Advocates ſhould be allowed to defend a Cauſe that is manifeſtly unjuſt; for it would be to erect the Tribunals of Juſtice into Sanctuaries for Robbers.

☞ *By the* Roman *Law this Oath was reiterated in every Cauſe, where the Advocates after Conteſtation of Suit were obliged to ſwear upon the Holy Goſpels, that they would defend with all their force what they ſhould judge to be true and juſt; and that they would abandon the defence of the Cauſe which they ſhould find at firſt to be unjuſt, or of which they ſhould afterwards diſcover the Injuſtice.*

Patroni autem cauſarum, qui utrique parti ſuum præſtantes auxilium ingrediuntur, cùm lis fuerit conteſtata, poſt narrationem propoſitam, & contradictionem objectam, in qualicumque judicio majore, vel minore, vel apud arbitros, ſive ex compromiſſo, ſive aliter datos, vel electos, ſacro-ſanctis Evangeliis tactis juramentum præſtent, quod omni quidem virtute ſuâ, omnique ope, quod verum & juſtum exiſtimaverint, clientibus ſuis inferre procurabunt, nihil ſtudii relinquentes, quod ſibi poſſibile eſt: non autem creditâ ſibi cauſâ cognitâ, quòd improba ſit, vel penitùs deſperata, & ex mendacibus allegationibus compoſita, ipſi ſcientes prudenteſque malâ conſcientiâ liti patrocinabuntur, ſed & ſi certamine procedente aliquid tale ſibi cognitum fuerit, à cauſa recedent, ab hujuſmodi communione ſeſe penitùs ſeparantes. *l.* 14. §. 1. *C. de judic.*

This Oath was not only taken by Advocates; but all ſorts of Judges, and even Arbitrators, were likewiſe obliged to take it.

Sancimus omnes judices, ſive majores, ſive minores, qui in adminiſtrationibus poſiti ſunt, vel in hac regia civitate, vel in orbe terrarum, qui noſtris gubernaculis regitur, ſive eos quibus nos audientiam committimus, vel qui à majoribus judicibus dantur, vel qui ex juriſdictione ſua judicandi habent facultatem,

cultatem, vel qui ex recepto, id eſt compromiſſo (quòd judicium imitatur) cauſas dirimendas ſuſcipiunt, vel qui arbitrium peragunt, vel ex authoritate ſententiarum & partium conſenſu electi ſunt, & generaliter omnes omninò judices Romani juris diſceptatores, non aliter litium primordium accipere, niſi priùs ante ſedem judicialem ſacro-ſanctæ deponantur ſcripturæ, & hæ permaneant non ſolùm in principio litis, ſed etiam in omnibus cognitionibus uſque ad ipſum terminum, & definitivæ ſententiæ recitationem; ſic enim attendentes ad ſacro-ſanctas ſcripturas, & Dei præſentia conſecrati, ex majore præſidio lites diriment, ſcituri, quòd non magis alios judicant, quam ipſi judicantur: cùm etiam ipſis magis, quàm partibus, terribile judicium eſt. Siquidem litigatores ſub hominibus, ipſi autem Deo inſpectore adhibito cauſas proferunt trutinandas. Et hoc quidem jusjurandum judiciale omnibus notum ſit, & Romanis legibus optimum à nobis accedat incrementum, & ab omnibus judicibus obſervandum: &, ſi prætereatur, contemptoribus periculoſum ſit. *l.* 14. *C. de judic.*

V.

5. They ought not to exerciſe their Functions out of a motive of gain.

The Honour of the Profeſſion of Advocates engages them not only to maintain and defend Juſtice and Truth [f], and to make uſe of no unfair practices in the exerciſe of their Miniſtry; but the ſaid Honour demands moreover, that they ſhould embrace their Functions upon other views than that of gain [g], and that not only they ſhould abſtain from all manner of prevarication [h], from purchaſing the Rights of their Clients, or bargaining with them for a ſhare of what they ſhall recover [i], from protracting the Law-ſuits [l], from giving counſel to both Parties [m], from acting as Judges in Cauſes wherein they have been concerned as Advocates [n], and from all other ſort of miſdemeanour; but they ought alſo to abſtain from all manner of covetouſneſs, and from the ſordidneſs of being too difficult to be pleaſed in their Fees: but they ought to reſt ſatisfied with a moderate recompence according to their labour, and in proportion to the nature of the Affairs, the condition of the Clients, and their circumſtances [o], abſtaining in their Writings from all things that are uſeleſs and ſuperfluous [p]; and they ought to ſerve the poor *gratis*, as they are enjoined to do by the Ordinances [q], which oblige the Judges to aſſign Council to thoſe perſons who by reaſon of their poverty, or the credit and intereſt of their Adverſaries, would be able to find none [r]; and it is on ſuch occaſions as theſe, in the Cauſes of poor and mean perſons, of Widows, of Orphans, and of thoſe who ſuffer any oppreſſion by the power and authority of their adverſaries, that Advocates ought to ſignalize themſelves in the exerciſe of their Functions by a generous defence of Truth and Juſtice againſt perſons of the greateſt power and intereſt [s].

[f] Juramentum præſtent, quod omni quidem virtute ſuâ, omnique ope, quod verum & juſtum exiſtimaverint, clientibus ſuis inferre procurabunt. *l.* 14. §. 1. *C. de judic.*

[g] Apud urbem autem Romanam etiam honoratis qui hoc officium putaverint eligendum, eo uſque liceat orare, quouſque maluerint, videlicet ut non ad turpe compendium ſtipemque deformem hæc arripiatur occaſio, ſed laudis per eam augmenta quærantur. Nam ſi lucro pecuniaque capiantur, velut abjecti atque degeneres, inter viliſſimos numerabuntur. *l.* 6. §. 5. *C. de poſtul.*

[h] Si patronum cauſæ prævaricatum putas, & impleveris accuſationem, non deerit adverſus eum pro temeritate commiſſi ſententia: atque ita de principali cauſa denuò quæratur. Quòd ſi non docueris prævaricatum; & calumnia notaberis, & rebus judicatis, à quibus non eſt provocatum ſtabitur. *l.* 1. *C. de Advocat. diverſ. judicior.*

[i] Litis cauſa malo more pecuniam tibi promiſſam ipſe quoque profiteris, ſed hoc ita jus eſt ſi ſuſpenſa lite ſocietatem futuri emolumenti cautio pollicetur. *l.* 1. §. 12. *ff. de extraord. cognit.*

Si qui advocatorum exiſtimationi ſuæ immenſa atque illicita compendia prætuliſſe ſub nomine honorariorum ex ipſis negotiis quæ tuenda ſuſceperint, emolumenta ſibi certæ partis cum gravi damno litigatoris & deprædatione poſcentes fuerint inventi, placuit ut omnes qui in hujuſmodi ſævitate permanſerint ab hac profeſſione penitùs arceantur. *l.* 5. *C. de poſtul.*

[l] Nemo ex induſtria protrahat jurgium. *l.* 6. §. 4. *C. de poſtul.*

[m] *See the Ordinance of* Octob. *in* 1533. *Chap.* 4. *Art.* 35.

[n] Quiſquis vult eſſe cauſidicus, non idem, in eodem negotio ſit, advocatus & judex: quoniam aliquem inter arbitros & patronos oportet eſſe delectum. *l.* 6. *C. de poſtul.*

See the Ordinance of October 1535, *Chap.* 4. *Art.* 16.

This Rule, which forbids Advocates to act as Judges in Cauſes wherein they have appeared as Advocates, is to be underſtood only of ſuch Cauſes where thoſe who have been Advocates in them are appointed Judges by the Judges themſelves, and not of thoſe Cauſes where the Parties agree to take their Advocates for their Judges and Arbitrators, as ſhall be ſhewn in the following Title.

[o] Nemo ex his, quos licebit accipere, vel decebit, aſpernanter habeat, quod ſibi ſemel officii gratia

tia libero arbitrio obtulerit litigator. *l.* 6. §. 3. *C. de poſtul.*

Nam ſi lucro pecuniâque capiantur, velut abjecti atque degeneres, inter viliſſimos numerabuntur. *d. l.* §. 5. *in f.*

See the Ordinance of April *in* 1453. *Art.* 45.

[p] *V. Baſilic. l.* 2. *t.* 33. *art.* 3.

See the Ordinances of King John *in* 1363; *of the twenty eighth of* October 1446, *Art.* 37; *of* April 1453, *Art.* 53; *of* October 1535, *Chap.* 4. *Art.* 4. *and the following Articles, and ſeveral other Ordinances.*

[q] *See the Ordinance of* Charles V. *of* 1364, *Article the ſeventh.*

[r] Obſervare itaque eum oportet, ut ſit ordo aliquis poſtulationum, ſcilicet ut omnium deſideria audiantur, ne fortè, dum honori poſtulantium datur, vel improbitati ceditur, mediocres deſideria ſua non proferant: qui aut omnino non adhibuerunt, aut minus frequentes, neque in aliqua dignitate poſitos advocatos ſibi proſpexerunt. Advocatos quoque petentibus debebit indulgere (*proconſul*) plerumque fœminis, vel pupillis, vel aliis debilibus, vel his qui ſuæ mentis non ſunt, ſi quis eis petat: vel ſi nemo ſit, qui petat, ultrò eis dare debebit. Sed, ſi qui per potentiam adverſarii non invenire ſe advocatum dicat, æque oportebit ei advocatum dare. Cæterùm opprimi aliquem per adverſarii ſui potentiam non oportet; hoc enim etiam ad invidiam ejus, qui provinciæ præeſt, ſpectat, ſi quis tam impotenter ſe gerat, ut omnes metuant adverſus eum advocationem ſuſcipere. *l.* 9. §. 4 *&* 5. *ff. de off. Proc. & leg.*

See the Ordinance of the thirtieth of Auguſt 1536, *Chap.* 1. *Art.* 38.

[s] Advocati qui dirimunt ambigua fata cauſarum, ſuæque defenſionis viribus in rebus ſæpè publicis ac privatis lapſa erigunt, fatigata reparant, non minus provideant humano generi, quam ſi præliis atque vulneribus patriam parenteſque ſalvarent. *l.* 14. *C. de advocat. diver. judic. laborantium ſpem & poſteros defendunt. d. l. in f.*

It was becauſe of this Honour which attends the Functions of Advocates, that their Functions are preferred in one of the Roman *Laws to that of judging Cauſes; for the Miniſtry of Advocates demands, not only the capacity and integrity which are neceſſary to Judges, but likewiſe a much larger extent of Learning, together with the gift and art of ſpeaking in publick, and of joining the Ornaments of a ſolid Eloquence to the force of Reaſon, and a Knowledge of the Laws; and becauſe at the time of enacting the ſaid Law, thoſe who judged Cauſes were not always the Magiſtrates themſelves, but perſons whom they made choice of to judge by themſelves, or whom they called to aſſiſt them with their counſel and advice, and that the Function of Advocates might be exerciſed by perſons of a more conſiderable Rank than that of thoſe Judges; the quality of Advocate was more conſiderable than that of the ſaid Judges, who might, without derogating from their Honour, quit the Function of a Judge, to put themſelves in the Rank of Advocates.* Quiſquis igitur ex his quos agere permiſimus vult eſſe cauſidicus, eam ſolum quam ſumet tempore agendi, ſibi ſciat eſſe perſonam quouſque cauſidicus eſt. Nec putet quiſquam honori ſuo aliquid eſſe detractum, cùm ipſe neceſſitatem elegerit ſtandi, & contempſerit jus ſedendi. *l.* 6. §. *ult. C. de poſtul.*

It may be remarked here on all that has been ſaid in this Title concerning the duties of Advocates, that there are three ſorts of Cauſes in which they are imployed; one ſort is, of thoſe that are notoriouſly unjuſt; others are manifeſtly juſt; and there is a third ſort that are doubtful.

As for the Cauſes which are notoriouſly unjuſt, whether they be contrary to the Law of Nature, or againſt the Poſitive Law, it is never lawful to defend them, in the ſame manner as it is never lawful to ſteal, nor to defend an unjuſt act. And if the Parties themſelves cannot carry on theſe ſorts of Cauſes without abandoning the Rules of their Conſcience, and committing a moſt enormous crime, which is odious in the eye of Man, and ſtill more abominable before God, becauſe they uſe his Authority to make it ſerve as an inſtrument of their Injuſtice; the Advocates who defend and maintain thoſe Cauſes, are ſo much the more guilty and criminal, in that they make themſelves accomplices in the malice of their Clients, and prevaricate in the exerciſe of their Function, and in the moſt eſſential duty belonging to it, which is that of diſſuading their Clients from proſecuting Cauſes that are unjuſt. But thoſe who undertake the defence of ſuch Cauſes againſt poor and indigent perſons, make themſelves acceſſaries to a Crime, the enormity of which can hardly be well expreſſed. The Holy Scripture compares the offering of him who offers to God the goods of the poor as an Alms or Sacrifice, to the Oblation which one would make to a Father by ſacrificing his Son before his eyes[a]. *By what words therefore could it deſcribe the action of thoſe who preſent themſelves before the Tribunal, not of the Mercy, but of the Juſtice of God, not to offer to him the Goods of other people, and to diveſt themſelves of them, but to wreſt them out of the Poſſeſſion of the right Owners, and to appropriate them to themſelves, and who have the boldneſs to invocate the Judges to be Executors of this Injuſtice.*

[a] Whoſo bringeth an offering of the goods of the poor, doth as one that killeth the ſon before his father's eyes. *Eccleſiaſticus* xxxiv. 20.

As for Cauſes that are juſt and equitable, the only Rule is to defend them by no other ways than what are juſt, without lying, and without trick; for if Actions that are juſt of themſelves, become unjuſt when they are not performed with the circumſtances of Juſtice, according to the ſaying of the Wiſe man[b], *much more ought the actions of Juſtice it ſelf to be accompanied with Truth and with Juſtice;*

and if all men owe to one another, in all their actions, truth and godly ſincerity, according to the expreſſion of St. Paul, *they owe it infinitely more to God himſelf, and in his Tribunal, which is the Seat of Juſtice* [c].

[b] For they that keep holineſs holily, ſhall be judged holy. *Wiſd. of Sol.* vi. 10.

[c] For our rejoicing is this, the teſtimony of our conſcience, that in ſimplicity and godly ſincerity, not with fleſhly wiſdom, but by the grace of God, we have had our converſation in the world, and more abundantly to youwards. 2 *Cor.* i. 12.

As for Cauſes that are doubtful, the chief Rule whereby Advocates are to govern themſelves therein is not to take thoſe Cauſes for doubtful, which may be rendred ſuch by covering Injuſtice with the appearances of Juſtice; but to take ſincerely all thoſe for doubtful whoſe Deciſions are uncertain, whether it be on account of the circumſtances of the facts, or by reaſon of the obſcurity of the Law, or becauſe of other conſiderations, which makes Juſtice doubtful in ſuch ſorts of Cauſes; and Advocates ought to determine themſelves therein according to their own Knowledge and Conſcience, and they ought neither to engage in them, nor to defend them in any other manner, nor by any other means than ſuch as are lawful in the defence of Cauſes that are juſt.

All theſe Rules of the duties of Advocates may be reduced to two Maxims; one, never to defend a Cauſe that is unjuſt; and the other, not to defend juſt Cauſes but by the ways of Juſtice and Truth; and theſe two Maxims are ſo eſſential to the duties of Advocates, and ſo indiſpenſibly neceſſary, that altho' they ſeem to be rather Maxims of Religion, they are however in proper terms expreſſed in the Laws of the Code *and* Digeſt.

TITLE VII.

Of ARBITRATORS.

ALL the matters which have been treated of hitherto, are in their nature ſo much a part of the Publick Law, that there is not any one of them that does belong to the Private Law, and which has come under our conſideration in the Book of the Civil Law in its Natural Order; but the ſubject of this Title is of ſuch a nature, that it has relation to both: ſo that it contains ſome Rules which are a part of the Private Law, and others which belong to the Publick Law; which proceeds from the nature of Arbitrations, and from the quality of the power which Arbitrators have to judge of differences of which they are choſen Judges. For it is neceſſary to conſider two things in Arbitrations: the firſt, is the Agreement of the Parties, which is called a Compromiſe, by which thoſe who are deſirous to make an end of a Law-ſuit depending between them, or to prevent their going to Law, give power to certain perſons whom they make choice of to examine their pretenſions, and to decide them, and oblige themſelves to perform whatever ſhall be awarded by thoſe whom they take for Judges: and the ſecond is, the Function of the Arbitrators choſen by the Parties, and the duties which are conſequences thereof. What relates to the Agreement of the Parties, is a matter that belongs properly to the Private Law, and it has been diſcuſſed in the firſt Tome of the Civil Law in its Natural Order, together with the other ſorts of Covenants, and under the the Title of *Compromiſes:* and what concerns the Function and Duties of the Arbitrators is a matter of the Publick Law, ſeeing it is a kind of Adminiſtration of Juſtice. Thus, altho' we have already explained under the Title of *Compromiſes* the quality of the Power which Arbitrators have to judge by the effect of the conſent of the Parties, yet we have not there explained the Rules of their Functions and Duties: and what has been ſaid in that Title of

Compromiſes touching the Power of Arbitrators, relates only to the effect which the Compromiſe ought to have, in order to give to the ſaid Power the extent, or the limits which the Parties intend it ſhould have. Thus we ſhall explain in this Title that which concerns the Functions and Duties of Arbitrators with reſpect to the Function of adminiſtring Juſtice, which belongs to the matters of the Publick Law, and which we ſhall make the ſubject of two Sections; one, of the Functions of Arbitrators, and their Power; and the other, of their Duties.

SECT. I.

Of the Functions of Arbitrators, and their Power.

The CONTENTS.

1. *Arbitrators have the ſame power as Judges, altho' they are not Judges, by a Title which gives them that quality.*
2. *The Function of Arbitrators determines by their definitive Sentence.*
3. *Arbitrators being Mediators, are not obliged to judge according to the rigour of the Law.*
4. *The Ordinances of* France *oblige the Parties to refer ſome affairs to Arbitration.*
5. *The power of the Arbitrators extends only to the affairs mentioned in the Compromiſe.*
6. *There are ſome matters which cannot be referred to Arbitration.*
7. *The Sentences of Arbitrators have not the ſame effect as thoſe of Judges.*
8. *There lies an Appeal from the Awards of Arbitrators.*
9. *If the Award is not pronounced within the time limited by the Compromiſe, it remains without effect.*
10. *Perſons who are incapable of being Arbitrators.*

I.

1. Arbitrators have the ſame power as Judges, altho' they are not Judges, by a Title which gives them that quality.

ALtho' Arbitrators are not Judges by vertue of a Title which gives them abſolutely that quality, and that they are Judges only of the Parties who have named them, to determine that which is referred to their Judgment by the Compromiſe, yet they exerciſe the ſame Functions as Judges would do if the Parties were pleading in Judgment. Thus, Arbitrators may direct the proceedings in the Cauſes which they are to judge, may give Interlocutory Sentences, may grant Delays, may examine Witneſſes, and after a full information may pronounce a Definitive Sentence, which may put an end to the differences, whereof they were choſen Judges [a].

[a] Compromiſſum ad ſimilitudinem judiciorum redigitur, & ad finiendas lites pertinet. *l.* 1. *ff. de recept.*

Tametſi neminem prætor cogat arbitrium recipere, (quoniam hæc res libera & ſoluta eſt, & extra neceſſitatem juriſdictionis poſita:) attamen ubi ſemel quis in ſe receperit arbitrium, ad curam, & ſollicitudinem ſuam hanc rem pertinere prætor putat: non tantum quod ſtuderet lites finiri: verum quoniam non deberent decipi, qui eum quaſi virum bonum diſceptatorem inter ſe elegerunt. Finge enim, poſt cauſam jam ſemel, atque iterum tractatam, poſt nudata utriuſque intima, & ſecreta negotii aperta, arbitrum vel gratiæ dantem, vel ſordibus corruptum: vel alia qua ex cauſa nolle ſententiam dicere: quiſquam poteſt negare, æquiſſimum fore prætorem interponere debuiſſe; ut officium quod in ſe recepit, impleret. *l.* 3. §. 1. *ff. de recep. l.* 14. §. 1. *C. de judic.*

II.

2. The Function of Arbitrators determines by their definitive Sentence.

After the Arbitrators have pronounced a Definitive Sentence, their Functions are at an end, and they have not ſo much as the power to put it in execution, even although there ſhould lie no Appeal from their Sentence; but the Party who intends to ſue for the effect of the Sentence, ought to apply himſelf to the Judges in Ordinary, that he may obtain their Order againſt him who refuſes to execute it, to oblige him either to acquieſce in the Award, or to pay the Penalty ſtipulated by the Compromiſe [b].

[b] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ perſecutionem. *l.* 2. *ff. de recept.*

According to the uſage in France, *he who deſires to have the Award put in execution, applies to have it ratified, that is, confirmed by the Judge in* Ordinary; *and if there lies an Appeal from the Award, the ſame is determined in the manner as ſhall be explained in the eighth Article.*

III.

3. Arbitrators being Mediators, are not obliged to judge according to the rigour of the Law.

Seeing Arbitrators are choſen, in order to accommodate as much as to judge the affairs that are put into their hands, and that for this reaſon they are as it were Mediators, to whom the Ordinances of *France* give the names of *Arbiters*, Arbitrators and amicable Compounders, their Functions are not reſtrained to the ſame ſeverity, nor to the ſame exactneſs as that of Judges: but

but whereas Judges ought to regulate their Sentences according to the Rights of the Parties, without any other mitigation than what the Laws allow of, according to the quality of the Affairs, and according as the facts and circumstances may require, pursuant to the Rules which have been explained in their proper place; the very nature of Compromises pointing out to the Arbitrators that each Party is willing to abate something of what they might hope for in Justice, and for the love of peace to forego a part of their interests, this disposition of persons, who instead of the Ordinary Judges make choice of Arbitrators, impowers those whom they chuse to prefer the considerations of peace and quiet to the rigour of Justice, which might leave still occasions of strife and contention. Thus we see sometimes that in doubtful cases, where the Judges are obliged to decide in favour of one or other of the Parties without any medium, Arbitrators make use of expedients and temperaments, such as the Parties themselves would do, if instead of a Sentence they should take the way of terminating their differences by an amicable Agreement [c].

[c] *See the Ordinance of* June 1510, *Art.* 34.

IV.

4. The Ordinances of France *oblige the parties to refer some affairs to Arbitration.*

The motive of preserving peace between the Parties being more especially favourable in the case of near Relations, and in Family Affairs, the Ordinances in *France* oblige those who have differences touching the Partitions of Inheritances among near Relations, Accompts of Guardianships and other Administrations, the Restitution of a Marriage Portion, and of a Dower, to refer the same to Arbitrators; and they ordain that in case any of the parties refuse to name Arbitrators on their part, the Judge shall name them. And the Ordinances do likewise direct, that all differences among Merchants in relation to their Trade, and among Partners in relation to their Partnership, be determined by Arbitrators: which gives unto the Arbitrators who are named for all these sorts of differences, a right to terminate them with all possible diligence, in order to avoid the delays of Judicial Proceedings; and also a right to qualify the Awards which they give on Affairs of that kind with such temperaments of Equity, as they shall find that the facts and circumstances may deserve [d].

[d] *See the Ordinance of* August 1560, *Art.* 2, 3, *and* 4; *and that of* Moulins, *Art.* 83; *and of* 1673, *Chap. of Partnerships, Art.* 9, *and the following Articles.*

[*Although in* England *there is no particular obligation laid on parties to refer their differences to Arbitration, as the custom is in* France *in some cases; yet our Statutes recommend References to the Subject, and more particularly to Merchants and Traders, as an useful Expedient to end their differences with the greater ease and expedition. And in order to give the greater force and efficacy to the Awards of Arbitrators, the parties are allowed to agree among themselves that their Submission of the Suit to the Award or Umpirage of any person or persons, may be made a Rule of any of his Majesty's Courts of Record, that the Parties may be thereby finally concluded.* Stat. 9 & 10 Gul. III. cap. 15. *entitled,* An Act for determining differences by Arbitration.]

V.

5. The power of the Arbitrators extends only to the affairs mentioned in the Compromise.

The power of the Arbitrators is regulated by the Compromise, as to what concerns the differences which they are to determine, and whatever they may decree beyond that, in relation to matters which are not comprehended in the Compromise [e], will be without effect: and as to the differences of which the Compromise makes them Judges, they have power to exercise therein the Functions which have been just now explained, and what else may be regulated by the Compromise.

[e] De officio Arbitri tractantibus sciendum est omnem tractatum ex ipso compromisso sumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere possit, cautum est, non ergo quodlibet statuere arbiter poterit, nec in re qualibet: nisi de qua re compromissum est. *l.* 32. §. 15. *ff. de recept.*

☞ *There are two sorts of causes which make it impracticable for certain Affairs to be referred to Arbitration: one relates to the Affairs in which the Publick has an interest; thus as the Publick is concerned that Crimes should be punished, it would be altogether fruitless to refer them to Arbitration, and the Reference it self would be a proof of the Crimes: and the other cause regards the Affairs where the honour of the Parties who should refer them to Arbitration would be engaged; for whereas one may with decency refer to Arbitration any common interest, it would be contrary to good manners to expose to the Judgment of Arbitrators an interest of Honour, seeing that would be wilfully to hazard the loss of it, which cannot be imputed to those who defend their Honour before the Ordinary Judges, because they are under a necessity*

to take them for Judges; thus he whose Legitimacy is called in queſtion, or whoſe Nobility is controverted, or againſt whom any diſpute of the like nature is ſtarted, cannot refer ſuch a matter to the deciſion of Arbitrators. Thus it is commonly ſaid of Affairs which perſons look upon to be dear and of importance to them, that they do not ſubmit them to Arbitration: which confirms the Remark that has been already made, that thoſe who refer their differences to Arbitration, agree to depart from ſome of their Rights for peace and quiet ſake; and which one ought not to do in an Affair which concerns his Honour; ſuch as is the Queſtion which relates to one's State, to know whether he is a Baſtard or a legitimate Son, Noble or Ignoble; for in theſe ſorts of Cauſes it is neceſſary to have for Judges thoſe who have naturally Authority and Dignity joined with the Right of judging.

De liberali cauſa compromiſſo facto, rectè non compelletur Arbiter ſententiam dicere: quia favor libertatis eſt ut majores judices habere debeat. *l.* 32. §. 7. *ff. de recept. qui arb.*

In litibus, in quibus, utrum ingenuus, an libertinus ſit aliquis, quæritur, quinquennii præſcriptionem (poſt quod divino adjutorio opus eſſe veteres leges præcipiebant) in poſterum ceſſare ſancimus: & hujuſmodi lites etiam poſt memoratum tempus, ad exemplum cæterarum, vel in provinciis apud earum moderatores, vel in hac alma urbe apud competentes maximos judices examinari. Quod etiam ſi clariſſima perſona ſuper tali conditione vel etiam ſervili quæſtionem patiatur, tenere cenſemus. *l. ult. C. ubi cauſ. ſtat. ag. deb.*

See the ſeventh and eighth Articles of the firſt Section of Compromiſes.

VI.

6. There are ſome matters which cannot be referred to Arbitration.

The power of Arbitrators is circumſcribed to ſuch matters as the parties are at liberty to refer to Arbitration; and if the Compromiſe ſhould happen not to be within theſe bounds, the Arbitrators would give judgment to no purpoſe, and they would even render themſelves guilty of diſobedience to the Law: Thus, for example, it being for the intereſt of the Publick that Crimes ſhould be judicially puniſhed, one cannot compromiſe a Crime[f]; and there are other matters which cannot be referred to the judgment of Arbitrators, as has been explained in the Title of Compromiſes, and in the Remark on the preceding Article.

[f] Julianus indiſtinctè ſcribit: ſi per errorem de famoſo delicto ad arbitrum itum eſt: vel de ea re de qua publicum judicium ſit conſtitutum, veluti de adulteriis, ſicariis, & ſimilibus: vetare debet prætor ſententiam dicere nec dare dictæ executionem. *l.* 32. §. 6. *ff. de recept. qui arb.*

VII.

7. The Sentences of Arbitrators have not the ſame effect as thoſe of Judges.

The Sentences of Arbitrators have not the ſame effect as thoſe of Judges; for they oblige thoſe who refuſe to execute them no further than to pay the Penalty ſtipulated in the Compromiſe: ſo that if he who finds himſelf aggrieved by the Award of Arbitrators chuſes rather to pay the Penalty, than to ſubmit to the ſaid Award, it will remain without any other effect than that of intitling the other party to recover the Penalty[g].

[g] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2. *ff. de recept.*

VIII.

8. There lies an Appeal from the Awards of Arbitrators.

The favour of Awards given by Arbitrators, does not hinder the parties aggrieved from appealing from them; and in *France* the Appeals from thoſe Awards go directly to the ſupreme Courts of Juſtice, from whence there lies no Appeal, whether it be to the Parliament, or to the Preſidial Courts in matters which come under their Juriſdiction.

[h] *See the Ordinance of* Auguſt, 1560. *art.* 1.

IX.

9. If the Award is not pronounced within the time limited by the Compromiſe, it remains without effect.

If there is an Appeal entred from an Award, or if the Award not having been given within the time limited by the Compromiſe, it remains without effect, one of the parties refuſing to prorogue it, that is, to renew it, and to grant to the Arbitrators another delay, or time for giving their Award, the Acts which ſhall appear to have been ſped in execution of the Compromiſe for preparing the Cauſe for Judgment, will ſubſiſt for the effect which they ought to have. Thus, for example, if any of the parties had confeſſed the truth of a fact that was in diſpute, or if proof had been made thereof before the Arbitrators, thoſe Acts might be produced in Court, and the Judges

would have that regard to them, as the quality and form of the ſaid Acts might deſerve[i].

[i] Ad hæc generaliter ſancimus, in his quæ apud compromiſſarios facta ſunt, ſi aliquid in factum reſpiciens, vel profeſſum eſt vel atteſtatum, poſſe eo & in ordinariis uti judiciis. *l. penul. in f. C. de recept. arb.*

X.

10. *Perſons who are incapable of being Arbitrators.*

All theſe Functions of Arbitrators which have been juſt now explained, agreeing only to perſons in whom there is no obſtacle which renders them incapable thereof, one cannot take for Arbitrators perſons in whom there are any ſuch obſtacles. Thus Women, perſons that are deaf, or dumb, and others who labour under the like incapacities, cannot be Arbitrators.

[i] Sancimus, mulieres ſuæ pudicitiæ memores, & operum, quæ eis natura permiſit, & à quibus eas juſſit abſtinere, licet ſummæ atque optimæ opinionis conſtitutæ in ſe arbitrium ſuſceperint, vel, ſi fuerint patronæ, etiam ſi inter libertos ſuam interpoſuerint audientiam: ab omni judiciali agmine ſeparari, ut ex earum electione nulla pœna, nulla pacti exceptio adverſus juſtos earum contemptores habeatur. *l. ult. C. de recept.*

Neque in pupillum, neque in furioſum, aut ſurdum, aut mutum, compromittitur. *l.* 9. §. 1. *ff. eod.*

It would ſeem by this text that it is only Infants under fourteen years of age, that are incapable of being Arbitrators, and that an Adult may exerciſe this Function after having attained the age of fourteen: but it is ſaid in the forty firſt Law of the ſame Title, that it is neceſſary to have attained twenty years of age: it is a difficult matter for ſuch caſes to happen, but if it ſhould ſo fall out that a young man under twenty years of age, of an extraordinary capacity, had been named an Arbitrator, and had given an Award in the matter referred to him, it would not be null by the Uſage in France, *as it would have been at* Rome *by the forementioned Law, and there was no other remedy but that of an Appeal. For according to the Uſage in* France, *the Acts in which there are Nullities, are not null until they are declared to be ſo by a Court of Juſtice, which is the reaſon why it is ſaid that Nullities do not take place in* France. *For we have no particular Law that ſettles the age at which perſons may take upon them the Office of an Umpire.*

Cùm lege Julia cautum ſit, *ne minor viginti annis judicare cogatur*: nemini licere minorem viginti annis compromiſſarium judicem eligere, ideòque pœna ex ſententia ejus nullo modo committitur. Majori tamen viginti annis, ſi minor viginti quinque annis ſit, ex hac cauſa ſuccurrendum, ſi temerè auditorium receperit multi dixerunt. *l.* 41. *ff. de recept.*

Sons living under the Juriſdiction of their Fathers may be Arbitrators.

Sed & filius familias compelletur. *l.* 5. *ff. de recept.*

SECT. II.

Of the Duties of Arbitrators.

IT is to be remarked here touching the duties of Arbitrators, that we do not obſerve ſome Rules relating to the ſaid duties which were eſtabliſhed by the *Roman* Law[a], and among others three of thoſe that are the moſt remarkable.

[a] Tametſi neminem prætor cogat arbitrium recipere (quoniam hæc res libera & ſoluta eſt, & extra neceſſitatem juriſdictionis poſita:) attamen, ubi ſemel quis in ſe receperit arbitrium, ad curam, & ſollicitudinem ſuam hanc rem pertinere prætor putat: non tantum quòd ſtuderet lites finiri: verum quoniam non deberent decipi, qui eum quaſi virum bonum, diſceptatorem inter ſe elegerunt. Finge enim, poſt cauſam jam ſemel, atque iterùm tractatam, poſt nudata utriuſque intima, & ſecreta negotii aperta arbitrum vel gratiæ dantem, vel ſordibus corruptum, vel alia qua ex cauſa nolle ſententiam dicere: quiſquam poteſt negare æquiſſimum fore, prætorem interponere ſe debuiſſe, ut officium, quod in ſe recepit, impleret. Ait prætor, *qui arbitrium pecunia compromiſſa receperit.* Tractemus de perſonis Arbitrantium: & quidem arbitrum cujuſcunque dignitatis coget, officio, quod ſuſceperit, perfungi: etiam ſi ſit conſularis: niſi fortè ſit in aliquo magiſtratu poſitus, vel poteſtate, conſul fortè, vel prætor: quoniam in hoc imperium non habet. *l.* 3. §. 1. *ff. de recept. qui arb.*

The firſt, which obliged Arbitrators, after they had promiſed to the Parties to decide their differences, to give their Award, and they might even be compelled by Law to do it, and that for this reaſon, that it might ſo happen that an Arbitrator having dived into the bottom of an Affair, and diſcovered the ſecrets of the Par-

ties, and all their proofs, and intending to favour the bad Cauſe, being either corrupted by bribery, or by ſome recommendation, ſhould refuſe to give his Award, and by that means ſhould do prejudice to the good Cauſe.

According to our Uſage, no ſuch neceſſity is impoſed on Arbitrators, and if the Arbitrator were capable of being corrupted in that manner, it would be of no great ſervice to force him to give an Award under ſuch diſpoſitions; and beſides, ſeeing there may happen cauſes which may oblige an Arbitrator to abſtain from giving his Award, altho' he had promiſed to do it, and even cauſes which he ought not to be obliged to declare in open Court, altho' he were incapable of theſe ſorts of corruptions, we leave Arbitrators at liberty to exerciſe, or not to exerciſe that Function, which ought to be free, and by that means we avoid the inconveniences which it is eaſy to perceive; but Arbitrators do not engage themſelves, nor do they accept of the Compromiſe, but when they do ſome Function relating to the matter that is referred to them, and it is always with a liberty to abſtain from it whenever they ſhall think fit ſo to do.

The ſecond Rule of the *Roman* Law, which made a ſecond duty unto Arbitrators, and which is not received in uſe with us, was that which in the caſes where there were only two Arbitrators named by the Compromiſe, ordained that they ſhould be compelled by the Magiſtrate to chuſe a third perſon, whoſe Sentiment was to be the Award, in caſe the two Arbitrators could not agree [b]: which would not be approved by our Uſage, and which would be even contrary to Equity; for thoſe who agree to refer their differences, mean to have no other Judges but thoſe whom they themſelves make choice of, and if the Arbitrators will have a third perſon joined with them, that cannot be but by conſent of the Parties: and when Arbitrators are named in an equal number, if power is granted them to take in a third perſon, it is always upon condition that the ſaid third perſon be not any ways ſuſpected by the Parties; which preſuppoſes that they are to approve of his Nomination.

[b] Principaliter (quæramus) ſi in duos arbitros ſit compromiſſum: an cogere eos prætor debeat, ſententiam dicere: quia res ferè ſine exitu futura eſt propter naturalem hominum ad diſſentiendum facilitatem. In impari enim numero idcirco compromiſſum admittitur. Non quoniam conſentire omnes facile eſt: ſed quia, etſi diſſentiant, invenitur pars major, cujus arbitrio ſtabitur. Sed uſitatum eſt etiam in duos compromitti & debet prætor cogere arbitros ſi non conſentiant tertiam certam eligere perſonam, cujus authoritati pareatur. *l.* 17. §. 6. *eod.*

The third of the ſaid Rules, is that which declares, that he who ought to be Judge of a Law-Suit, cannot be Arbitrator of it [c]. It is true, that the dignity and duty of a Judge require that he ſhould not abſtain from the exerciſe of his Functions, nor put himſelf out of a condition of rendring Juſtice whenever any occaſion for the exerciſe of his Miniſtry ſhould preſent it ſelf; and that therefore a Judge, who ought naturally to have the determination of a difference in the quality of Judge, and not as an Arbitrator, ought to remain in that State, and not run the hazard of being diſabled afterwards to adminiſter Juſtice, by reaſon of his engagements in a Compromiſe, which might oblige him to abſtain from his Functions of Judge, either on account of his being excepted againſt, or by reaſon of other conſequences of the Compromiſe: ſo that this Rule is highly juſt. And there is even an Ordinance in *France*, which forbids the Preſidents and Judges to take upon themſelves the Arbitrations of matters depending before the Courts, or before the inferior Judges [d]: which ſeemed to be leſs neceſſary than under the *Roman* Law, where each Affair had not the ſame number of Judges as there are in *France*, where the Courts of Juſtice are compoſed of many Judges; but the ſaid Ordinance is not obſerved; and it is permitted in *France*, to make choice of ſome of the Judges of a Court of Juſtice, to be Arbitrators of Law-Suits, of which they ought to be the Judges, and they prefer to that Rule of the *Roman* Law, the good of Agreements; and although the Parties take care to make choice of the ableſt Judges to be their Arbitrators, and that it may ſo happen that the intended Accommodation not taking effect, the Affair may come to be decided without them, yet they who choſe them for their Arbitrators have

no body to blame for it but themſelves, and they will have for their Judges the others of the Bench who remain. Thus, if we conſider this Uſage with a view only to the publick Good, it does not ſeem to be any ways inconſiſtent with it; and the favour of amicable Agreements may juſtify the ſaid Uſage.

[c] Si quis judex ſit, arbitrium recipere ejus rei, de qua judex eſt, in re ſe compromitti jubere prohibetur lege Julia, & ſi ſententiam dixerit non eſt danda pœnæ perſecutio. *l.* 9. §. 2. *eod.*

[d] *See the Ordinance of* October, 1535. *chap.* 1. *art.* 75.

tizen, a Gentleman, or other perſon of good ſenſe and probity, for an Arbitrator of Queſtions in Law.

[e] Dare any of you, having a matter againſt another, go to law before the unjuſt, and not before the Saints? Do ye not know that the Saints ſhall judge the world? and if the world ſhall be judged by you, are ye unworthy to judge the ſmalleſt matters? Know ye not that we ſhall judge Angels? how much more things that pertain to this life? If then ye have judgments of things pertaining to this life, ſet them to judge who are leaſt eſteemed in the Church. I ſpeak to your ſhame. Is it ſo that there is not a wiſe man amongſt you? no not one that ſhall be able to judge between his brethren? but brother goeth to law with brother, and that before the unbelievers. 1 *Cor.* i. 2, *&c.*

We ſhall not put down in this Section, among the Rules of the Engagements of Arbitrators, that of Capacity; for although it be true that in order to judge of a difference, it is neceſſary to know the Rules of the matter in queſtion, yet it being for the intereſt of the perſons who chuſe the Arbitrators, that they ſhould be capable of judging of the matter, they ſeldom fail to chuſe thoſe whom they eſteem the moſt capable; thus they uſually make choice of Judges or Advocates: but if for the deciſion of a Queſtion in Law, the Parties had made choice of other perſons in conſideration of their good ſenſe and probity, the ſaid Arbitrators might either abſtain from judging, if they found themſelves incapable thereof, or take information touching the difficulties, that they might be able to underſtand them in ſuch a manner as that the Parties might have reaſon to be ſatisfied with their knowledge, and ground to expect from them an equitable Award, which the ſaid Arbitrators might form, either of their own knowledge, according as they might receive light from the ſeveral pretenſions of the Parties, or by the aſſiſtance of perſons whom the Parties ſhould agree that they ſhould adviſe with; and ſuch a choice of Arbitrators as this might be juſtified by the counſel of St. *Paul* himſelf, who for ſo trivial a thing as a Temporal Good, adviſes the faithful to chuſe ſome of the leaſt among themſelves for Judges, rather than carry before the Tribunals of Infidels, pretentions whereof none can be of ſo great conſequence as the Peace which ought to unite them: thus there does not appear to be any inconvenience in chuſing a Ci-

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I.

ALthough the choice of the Parties who name the Arbitrators is inſtead of a proof that they are capable of judging the Affairs which are put into their hands, yet it is a duty incumbent on thoſe who find themſelves named Arbitrators by a Compromiſe, not to take upon them the charge of judging matters which are above their capacity, and to ſignify to the Parties the diſtruſt they have of their own abilities, or to excuſe themſelves by ſome other way [a], unleſs that after their declaration the Parties do ſtill inſiſt on having them for Judges, and that they take the proper meaſures to be inſtructed in the Cauſe, and regulate the differences by ſuch temperaments of Equity

1. *Arbitrators ought not to take upon them to judge of matters above their capacity.*

as the Rights of the Parties, and the good of Peace may demand.

[a] And the cauſe that is too hard for you, bring it unto me, and I will hear it. *Deut.* i. 17.

Although this paſſage relates to Judges, yet it may be applied here.

II.

2. They are obliged to diſtinguiſh the Rights of the Parties without reſpect of perſons.

Seeing it often happens that in Compromiſes each Party names his Arbitrator, and looks upon him not ſo much as being his Judge, but rather as his Advocate, engaged to defend his intereſts, and that for this reaſon they name ſupernumerary Arbitrators, this intention of the Parties does not hinder the perſons whom they name from being really and truly Arbitrators, nor exempt them from the obligation of diſtinguiſhing juſtly between the Rights of the one and the other Party, and of forming conſcientiouſly their ſentiments in relation to the differences which they have to determine; Thus it is their duty not to look upon themſelves as Arbitrators for one Party only, and obliged to judge rather in his favour than in the favour of the other; but they ought to conſider themſelves as Mediators of peace between the Parties, which obliges them, in their choice of expedients for accommodating the differences, not to incline, out of reſpect to the perſons [b], to diminiſh the Rights of one of the Parties rather than thoſe of the other, but to have the ſame regard to both Parties alike, and not to have any other view in curtailing the Rights of one of the Parties rather than thoſe of the other, except the difference that may be between their Rights, ſuch as indifferent perſons to whom the Parties are altogether unknown would have regard to; for this diſtinction of perſons would be an injuſtice, which the liberty allowed to Arbitrators to accommodate matters by temperaments of Equity cannot excuſe.

[b] Thou ſhalt not reſpect perſons. *Deut.* xvi. 19.

Judge righteouſly between every man and his brother, and the ſtranger that is with him. *Deut.* i. 16.

That which is altogether juſt ſhalt thou follow. *Deut.* xvi. 20.

Ye ſhall not reſpect perſons in judgment, but you ſhall hear the ſmall as well as the great; you ſhall not be afraid of the face of man, for the judgment is God's. *Deut.* i. 17.

Ye ſhall do no unrighteouſneſs in judgment; thou ſhalt not reſpect the perſon of the poor, nor honour the perſon of the mighty: but in righteouſneſs ſhalt thou judge thy neighbour. *Levit.* xix. 15.

He will not accept any perſon againſt a poor man, but will hear the prayer of the oppreſſed, *Eccluſ.* xxxv. 13.

How long will ye judge unjuſtly; and accept the perſons of the wicked? Defend the poor and fatherleſs: do juſtice to the afflicted and needy. Deliver the poor and needy, *&c.* *Pſal.* lxxxii. 2, 3, 4.

Judges and Officers ſhalt thou make thee in all thy gates which the Lord thy God giveth thee throughout thy tribes: and they ſhall judge the people with juſt judgment. Thou ſhalt not wreſt judgment, thou ſhalt not reſpect perſons, neither take a gift, for a gift doth blind the eyes of the wiſe, and pervert the words of the righteous. That which is altogether juſt ſhalt thou follow. *Deut.* xvi. 18, 19, 20.

Although theſe texts relate to the duty of Judges, yet they may be applied here, ſeeing the perſons who are named Arbitrators do exerciſe the Functions of Judges. It is neceſſary to diſtinguiſh among the conſiderations that an Arbitrator may have for one of the Parties more than for the other, thoſe which relate to the perſon barely on account of the favour and affection which the Arbitrator may have for him, whether it be becauſe of the confidence which the Party ſeems to repoſe in him by taking him for his Arbitrator, or becauſe he is his friend, and others of the like nature, from thoſe which regard in the perſons the quality of their Rights; the matter in diſpute being, for example, about a large Sum of Money claimed by one that is rich, from one that is poor, and that by a diſputed Title, the conſiderations of the firſt ſort are a reſpect of perſons that is never allowed; for it is never lawful to prefer in Judgment the intereſt of one perſon before that of another, becauſe one loves him, eſteems him, or has ſome obligation to him, and ſuch a view as this in Judgment is always unjuſt; but it is not to be eſteemed a reſpecting of perſons in an Arbitration upon a doubtful Right, if for the ſake of peace an Arbitrator is obliged to have recourſe to ſome expedient for accommodating the matter in diſpute, and if he inclines to abridge the pretenſions of one of the Parties rather than thoſe of the other, becauſe of the difference that is between them, and which does not proceed from the affection which the Arbitrator has for either of them, but from the quality of their pretenſions, and the circumſtances either of their Perſons or their Rights.

III.

3. *The liberty which Arbitrators have of not rendring Juſtice according to the rigour, ought not to be abuſed by committing injuſtices under the pretext of accommodation.*

The liberty which Arbitrators may have not to render Juſtice according to the rigour thereof, and to make uſe of ſome healing expedients for the ſake of peace between the Parties, hath its bounds and extent according to Equity, and ought not to be extended ſo far as to be a handle to the Arbitrators to commit injuſtices under pretext of accommodating matters: thus it is the duty of Arbitrators to apply the temperaments of Equity with diſcretion; to chuſe them, in the caſes where Equity may require, ſuch as may not deſtroy that very Equity by ſome exceſs, and not to uſe any in the caſes where Juſtice is due in its full extent to demands that are ſo juſt and ſo clear, that they do not admit of any abatement, or of any difficulty [c].

[c] Take heed what ye do: for ye judge not for man, but for the Lord, who is with you in the judgment. 2 *Chron.* xix. 6.

Ye ſhall do no unrighteouſneſs in judgment, in mete-yard, in weight, or in meaſure. *Levit.* xix. 35.

IV.

4. *Arbitrators ought to abſtain from judging of matters which cannot be referred to Arbitration.*

Seeing there are matters which cannot be referred to Arbitration, as has been ſaid in the ſixth Article of the foregoing Section; if there ſhould be any Compromiſe contrary to this Rule, it would be the duty of thoſe who are named Arbitrators to abſtain from judging of ſuch matters.

THE

THE PUBLICK LAW:

BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK III.

Of CRIMES and OFFENCES.

WE have not in our Language any common word which comprehends in general and preciſely every thing that is underſtood by theſe two Words, *Crimes* and *Offences*. For the word *Miſdeeds*, which might ſignify both the one and the other, is not ſo common in uſe. But we not only have not any proper word, whereof the meaning takes in all Crimes and Offences; but we have not even any Rule or Uſage which diſtinguiſhes preciſely the meaning of the word Offences from that of Crimes. And altho' we commonly underſtand by the word Crimes a Robbery, a Murder, Forgery, and other wicked deeds, which deſerve the puniſhment of Death, the Gallies, Baniſhment, and other great puniſhments; and that the bare word of Offences is uſually underſtood of actions that are leſs wicked, and liable to a leſſer degree of puniſhment, but which may nevertheleſs deſerve ſome puniſhment, ſuch as Injuries, a wound or hurt in a Scuffle, yet ſometimes the word Offences is made uſe of to expreſs the greateſt Crimes. Thus it is ſaid, that an Offender has made ſome diſpoſition of his Goods after the Offence is committed; that a Thief, a Robber, a Murderer has been taken in the very act, but we never apply the word Crime to Injuries, or to wounds in a Scuffle; and to them we give the name only of bare Offences. Thus the word Offence is underſtood ſometimes of Crimes, but the word Crime is never uſed to expreſs a ſlight Offence.

It is in conſideration of the want in our language of a common term which may agree to all Crimes and to all Offences, that we have entitled this Book of Crimes and Offences: and ſeeing theſe two words have different ſignifications, but which are not clearly enough diſtinguiſhed; in order to give

a juſt and preciſe Idea of them, it was neceſſary before we ſhould begin to ſpeak of Crimes and Offences to make this firſt reflexion on the uſe of theſe two words; to which we muſt likewiſe add, that in the *Roman* Law, from whence the ſaid words have been taken, they have not even there a meaning that is peculiar to each of them, and ſuch as may not agree to the other, but they are often there confounded together; neither is there in the *Roman* Law any true and proper word that ſignifies exactly and preciſely every thing that is contained under theſe two words of Crimes and Offences, on which it would be ſuperfluous to enlarge any further here; but it is neceſſary to take notice here of a difference that was made in the *Roman* Law of two ſorts of Crimes or Offences which comprehended them all, and divided them into two kinds, which it is neceſſary to underſtand becauſe of the relation which they have to our Uſage.

The firſt of theſe two kinds of Crimes or Offences, was of thoſe which were called publick; and the ſecond of thoſe that were called private. The publick Crimes were thoſe which the Law allowed all manner of perſons to proſecute in Judgment, altho' they had no particular intereſt therein; and the private Offences were thoſe of which the proſecution was not allowed to any but the perſons who had an intereſt therein. Thus the Crimes of Treaſon, Imbezzlement of the Publick Money, Forgery, Adultery, and many others were publick Crimes. Thus, the Emperors *Arcadius*, *Honorius*, and *Theodoſius* ranked in the number of publick Crimes the Hereſy of the *Manicheans*[a]. Thus on the contrary Injuries, defamatory Libels, Theft, Stellionate, or all kind of Cozenage in bargaining, and ſome others were private Offences.

[a] Huic itaque hominum generi nihil ex moribus, nihil ex legibus, commune ſit cum cæteris. Ac primùm quidem volumus eſſe publicum crimen. *l.* 4. *C. de hæret.*

We ſhall ſhew hereafter how far this diſtinction between publick Crimes and private Offences agrees with our Uſage; but it is neceſſary to obſerve in the firſt place, that altho' in the *Roman* Law they uſed the word Offences commonly for private Offences, and the word Crimes for publick Crimes; yet ſometimes they gave the name of Crimes to private Offences[b], and the name of Offences to all ſorts of Crimes without diſtinction[c].

[b] *Stellionate, or Cozenage in bargaining, was a private Offence, and it is placed in that rank in the twentieth Title of the forty ſeventh Book of the* Digeſts; *and in the thirty fourth Title of the ninth Book of the* Code, *it is called a Crime, altho' it is ſaid in the third Law of the ſame Title that it is not a publick Crime.*

[c] *Altho' in ſome places Offences are diſtinguiſhed from Crimes, as in the eighteenth Section of the ſeventeenth Law.* ff. de Ædil. edict. *where Offences are oppoſed to Publick Crimes,* quæcunque committuntur ex delictis, non publicis criminibus; *Yet we ſee in other places that the word Offence ſignifies all manner of Crimes. Thus in the ſecond Law,* ff. de re militari, *all the Crimes of Soldiers are called Offences. Thus in the* 131ſt *Law,* §. 1. ff. de verb. ſignif. *the word Puniſhment is defined as a general word, which ſignifies the chaſtiſement of all ſorts of Offences; which comprehends very clearly all manner of Crimes, and all manner of Offences, ſeeing they have all of them their proper Puniſhments,* cum pœna generale ſit nomen, omnium delictorum coercitio. *d. l.*

This diſtinction of the *Roman* Law between publick Crimes and private Offences, altho' it is not received with us in the ſame manner as in the *Roman* Law, yet it has been the occaſion of our retaining theſe expreſſions of publick Crimes and private Offences in another ſenſe and meaning; as to which it is neceſſary to obſerve wherein it is diſtinguiſhed from that of the *Roman* Law.

In the *Roman* Law there were no publick Crimes but thoſe which were declared to be ſuch by ſome Law or other: and they were called publick Crimes, becauſe the puniſhment of them was of importance to the Publick, and becauſe for that reaſon whoever was willing to proſecute an Offender for a Crime of this nature, was allowed to do it, as has been juſt now obſerved: and altho' the perſon, if there was any who was injured by the Crime, did not complain of it, the Proſecutor might go on to make proof of the Accuſation, in order to have the Offender brought to puniſhment. And in private Offences, it was only the parties who were injured that could complain thereof, and ſue for the puniſhment of the Offenders, as has been likewiſe remarked, becauſe the puniſhment of theſe Crimes was not thought to be of the ſame importance to the Publick. And they placed in this Rank Theft, Defamatory Libels, the driving away of Cattle, the Crime of thoſe who cut down Trees privately, Stellionate, and ſome others.

By our Uſage no body has a right to carry on a Criminal Proſecution, and to ſue for the puniſhment of a Crime, except the party who is injured, and the publick Officer to whom this charge is committed. And it is for this end that in all Courts of Juſtice which have a

Juriſdiction

Juriſdiction in Criminal matters there are Officers appointed, one of whoſe moſt important Functions is to be careful and diligent in bringing Offenders to Juſtice, as has been taken notice of in another place. Theſe are the Officers who are called the King's Council, who are the Advocates and Procurators General in the Supreme Courts; the King's Advocates and Procurators in the Diſtricts of Bailiffs, Seneſchals, and other Juriſdictions; and the Proctors, who are called Fiſcals, or Promoters of the Office, in the Juriſdictions of Lords of Mannors, as has been already obſerved in the ſame place: So that thoſe Officers being obliged by the duty of their Offices to ſue for the puniſhment of all Crimes, which the Publick is concerned to have puniſhed, it is not allowed for any particular perſon to become an Accuſer of an Offender, and to carry on the Criminal Proſecution in his own Name; but becauſe it may happen that ſome perſons who have a particular knowledge of the proof of a Crime, and who may be induced by ſome motive or other to intereſt themſelves in getting the ſame to be puniſhed, they are allowed to become Informers, that is, to acquaint the King's Procurator, that ſuch a one has committed ſuch a Crime, and to inform him of the circumſtances which may ſerve to prove the fact. This Information, which is taken down in writing in the Regiſtry of the King's Procurator, and ſigned by the Informer, is kept ſecret, ſo that the King's Procurator does not carry on any Proſecution in the name of the Informer, nor is there any mention made of him in any one of the Acts; but if by the event of the Proſecution the accuſed Party is acquitted, the King's Procurator is obliged in that caſe to give him the name of his Accuſer, that he may ſue him for having falſly accuſed him. And as for the Accuſers, who are otherwiſe called Plaintiffs, and are the Parties intereſted, they are particularly named in the ſeveral Acts of the Proceeding, which is carried on in the name, and at the requeſt of the King's Procurator, and upon the complaint, and at the inſtance of the Plaintiff, who is called the Civil Party, becauſe he ſues only for his Civil Intereſt. For there is this difference between the intereſt of the Party, and that of the King's Procurator, that all the ſteps made by the Civil Party tend only, with regard to him, to obtain a Sentence of Condemnation for Damages, or a Civil Reparation of the Loſs which the Crime may have occaſioned to him; but he cannot demand that the party who is accuſed ſhould be condemned to undergo the puniſhment which the Crime may deſerve with regard to the Publick: for it is properly the buſineſs of the King's Procurator to demand that the ſaid Puniſhment be inflicted, whether it be that of Death, the Gallies, or other Puniſhment. And this Policy is conformable to the Spirit of the Chriſtian Religion, which puts into the hands of the Prince and of his Officers, the Right of avenging and puniſhing Crimes[d]; and which forbids private perſons to take vengeance[e]. Thus our Uſage is in that reſpect different from the *Roman* Law, ſeeing it does not give liberty to any private perſon to ſue for the puniſhment of a Crime. Our Uſage likewiſe differs from the *Roman* Law in another reſpect; for whereas by the *Roman* Law many Crimes which deſerved a publick puniſhment were not for all that accounted publick Crimes; we place in the rank of publick Crimes, which may be proſecuted by the King's Procurators, Crimes which were not publick in the *Roman* Law; ſuch as Theft, the receiving of ſtollen Goods, Robbery, the cutting down of Trees by ſtealth, the aſſembling together in a riotous manner to do ſome act of violence, or to carry away any thing by force, the driving away of Cattle, and the breaking of Priſon[f]. For there is not any one of theſe ſeveral ſorts of Crimes, which having been brought before a Court of Juſtice, the King's Procurator may not proſecute, in order to have the ſame puniſhed. For there is none of theſe ſeveral Crimes, which may not be proſecuted at the inſtance of the King, when his Officers have knowledge of them, altho' the party who firſt brought the complaint ſhould deſiſt from it, or agree the matter with the party accuſed.

[d] To me belongeth vengeance. *Deut.* xxxii. 35.

If thou do that which is evil, be afraid; for he beareth not the ſword in vain: for he is the miniſter of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 14.

[e] Recompence to no man evil for evil. Provide things honeſt in the ſight of all men. If it be poſſible, as much as lieth in you, live peaceably with all men. Dearly beloved, avenge not your ſelves, but rather give place unto wrath: for it is written, Vengeance is mine, I will repay it, ſaith the Lord. *Rom.* xii. 17, 18, 19. *Mat.* v. 39.

He that revengeth ſhall find vengeance from the Lord, and he will ſurely keep his ſins in remembrance. Forgive thy neighbour the hurt that he hath done unto thee, ſo ſhall thy ſins alſo be forgiven when thou prayeſt. One man beareth hatred againſt

againſt another, and doth he ſeek pardon from the Lord? *Eccluſ.* xxviii. 1, 2, 3.

[f] *All theſe ſeveral Crimes are ranked in the number of private Offences in the forty ſeventh Book of the* Digeſts.

It was neceſſary to make theſe Remarks on the differences between our Uſage and the *Roman* Law as to the manner in which we conſider Crimes and Offences in whatever ſenſe we take the one and the other of theſe two words; and the Reader may be able to judge by what has been ſaid, that it is of no great importance, and that it would be no eaſy matter to give a juſt and preciſe Idea of the diſtinction between Crimes and Offences; and that it is ſufficient to know that in our Uſage we conſider as Crimes, and as publick Crimes, all Crimes and all Offences whatſoever, in which the Publick is concerned, that they ſhould not be let go unpuniſhed, to the end that they may not multiply thro' impunity, and that the puniſhments may reſtrain at leaſt ſome of thoſe who would not be withheld by other motives. For altho' it be true that the greateſt Puniſhments do not totally prevent any Crime, yet they diminiſh the frequency thereof, and if they were let go unpuniſhed, it would occaſion an infinite multitude of all ſorts of Crimes; and it is for this reaſon, that when ſome Crimes become more frequent than they were, the puniſhment of them is made the more ſevere, in order to reſtrain the growing multitude of Offenders.

It is to this Puniſhment of Crimes and Offences that all the Rules concerning this matter have a relation, and all that ſhall be ſaid thereof in this third Book hath its uſe only with reſpect to this Puniſhment, without which the matter of Crimes would not be a ſubject of Human Laws, and would have for its Rules only the Divine Law; as to which it is neceſſary to remark the different ways in which the Spirit of the Divine Law, and that of Human Laws conſider Crimes. For in this difference conſiſts the diſtinction between the Conduct which the Paſtors of the Church and the Miniſters of the Spiritual Power ought to hold with reſpect to Crimes; and that which the Miniſters of Juſtice and of the Temporal Power ought to obſerve therein.

The Spirit of the Law of God, who prepares for Crimes which he ſhall not have forgiven in this world other puniſhments than death, and which are more terrible than the ſevereſt puniſhments that can be inflicted in this life, aims at the amendment of the greateſt Offenders, and at reclaiming them to their duties, by working in them ſuch a change as may transform them from being the moſt profligate Wretches into the greateſt Saints; and we ſee ſometimes Offenders, whom God ſuffers to eſcape the puniſhments inflicted by the Temporal Laws, that he may work this change in them, or whoſe hearts he touches even in the midſt of their Puniſhments, as it happened to that Robber, who at the laſt moment of his life made his puniſhment ſerve as a paſſage for him into Heaven. But the Policy of Human Laws, which tends to regulate the Society of Mankind, and to reſtrain all attempts that may diſturb the Order thereof, hath eſtabliſhed Puniſhments proportionable to the different Crimes, and even that of Death it ſelf, againſt ſome which could not be prevented by leſſer Puniſhments; accompanying it ſometimes with torments which ſtrike a greater terror than ſimple Death: and as this uſe of Puniſhments has always been neceſſary in the multitude of Crimes which have always abounded, we have ſeen that in the days wherein God himſelf was pleaſed to govern in a viſible manner the People whom he had made choice of, and to mix together the Spiritual and the Temporal Government by his Divine Law which he gave to *Moſes*, he there eſtabliſhes the Puniſhment of Death againſt ſeveral Crimes [g]. But when he ſent his Son into the World to plant the Goſpel in the room of the ancient Law, he ſeparated from the Spiritual Miniſtry of Religion, the uſe of the Puniſhment of Death, and of other Corporal Puniſhments, and left it ſolely to the Temporal Powers, that they might thereby maintain, as much as is poſſible, the Order of Society.

[g] And the *Iſraeliti∫h* woman's ſon blaſphemed the name of the Lord, and curſed: and they brought him unto *Moſes*, (and his mother's name was *Shelomith*, the daughter of *Dibri*, of the tribe of *Dan*.) And they put him in ward, that the mind of the Lord might be ſhewed them. And the Lord ſpake unto *Moſes*, ſaying, Bring forth him that hath curſed, without the camp, and let all that heard him, lay their hands upon his head, and let all the congregation ſtone him. And thou ſhalt ſpeak unto the children of *Iſrael*, ſaying, Whoſoever curſeth his God, ſhall bear his ſin. And he that blaſphemeth the name of the Lord, he ſhall ſurely be put to death, and all the congregation ſhall certainly ſtone him; as well the ſtranger, as he that is born in the land, when he blaſphemeth the name of the Lord, ſhall be put to death. And he that killeth any man, ſhall ſurely be put to death. *Levit.* xxiv. 11, *&c.* See *Exod.* xxi. 23, 24. *Deut.* xix.

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We ſhall not enlarge any further on this diſtinction between the Spirit of Religion, and that of the Temporal Policy; the Reader may ſee what has been ſaid of it in the 10th Chapter of the Treatiſe of Laws, and in the 19th Title of the firſt Book of the Publick Law. It ſufficeth that we remark here the Cauſes of the neceſſity of puniſhing Crimes; as to which it is neceſſary in the firſt place to diſtinguiſh two ſorts of Crimes.

The firſt is of thoſe which without doing any wrong to any particular Perſon, deſtroy the publick Order, and diſturb Society, ſuch as Impiety, Hereſy, Blaſphemy, the deſpair of thoſe who lay violent hands on themſelves, and other Crimes, ſome of which ought not ſo much as to be named. The ſecond is of thoſe which beſides the diſturbance of the publick Order of the Society, do prejudice to ſome Perſons in particular, ſuch as Theft, Robbery, Imbezlement of the Publick Money, the counterfeiting of the King's Coin, Murder, and others. The Crimes of the firſt of theſe two ſorts, deſerve only a ſimple Puniſhment, ſuch as may revenge the Publick of the Crime, and chaſtiſe the Offender; and thoſe of the ſecond ſort deſerve, beſides this Vengeance and this Chaſtiſement, to be puniſhed with a Reparation of the Damage that is done by the Crime, ſuch as the Reſtitution of the thing ſtolen, the indemnifying a Widow whoſe Husband has been killed, and the other Civil Intereſts of the like nature, to the Perſons to whom they are due. So that there are two ſorts of Puniſhments for this ſecond kind of Crimes: that of the Crime it ſelf, without regard to the Damage, by the bare View of the Chaſtiſement which it may deſerve; and that of making good the Loſs occaſioned by the Crime.

Beſides this firſt diſtinction of theſe two ſorts of Puniſhments, which is neceſſary for underſtanding aright the uſe of Puniſhments according to the Spirit of the Laws, we muſt take notice of a ſecond diſtinction of four ſeveral Kinds of the firſt ſort of Puniſhments which have been juſt now mentioned. The firſt, to begin with the leaſt, is that of the Puniſhments which are called pecuniary, which are limited to a Condemnation in a certain Sum of Money without inflicting any mark of Infamy; and we muſt place in the ſame Rank of the firſt ſort of leſſer Puniſhments, the Admonitions and Reproofs which are given in open Court, and which likewiſe do not brand with Infamy. The ſecond Kind is that of the Puniſhments which affect the Honour, and carry with them a mark of Infamy; ſuch as a Condemnation in a Fine to the King, and that ſort of Correction, which is called a Judicial Reprimand. The third, is of the Puniſhments which are inflicted on the Perſon, and on the Body of the Party accuſed, ſuch as Whipping, Marking, the making a publick Confeſſion of the Crime in that ignominious manner which is called in *France, Amande Honorable* *, Baniſhment, and other Corporal Puniſhments, all which are attended with Infamy. And the fourth is of the ſeveral ſorts of Puniſhment by Death; ſuch as Hanging, Burning, Breaking on the Wheel, and others.

It is eaſy to judge by theſe ſeveral ſorts of Puniſhments, of the divers Views of the Laws which have enjoined them. The firſt of thoſe Views, which is common to all the four ſorts of Puniſhments, is to puniſh and avenge the Crime by the publick Satisfaction which the Offender is obliged to make *h*. The ſecond, which is common alſo to all Puniſhments, is to reſtrain by the Example of the Puniſhments, thoſe who cannot be influenced by better Motives to abſtain from the Commiſſion of Crimes *i*. The third, which agrees only to the three firſt ſorts of Puniſhments, is that of the Correction or Amendment of the Offenders: For altho ſome of theſe Puniſhments have in them a ſeverity which exceeds the bounds of Correction, yet they all of them imply the effect of Correction and Amendment, by putting the Offenders in mind that greater Puniſhments are reſerved for them, in caſe they fall into new Crimes; and there are ſome of theſe Puniſhments which are Corrections from the Mouth of the Judges, when they give Admonitions to ſome Offenders; for the end of theſe ſorts of Admonitions is not

[* ‘ This Puniſhment which is ſtiled in *France* ‘ *Amande Honorable*, is when the Criminal is con- ‘ demned to make a publick Confeſſion and Ac- ‘ knowledgment of his Crime, being ſtript naked ‘ to his Shirt, bare headed, and bare footed, ha- ‘ ving a Torch in his Hand, and in this Poſture to ‘ ask Pardon of God, of the King, of Juſtice, and ‘ of the Party whom he has injured. *Imbert Pra- ‘ tique Civile & Criminelle liv.* 3. *chap.* 21.]

h For the Puniſhment of Evil doers. 1 Pet. 2. 14.

i And thoſe which remain ſhall hear, and fear, and ſhall henceforth commit no more any ſuch Evil among you. Deut. 19. 20.

only to puniſh the Offenders by the ſhame of being reprimanded in open Court, but alſo to amend them, and to exhort them to change their Courſe of Life *l*: And we may add for a fourth View of the Laws in enacting Puniſhments, that of putting profligate Wretches and thoſe who are guilty of great Crimes out of a condition of committing new ones; which properly agrees only to the Puniſhment of Death, altho there be others which may have this Effect.

Altho it be certain that the ſeverity of the Puniſhments diminiſhes in a great meaſure the number of the Crimes in a State, and that in proportion as the Laws uſe more precaution, and the Officers are more diligent and careful in finding out and puniſhing Offenders, there are fewer Crimes committed; yet ſtill it muſt be owned that notwithſtanding theſe Remedies Crimes are very frequent; for they cannot cure the Cauſes of the Diſeaſe, which are the different Paſſions of Men, ſo ſtrong in a great many and having ſo great a maſtery over them, that even the ſight of the Puniſhment does not deter them from committing the very Crimes which they ſee actually puniſhed in others. Thus thoſe whom Avarice has engaged in a habit of Theft, make no ſcruple to pick Pockets in a Crowd of Spectators that are looking on at the Execution of a Thief; and the acquired habits of other Crimes, and the tranſports of Revenge, and other Paſſions, kindle ſuch a Fire as nothing is able to extinguiſh, and which takes away all manner of thought of the Conſequences of the Crimes, or makes them run the hazard of all Events let them prove what they will.

It is from this Fountain that we ſee daily flow thoſe ſeveral Crimes which are ſo frequent, eſpecially in great Towns, where the occaſions of committing them are more common, and where it is eaſier to conceal the Crimes, and to skreen the Offenders from the hands of Juſtice.

This frequency of Crimes, is it then become an Evil without any Remedy, which may at leaſt diminiſh it? And is there no poſſibility to render thoſe Crimes leſs frequent which are moſt common, ſuch as Thefts, Robberies, Murders? Might not we hope from the great and ſingular Example of the diſuſe of Duels, which has been effected in *France*, to be able to procure a diminution of thoſe other Crimes, not by the ſame ways which have been taken to prevent duelling, which would not be applicable to this deſign, but by other ways proportioned to the Cauſes of the Evil? The Cauſes of the frequency of Thefts, of Robberies, and of Murders which are the Conſequences thereof, are Poverty joined with a bad Education, Idleneſs, vicious Habits, Debauchery, and the diſorderly Life which Perſons under thoſe Circumſtances commonly fall into, and from which they are gradually drawn into the Commiſſion of the greateſt Crimes. Many are poor from their Birth, a bad Education trains them up in Idleneſs, and the habit of doing nothing leads them to the doing of Miſchief, which cannot afterwards be ſtopped but by the Force of Juſtice; which comes too late, and ſerves only as a Fence againſt a Torrent, which overflows its Banks.

It would ſeem therefore to be of great advantage to a State, to eſtabliſh therein ſuch a Policy, as might diminiſh in it as much as is poſſible theſe bad Effects, by removing their Cauſes; which are Idleneſs, Poverty, a bad Education, which occaſion ſo many Thefts, Robberies, and Murders which uſually attend Robberies; for theſe are the ſorts of Crimes that are the moſt frequent, and they are ſo frequent only becauſe they ſpring from thoſe three Cauſes which are common every where: So that there is this difference between theſe ſorts of Crimes and all others; that altho there be many other Kinds of Crimes, ſuch as Treaſon both againſt God and Man, Impiety, Blaſphemy, Sorcery, Sedition, Rebellion againſt the Orders of a Court of Juſtice, counterfeiting the King's Coin, Murders, and Aſſaſſinations on account of Quarrels and out of Revenge, Poiſoning, Forgery, Extortions, Adulteries, and others; yet we ſee as many or more Crimes of that one kind of Thefts, Robberies, and of Murders committed by Robbers, as of all the other kinds of Crimes put together. And there is likewiſe this other difference between theſe Crimes and all the others; that altho there be no other Remedy, to prevent the multitude of the ſeveral Crimes beſides

l Interlocutio præſidis, quæ indicta eſt, infamem eum de quo quæris feciſſe non videtur: cum non ſpecialiter ob injuriam vel admiſſam vim condemnatus ſit, ſed ita præſidis verbis gravatus & admonitus, ut ad melioris vitæ frugem ſe reformet. *l.* 19. *C. ex quib. cauſ. inf. irr.*

beſides the Example of Puniſhments, and that it is not poſſible to cure in every one Ambition, Avarice, Debauchery, Libertiniſm, Impiety, Envy, Hatred, and the other Paſſions and diſorderly Affections, which lead to the Commiſſion of thoſe different ſorts of Crimes, even thoſe Perſons who are rich enough, and ſome who have had the Advantage of a good Education; yet it does not appear to be impoſſible for a State to provide Subſiſtence for all the Families in it, either by their own Labour, if that be ſufficient, or by giving them ſuch Aſſiſtance as cannot be refuſed without Injuſtice; by puniſhing thoſe who having nothing of their own to ſubſiſt on, and being able to work and gain their Livelihood, do nevertheleſs ſpend their time in Idleneſs; by making a diligent Enquiry after poor Families, in order to find out and puniſh thoſe who do not work; by viſiting carefully all the Houſes ſuſpected to harbour idle Perſons, and to receive ſtolen Goods; by making all Perſons whoſe Condition is not known, give an account of the Place of their Abode, of their Family, of their Imployment; and in fine by uſing all poſſible and juſt Precautions for leſſening the number of idle Perſons and Vagabonds, which would of conſequence diminiſh likewiſe the Crimes which proceed from Idleneſs. Such an Inquiry as this would moreover produce this good Effect in the State, that it would multiply in it Manufactures and Trade, and would add to the publick Tranquillity one of the beſt Ways for maintaining it. And altho this Policy does imply a neceſſity of having Officers to put the ſame in execution, and of erecting publick Work-Houſes for employing the Poor; and tho it ſhould conſequently put the Publick to great Charges, yet that would be no inconvenience, for there would be no proportion between the Expence and the Advantages that ſuch a Regulation as this, if well concerted, and well executed, would produce in many reſpects, and even by the bare Effect of diminiſhing conſiderably Idleneſs, and the Vices which are the Conſequences of it.

As for the other ſorts of Crimes, it is to no purpoſe to hope for a total Ceſſation of them, no more than that of the Vices and Paſſions of Men; and we muſt on the contrary own that it is only by a ſingular Effect of the Divine Providence, that the number of all ſorts of Crimes is not much greater, as it certainly would be, if God ſhould abandon every one to his Paſſions; but his Providence over the Society of Mankind moderates in a great many their Inclination to Vices and Paſſions by the bare Effect of Reaſon, and of a leſs corrupted natural Conſtitution; ſo that the greater part of Mankind is free from the Vices and Habits which lead to the Commiſſion of Crimes, and chuſe to contain themſelves within the external Order of the Temporal Policy. And this Order is moreover greatly preſerved by the Union of Religion and the Civil Policy together, and by the good Uſe which ought to be made of the one and of the other, both by Perſons in a private Capacity, that they may keep within the bounds of their reſpective Duties; and alſo by thoſe who have a ſhare in the Government, and in the Adminiſtration of Juſtice, that they may puniſh thoſe who diſturb the ſaid Order.

It is by the means of this Providence of God over Mankind, and of the joint Concurrence of Religion and Policy together, that altho the Crimes which diſturb the Order of Society are very frequent with reſpect to the great Evils which they cauſe, yet it may be ſaid in another ſenſe that conſidering the univerſal Bent which Men have to Evil, the Crimes which are ſo exorbitant as to deſerve ſome temporal Puniſhment are too frequent in proportion to the other Evils, which do not amount to that Exceſs: for we muſt diſtinguiſh in the Society of Mankind two ſorts of Evils, which are cauſed by the Paſſions and wicked Inclinations of the greateſt part of thoſe who are Members thereof. The one, of that infinite number of Infidelities, Injuſtices, Cheats, vexatious Law-Suits, Quarrels, Enmities, Diviſions, and other Evils which over-run the Society, and which being the Works of Covetouſneſs, Ambition, Hatred, Anger, Envy, and of all ſorts of unlawful Deſires, Vices and Paſſions, are before God, and in the Language of the Scriptures, ſo many ſeveral Crimes worthy of the Puniſhments which the Divine Juſtice prepares for thoſe who tranſgreſs his Law, altho they do not amount to that Exceſs as to be placed in the Rank of Crimes in the ſenſe which is given to this Word in the Style of Human Laws. And the other of

theſe two ſorts of Injuſtices is that which conſiſts of thoſe to which the human Laws give the Name of Crimes, and which they puniſh with ſeveral Puniſhments; and it is neceſſary likewiſe to diſtinguiſh, among all thoſe Injuſtices of Men, which do not come under the Rank of Crimes, in the ſenſe which human Laws give to this Word, altho they may be Crimes in the ſight of God, between thoſe which create no diſturbance in the Society, and which do hurt to none but thoſe who commit them; and thoſe which beſides that they do hurt to other Perſons than the Authors of them, do alſo diſturb the Order of the Society. The firſt ſort of Injuſtices which create no diſturbance in the Society that deſerves to be revenged by human Laws, and which do hurt to no Perſon, are properly ſpeaking a Matter belonging to the Rules of the Church, which preſcribe Remedies againſt them, and direct her Miniſters in the Method of correcting and reclaiming thoſe who are guilty of them, by Ways proportioned to the Spirit of Religion, which requires Juſtice in the inward Parts of Man; and the temporal Policy does not meddle therewith. But as for the Injuſtices which diſturb the Order of the Society, and which go to that Exceſs as to be ranked among Crimes and Offences, they are not only a Matter which belongs to the Rules and Canons of the Church which forbids them; but they are moreover a Matter cognizable by the temporal Policy, and ſubject to the Adminiſtration of Juſtice, which ought to ſuppreſs all Attempts againſt one another's Right, and maintain every one in their Property, which is the Duty of thoſe who are intruſted with the Care of the Government, and the Adminiſtration of Juſtice. Thus the temporal Policy, whoſe buſineſs it is to regulate the external Order of human Society, exerts it ſelf in two different manners, with reſpect to all the kinds of Injuſtices that diſturb the ſaid Order.

The firſt which reſpects in general all ſorts of Diſturbances, Attempts and Injuſtices, which are not of the number of Crimes and Offences, and which do not deſerve any Puniſhment; and the ſecond, which relates to the Puniſhment of Crimes and Offences that may deſerve Puniſhments or other Correction. And this is what diſtinguiſhes the Subject of this third Book from all the other Matters of the Laws, whether they be of the Publick or Private Law.

We thought it neceſſary to make all theſe general Reflections on this Matter of Crimes and Offences, in order to give an Idea of the Rank which it holds in the Publick Law, and of the Uſe of the Laws which regulate it; it remains now that we ſhould explain what it is wherein the Detail of this Matter conſiſts, and the Views which we propoſe by digeſting it in order.

The Matter of Crimes and Offences conſiſts of two Parts; every one of which hath its Rules of a different nature, which it is neceſſary to diſtinguiſh, and which ought to have their ſeparate Rank. The firſt of theſe two Parts comprehends every thing which relates to the Diſtinctions of the ſeveral kinds of Crimes and Offences, and their Puniſhments; the Rules of the Proportion of the Puniſhments to the Crimes and Offences, in conſideration of their Enormity, their Quality, their Conſequence, the Neceſſity of making an Example, or upon other Conſiderations which may plead for a Mitigation of the Puniſhments; the Rules of the Regard which ought to be had to the different Circumſtances of the Quality of the Perſons, of their Age, the Time, the Place, of the Diſpoſitions of the Offenders, which diſtinguiſh thoſe who offended with Deſign, out of Raſhneſs, by ſome Effect of an Accident, and the other Circumſtances of the like nature; the Diſtinction which ought to be made between the principal Offenders, and their Accomplices and others who may have had ſome hand in the Crimes and Offences; what the Proofs of Crimes ought to be, and in what manner they are gather'd, not only from the Depoſitions of the Witneſſes, and from Writings, if there be any, but alſo from the Mouth of the Offenders themſelves; whether it be by their Confeſſion, or by Conſequences drawn from their Anſwers, as if they deny known Truths, or if they aſſert Facts that are notoriouſly falſe, or if they vary in their Anſwers to Interrogatories, and make other Diſcoveries by which they may be convicted; what are the Caſes wherein it may be lawful to proceed to Torture, which is called the Queſtion; what are the Rules of the Abolition, Remiſſion, or Pardon of Crimes by Letters Patent of the Prince.

The

The ſecond part of the Matters of Crimes and Offences contains that which relates to the Proceedings in criminal Cauſes, the manner of forming Complaints, Accuſations, Denunciations, the taking of Informations and the other Proofs, Decrees for apprehending the Perſons who are charged with any Crime, or for obliging thoſe to appear in Judgment who cannot be impriſoned, their Examinations, the repeating and confronting of Witneſſes when it is neceſſary to have recourſe thereto, and every other thing relating to the Proceedings that are neceſſary for the Inſtruction of Criminal Cauſes.

It is eaſy to judge that theſe two ſorts of Matters being different, they ought to be treated ſeparately, and that thoſe of the ſecond part belong to the Order of Judicial Proceedings, and ought to be explained in the fourth Book, where we ſhall explain every thing that relates to Judicial Proceedings, as well in civil as in criminal Cauſes; and the Matters touching Proceedings in criminal Cauſes ſhall be the ſecond Part of the ſaid fourth Book: So that there remain for the Subject of this Book the Rules which concern the Detail of this firſt part of Crimes and Offences which we have been juſt now explaining, and of which it is neceſſary to draw the Plan.

According to the natural Order of theſe Matters, the firſt Rank ought to be given to that which relates to the Diſtinctions of the different kinds of Crimes and Offences: for before we explain the Detail of a Subject, it is neceſſary in the firſt place to know its Nature; and it is from the Nature of things that we diſcover the Grounds and Principles of the eſſential Truths which relate to them; and when the Buſineſs is to lay down Rules which are the Truths of the Science of Laws, it is from the Nature of that which is their Object that we muſt gather them.

The Diſtinctions of the different kinds of Crimes and Offences may be made differently by divers Views, as by the Difference between publick Crimes and private Offences, taking this Diſtinction in the ſenſe in which it is applicable to our Uſage, as the ſame is explained in the beginning of this Preamble: or by the different Degrees of the Malice and Heinouſneſs of the Crimes, diſtinguiſhing the greater from the leſſer; thus Murders are more heinous Crimes than Thefts, and Seditions greater than Calumnies and defamatory Libels: Or by the Conſequence of the publick Intereſt, which is greater in ſome Crimes than in others; thus Rebellion and Diſobedience to the Orders and Decrees of Courts of Juſtice give greater Diſturbance to the publick Tranquillity than Thefts; and the counterfeiting the Coin more than Forgery: Or by the Difference of the Objects which the Crimes may have relation to; thus Blaſphemy, Impiety, Atheiſm, and the other Crimes of Treaſon againſt the Divine Majeſty relate to God himſelf; thus all Attempts againſt the Prince and againſt the State, which come under the Denomination of High Treaſon, reſpect the Sovereign and the Order of the Government; thus Robberies, Murders, Adultery, defamatory Libels, and other Crimes, affect particular Perſons, either in their Eſtates, Honour, or Perſons: Or by the Difference of the Puniſhments that the different Crimes may deſerve; for ſome Crimes againſt the Divine Majeſty are more mildly puniſhed than others againſt private Perſons; thus Blaſphemy is not puniſhed with Death, as Murder is. We might likewiſe under another view diſtinguiſh between the Crimes which are cognizable by the Judges of the Courts of Lords of Manors, as well as by the King's Judges, and thoſe which are called Royal Caſes, or Pleas of the Crown, which are cognizable only by the King's Judges, ſuch as the counterfeiting of the King's Coin, Sedition, and many other Crimes.

We might likewiſe diſtinguiſh by other Views the ſeveral kinds of Crimes, and place them in different Orders; but it would ſeem that the moſt ſimple and moſt natural way of diſtinguiſhing the ſeveral ſorts of Crimes and Offences, is to conſider in the firſt place what is the Character that is common to them all, which places them in the number of Crimes and Offences, and to remark in every one of them what it has peculiar and ſingular in its Nature, which makes it to partake of this Character. This Idea, which may appear to ſome to be ſomewhat obſcure, will be eaſily made clear by a bare Explanation of this Character, and by two Examples of ſome Crimes wherein the ſaid Character is conſider'd.

The common Character which makes all

all Crimes and all Offences, is that they disturb the Order of the Society of Mankind in such a manner as to prejudice the Publick, and so for that reason deserve some Punishment; and this Character is so essential to the Nature of Crimes and Offences, that as it is in all of them, so likewise there are no Actions which have this Character but what are either a Crime or an Offence. Thus Sedition is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince, and therefore deserves some Punishment. And Sedition is an Offence against the Publick, because it disturbs the publick Tranquillity by an Attempt which puts those who ought to obey in the place of those who have the Command, and which makes mutinous and seditious Persons become Dispensers of Authority: and by that means it is an Offence likewise against the Prince. Thus the counterfeiting of the King's Coin is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince; and for that reason is worthy of some Punishment. And the counterfeiting of the Coin is an Offence against the Publick, because it occasions an infinite number of Losses to all sorts of particular Persons, disturbs Trade and Commerce, and does Injury to the Prince, who alone has the Right of giving Currency to the Money he orders to be stamped, or of which he is willing to allow the Use.

We see in these two Examples, that each of these two Crimes has the character of disturbing the Order of the Society, and of offending the Publick; and we see in every one of them what it has peculiar and singular in its Nature that makes it to partake of this character: Sedition, by disturbing the publick Tranquillity, and encroaching on the Government and Authority of the Sovereign; and counterfeiting the Coin, by causing Disorders in Trade, and Losses to particular Persons. And it is necessary likewise to discern in each Crime and in each Offence, this Character which is common to them, and to distinguish also in the Nature of every one of them that which it has peculiar in it that disturbs the Order of Society, and which offends the Publick in such a manner as to deserve Punishment; and in order to form this Judgment, and to make this Distinction, it is necessary first of all to consider what there is in the Order of the Society of Mankind, which makes this publick Good, that is injured by Crimes and Offences; and we shall easily perceive in every one of them, wherein it is that its Nature hath this Character.

We take for granted here what has been already explained in the Treatise of Laws, touching the Foundations on which God hath established the Society of Mankind; and as to what concerns the Distinctions of the several sorts of Crimes and Offences, it sufficeth to consider in general the Plan of this Society, according to the Description that has been given thereof in the said Treatise of Laws; and to distinguish in that Plan the divine Order which hath established Society, and made it to subsist by his Providence, by the Ministry of Religion in the Places where it is known, by the Temporal Government, and by the Ties and Engagements which unite Men to one another, in order to their forming their Society: for it is by the Distinctions of those Foundations of the Order of Society, and of those Ties and Engagements which make it as it were different Parts of the Order which God has established in it, that we may be able to judge in each Crime and in each Offence, in what manner it violates the said Order.

According to this view, we may distinguish in the Order of the Society of Mankind, as it were six different Parts which are the Foundations of it, and which compose the said Order; and according as the Crimes and Offences offend differently any one of the said Parts, they may be divided into six kinds.

The first of these parts of the Order of Society, consists in the Dependance on the said Order of God who has formed it, and who preserves it by his Providence, by his Divine Laws, by the Rules of the Law of Nature, and by Religion in the Places where it is known.

The second is the Authority which God has given to the temporal Powers for the Government of the Society.

The third is the general Policy of each State.

The fourth takes in the two sorts of natural Ties which God has made use of for forming the first kind of Engage-

ments

ments which unite Men together: Thoſe two Ties are Marriage, which unites the two Sexes, and Birth, which unites Parents to their Children, and compoſes the Families, which being aſſembled together, form the Society.

The fifth contains all the other kinds of Engagements, which link Men together for all their Wants, which God has eſtabliſhed in order to render them neceſſary to one another, and that they may exerciſe towards one another the ſecond Law, as has been explained in the fourth Chapter of the ſame Treatiſe of Laws.

The ſixth and laſt of theſe Parts, which ought to form the Order of Society, relates to every individual Perſon, conſidering him as a Member of this Body, and with reſpect to what he owes in his Perſon to the Society of which he is a Member; which diſtinguiſhes this ſixth Part from that immediately preceding, which relates to the Engagements of every one towards others in particular, whereas this laſt Part concerns only the Engagements of every individual Perſon to the Publick. Thus, for example, every particular Perſon is obliged both with regard to himſelf, and alſo to the Publick, to make a right Uſe of his Perſon; which makes ſome Actions liable to Puniſhment, altho they appear to be confined to the Perſons of thoſe who commit them, and they are, as will appear immediately, a laſt kind of Crimes and Offences.

Among all the different Manners in which the different kinds of Crimes might have been diſtinguiſhed, as has been already obſerved, we have thought fit to make choice of that of dividing them, according as they offend any one of theſe ſix Parts of the Order of Society, ſeeing it is certain that the Character which is common to Crimes conſiſts in this, that they diſturb that Order; and therefore it is natural to diſtinguiſh them by the Relation which they have to ſome one of theſe ſix Parts, which makes ſix different kinds of Crimes and Offences, which comprehends them all.

The firſt kind is of thoſe Crimes which offend againſt the firſt part of the Order of Society; the Character of which is to attempt ſomething directly or indirectly againſt the Divine Majeſty; ſuch as Blaſphemies, Impieties, Hereſies, Sacrilege, Sorcery and others.

The ſecond, of thoſe which violate the ſecond part of the Order of Society, and which treſpaſs againſt the Prince and the State; ſuch are the Crimes of High Treaſon in the firſt degree, which is againſt the Perſon of the Prince; and in the ſecond, which is againſt the State, and the other Crimes which partake of this nature.

The third, of the Crimes which tranſgreſs againſt the general Policy and publick Order of the State, and which on one part do not eſpecially affect the Intereſt of any one Perſon in particular, and on the other, are not properly Crimes of High Treaſon, altho they encroach upon the Authority of the Prince; ſuch as are the Crimes of unlawful Aſſemblies, of Monopolies, of counterfeiting the Coin, and other ſorts.

The fourth, of the Crimes which violate the natural Ties of Marriage, and of Birth, in ſuch a manner as to diſturb the publick Order of the Society, and of which the Conſequence demands a publick Puniſhment; ſuch as are Adultery, the having of two Wives or Husbands, which is called Bigamy, a Rape, the impoſing of ſuppoſititious Children, Inceſt, Parricide, Attempts againſt the Perſons of Parents, the expoſing of Children, the Crimes of Mothers who ſuffocate their Children at their Birth, and the other Crimes and Offences which violate theſe ſorts of Ties.

The fifth, of the Crimes and Offences which violate the different Engagements between particular Perſons; and this takes in all the Crimes and Offences which injure any one, either in his Perſon, or his Honour, or in his Eſtate, to ſuch an Exceſs as may deſerve to have ſome kind of Puniſhment inflicted for it by a Court of Juſtice; ſuch as Manſlaughter, Murder, Robbery, Theft, Forgery, Injuries, defamatory Libels, and others.

The ſixth, of Crimes and Offences, which without prejudicing the Intereſts of any particular Perſon, diſturb the publick Order of the Society by the bad uſe which ſome make of their Perſons; ſuch as thoſe who ſpend their time in Idleneſs, Prodigals, thoſe who run into Deſpair, leud Women, and Perſons who fall into thoſe monſtrous Crimes which are not proper to be named.

It is eaſy to perceive by this Diſtinction

tion of theſe ſix kinds of Crimes and Offences, that they comprehend them all, and that there is not any one of them of which we may not at firſt ſight judge under which of the kinds it ought to be ranked: and it is only neceſſary to obſerve that there may be ſome Crimes and Offences of a complex nature, which conſiſt of both Characters, and have relation to more than one kind, but even thoſe have their moſt natural Situation in one of the two, which it is very eaſy to diſcern. Thus, for example, a Robbery of Church-Plate is a Sacrilege, and by reaſon of this Character it belongs to the firſt kind of Crimes; but becauſe this Crime does hurt to thoſe to whom the ſaid Plate did appertain, it does by this ſecond view belong to the fifth kind: but ſince the Character of Sacrilege diſtinguiſhes it from other Robberies, it is more naturally qualified by the Name of Sacrilege, and therefore is ranked in the firſt kind.

It is according to this Method and Order that we ſhall explain in this third Book all the different kinds of Crimes and Offences, not by reducing them all to ſix Titles, according to theſe ſix general Kinds, but by ranking them under their proper Titles, and placing the Titles in the Order of theſe ſix Kinds, as they are in the Table, where thoſe of the firſt Kind are the firſt in Order, and the others follow, each in the Order of its Kind.

The Matter of Crimes and Offences takes in two ſorts of Rules: The firſt is of thoſe which are peculiar to each Crime and to each Offence; ſuch as are the Rules which relate to their Nature, their Characters, the Conſequence of making enquiry after thoſe who are guilty of them, and of bringing them to Juſtice, the Puniſhments proportioned to the Quality of the Crime or Offence, and others of the like nature. The ſecond, of ſome Rules which are common, either to all ſorts of Crimes and Offences in general, or only to ſome in particular. Thus the Rules concerning the Regard which ought to be had to the Intention of the Party that is accuſed, and to the Circumſtances, are common to all Crimes and Offences; and thoſe relating to the Effect which the Intention and Circumſtances ought to have, in order to obtain the Pardon of a capital Crime, are proper only to ſome Crimes, and do not agree to all: Thus the Rules which relate in general to the Proofs of Crimes agree to all Crimes and Offences; and thoſe concerning the Proof which is drawn from the Torture of the Perſons who are accuſed, are peculiar to capital Crimes.

In order to diſtinguiſh theſe two ſorts of Rules, and to rank them each in its proper place, we ſhall explain thoſe of the firſt ſort in the Titles proper to each Crime, and to each Offence, according to their different Natures which diverſify the ſaid Rules; and as for the Rules of the ſecond ſort, we ſhall reduce them under ſix Titles, which ſhall be the laſt of this Book. The firſt, where we ſhall explain the Cauſes of Crimes, in the Diſpoſition and Intention of the Criminals and their Accomplices. The ſecond, of the different Circumſtances of Crimes, and the Regard which ought to be had to them. The third, of Accuſations, and the Engagements of the Accuſers. The fourth, of the ſeveral ſorts of Proofs of Crimes and Offences. The Fifth, of the Puniſhments of Crimes and Offences. The ſixth and laſt, of the Ways by which the Perſons accuſed are either cleared or acquitted from the Puniſhments due to the Crimes.

TIT. I.

Of Crimes and Offences.

WE have run through in general all the different Natures of the ſeveral Affairs and Intercourſes which paſs between Men, the Manners by which they communicate to each other the Property and Uſe of one anothers Goods and Labours, and the Ways by which the Goods paſs from one Generation to another. We have likewiſe ſeen that Providence hath thus multiplied the ſaid Communications and Intercourſes, in order to keep Men in the Exerciſe of the Law of Love. And ſeeing all theſe Matters have a relation to this Fundamental Law, all the particular Laws which are the Rules of theſe Matters, are only Conſequences of that primary Law, which is the Foundation and Principle of all the others; and that they all tend to unite Men

Men together, and to keep them in Peace one with another, without which they cannot obſerve the Law which commands them to love one another.

It is this Peace which is the natural Work of Juſtice, and the End of all Laws; but becauſe the greater part of Mankind neither know, nor ſeek after, nor love any other Peace beſides the quiet Uſe of all the Objects of their Self-Love, and that the Deſire of this falſe Peace engages often many Perſons in the purſuit of the ſame Objects, they are ſo far from being united, that they fall out with one another, and come not only to Conteſts and Diſputes, which oblige them to have them regulated by the Ways of Juſtice; but they proceed to Acts of Violence in order to make themſelves Maſters of what their Intereſts and Paſſions deſire. And it likewiſe often happens that without Diviſion, and without Diſputes, the Paſſions of People carry them to Exceſſes of another nature, the Conſequences of which, or the bare ſight of them, gives diſturbance to the Publick. Thus Men are carried differently to the Commiſſion of all the ſeveral kinds of Enterprizes, Violences, and other Exceſſes, which are called Crimes or Offences.

Theſe are the Crimes and Offences that trouble the Peace and Quiet of Societies in ſo many different manners, which ſhall be the Subject of this third Book, and which we are now to conſider, that we may digeſt them into their proper Order.

By a Crime or Offence is meant an Injuſtice which deſerves Puniſhment; not that there is any Injuſtice that does not deſerve a Puniſhment proportionable to the Diſobedience to the Law which it tranſgreſſes, ſince every Act of Injuſtice implies the Violation of ſome Law, and that the Effect of the Law is not only to command and to prohibit, but likewiſe to puniſh thoſe whodo not what the Law commands, or thoſe who do that which it forbids: but ſeeing there are two ſorts of Laws, thoſe of Religion, and thoſe of Policy, the Characters and Differences of which ſhall be hereafter explained, Injuſtices are differently conſider'd and puniſhed by theſe two kinds of Laws; and it often happens that Injuſtices, which in Religion are great Crimes, ſuch as Avarice, Hatred, Envy, and others of the like nature, which tranſgreſs the Law of Love in a higher degree, are conſider'd in the Order of the Civil Policy only as Injuſtices of a kind which it takes no manner of notice of, in caſe the Crimes of that nature do not in outward Acts proceed to ſuch an Exceſs as to diſturb the Order of the Society: So that many Injuſtices, which are great Crimes in Religion, go unpuniſhed by the Civil Government; which gives the Name of Crime only to ſuch Injuſtices as deſerve a Puniſhment according to the Preſcription and Rules of the Civil Policy. We ſhall explain in its proper place the Cauſes of this Difference between the Conduct of Religion and that of the Civil Policy: but it ſufficeth here to take notice of one of the Foundations of this Difference, which conſiſts in this, that Religion does not content itſelf with the falſe outward Peace which is maintain'd by Self-Love, but it aims at the eſtabliſhing a true and ſolid Peace, which is the Fruit of an univerſal Juſtice, and an Obſervance of the whole Law; and that Religion likewiſe produces in thoſe who love and obſerve this Juſtice, this two-fold Effect, of forming in the inward part of the Mind and Heart a ſincere Peace, and of keeping them in an outward Peace with all others, and even with thoſe who love not Peace, or who are Haters of it. And thus Religion condemns and puniſhes differently, and by Puniſhments ſuited to its own Spirit and Conduct, all the Injuſtices which violate this double Peace. But ſeeing the Spirit of the Divine Law and of Religion tends principally to reclaim thoſe whom it puniſhes, and to bring them back to the Peace which it recommends to them; this Law of Peace makes uſe only of ſuch Puniſhments in this Life, as ſerve to reclaim thoſe whom it puniſhes, and abſtains from all thoſe Puniſhments which are not proper for ſuch a purpoſe. But becauſe this Spirit of Religion doth not reign in the Multitude, and doth not produce in all Perſons the inward Peace, God has provided by another Method of his Providence, that the Civil Policy ſhould correct or reſtrain thoſe whom the Spirit of Religion doth not mend, and who proceed to that Extravagance as to commit Violences and other Exceſſes, which diſturb the external Order of the Society: and it is for this reaſon that the Civil Policy retaining the univerſal Spirit of the Divine Law for the common Good of the Society, and in

order to contain Men at leaſt in outward Peace as much as is poſſible, makes three different Uſes, according to the Spirit of the Divine Law, of the Penalties and Puniſhments which it eſtabliſhes againſt all Crimes.

The firſt, which is proper to all the Puniſhments, excepting that of Death, is to reform thoſe who are puniſhed.

The ſecond, which is peculiar to Capital Puniſhments, is to put the Criminals out of a condition of cauſing new Troubles in the Society.

The third, which is common to all ſorts of Puniſhments, is the Uſe of Example, for reſtraining by the Sight and Fear of Puniſhments thoſe who abſtain from Crimes only out of fear; and it is this Example that diminiſhes the number of Crimes, which we ſhould ſee multiply to a ſtrange degree if they were let go unpuniſhed.

Theſe are the Violences, the Attempts, and other Exceſſes, that trouble the outward Peace and Order of the Society, which the Civil Policy reſtrains by Puniſhments and other Penalties.

We may conſider in the external Order of the Society three ſorts of Goods, the Uſe whereof is neceſſary in it, and upon which no Man can make any Attempt without being guilty of ſome Crime, or Offence. The firſt ſort, is Life, and the Liberty of one's Perſon. The ſecond, is the free Uſe of the Temporal Goods, which God gives unto Men, whereby they may be enabled to ſubſiſt in the free Uſe of their Lives and Perſons. And the third, is that Good which is called Honour, and which Men value above all other Goods.

There is no body but what comprehends ſufficiently what the Nature of the two firſt kinds of Goods is, and every one hath the ſame Idea of them; but as for Honour, it is ſuch a Good, that altho it be a real one, yet it is not of ſuch a nature, as that it is very eaſy to conceive a juſt Idea thereof: and ſeeing the neceſſity of underſtanding aright what are the Crimes which offend againſt Honour, makes it likewiſe neceſſary to know what this Honour is which the ſaid Crimes may offend; we cannot forbear enquiring in what manner this Honour, which makes this third kind of Goods, is conſidered in the Order of the Laws, which take it ſo far under their protection, as to inflict Puniſhments, and ſometimes Death it ſelf, for the Chaſtiſement of thoſe who have either raviſhed, or attempted to raviſh it.

This word Honour in our Language hath divers ſignifications; for it ſignifies the Reſpect or Conſideration which one has for Virtue, for Merit, for Dignity: and it is in this ſenſe that we are ſaid to honour one.

It ſignifies likewiſe Virtue it ſelf, the Merit, and the Dignity which procure this external Honour; and it is in this ſenſe that we ſay, that thoſe Qualities do honour to a Man.

It ſignifies alſo in a more extenſive and more common Senſe, that advantage which thoſe who live in ſuch a manner, even thoſe of the meaneſt Condition, as not to draw upon themſelves any Cenſure or Imputation from the Publick, have over thoſe Perſons whoſe Life is ſubject to ſome Reproach, which diſcredits them in the eye of the World; and it is ſaid of thoſe Perſons who are of an unblemiſhed Character, that they live like Men of Honour.

It ſignifies that honourable State, in which young Women are who have preſerved their Integrity, and Wives who have not violated their Marriage Vows, and Widows who live chaſte. And laſtly it ſignifies Reputation, that is, the Eſteem which all theſe different kinds of Honour procure to Perſons in publick; and it is in this ſenſe that we ſay of thoſe who injure any one's Reputation, that they take away their Honour.

We may perceive by all theſe different ſignifications of the word Honour, that there is in every one of them that Character which is proper to expreſs the manner in which the Publick conſiders the Condition in which every Man is by his Virtue, by his Merit, by his Dignity, and by his other qualities, according as the ſaid condition and the ſaid qualities procure him Reſpect, or exempt him from juſt Reproach: ſo that Honour, according to all the different ſignifications that have been juſt now taken notice of, is a real Good which conſiſts chiefly in thoſe Qualities, which procure Eſteem, or which exempt from Reproach; and that Eſteem alſo, in which Reputation conſiſts, is a real Good: for altho it is not right to covet and deſire that Eſteem, yet it is a good thing to deſerve it, not only becauſe it is a natural Conſequence of Merit and Virtue, and of other

other good Qualities, but likewiſe becauſe it is of importance in a Society that each Member thereof be conſidered in it according as he is uſeful or hurtful, valuable or deſpicable by his Qualities. And it is not only of importance to the Society, that the Perſons who compoſe it ſhould have the Qualities which may render them uſeful, and may procure them an Honour proportionable to the uſefulneſs and advantages of their Qualities; but it is alſo of very great importance, that the Publick ſhould acknowledge and conſider thoſe Qualities in the Perſons who have them, and ſhould take care that the Diſgrace and Contempt that People fall into by Slander and Defamation, do not render thoſe Perſons either uſeleſs or contemptible, whoſe known qualities may be of ſervice to the Publick. And in fine, it is a natural uſe of Honour in the Order of Society, that it ſupports mutual Love, which nothing begets ſo much as Eſteem: for altho we ought to love thoſe in whom we eſteem nothing but their Human Nature, and the hopes of making them good, yet the Love which is reduced to ſuch Motives, is but of little uſe in the external Order of Society; and that Love which is maintained by the Ties of Honour and Eſteem, is of a more univerſal Uſe, both in Religion, and in the Civil Government.

It is for theſe very eſſential Reaſons, that Honour is a real and a very great Good, both for thoſe who have it, and for the Publick, both in Religion and in the State: And this Good both in the one and the other is of ſo great a Value, that in Religion the wiſeſt and the moſt humble are obliged to prefer Honour to all other Temporal Goods, and to defend themſelves againſt the Calumnies which caſt a ſlur upon it; and in the Civil Policy the Laws conſider Honour in ſuch a manner, that they do not ſuffer Perſons in any Caſe either to wound the Honour of thoſe who have the advantage of it, or to reproach the want of it in thoſe who have it not; and no body can with impunity diſhonour any Perſon whatſoever, whether it be by Calumny, or by reproaching one with a defect which he really has; and it is lawful for none to take away any Perſon's Honour, except the Magiſtrate alone, who may diſgrace or diſhonour in a Judicial way of proceeding thoſe who deſerve ſuch a Puniſhment.

It is therefore in this Point that the Importance and Conſequence of Honour do conſiſt, that ſeeing all Men are obliged to make themſelves uſeful one to another, and to render themſelves amiable by the good Qualities which make them both uſeful and amiable, one ought to prefer to all other Good whatſoever that ſtate of Honour, in which one has the Qualities which render Perſons uſeful and amiable, and the Reputation which puts the ſaid Qualities in uſe: which ſhews that ſolid Honour ought not to be underſtood, to conſiſt, either in vain Qualities, which without Virtue and without Uſe make but an empty Merit, or in the vain Reputation which all thoſe vain Qualities may procure.

It was neceſſary to make here all theſe Remarks, that the Reader may be the better able to diſcern in the ſequel of this Book the different Characters of the Crimes, which offend againſt the different Kinds of Honour; and we may now proceed to conſider the ſeveral Crimes which encroach upon theſe three ſeveral Kinds of Goods, Life, Honour, and Eſtate.

The Crimes and Offences, which attack the Life and Perſon of Man, are Aſſaſſinations, Duelling, Homicide, Poiſoning, Acts of Violence committed upon the Perſon, Blows, and all Exceſſes which wound, diſfigure, lame, or hinder otherwiſe the uſe of the Members, or which prejudice the Health *b*.

The Crimes and Offences which affect Peoples Eſtates, are the ſeveral Enterprizes, Acts of Force and Violence, Frauds, and other ways, by which one encroaches upon the Goods of another, either by Force, or otherwiſe, or by other ways; ſuch as Robbery, Theft, the receiving of ſtolen Goods, Uſury, Forgery, Stellionate or Cozenage in bargaining, fraudulent Bankrupcies, the driving away of Cattle, the cutting down of Timber, ſetting Houſes on fire, removing of Land-marks, and all the Crimes and Offences which occaſion any Loſs or Damage.

The Crimes and Offences which relate to Honour, are all the attempts to blemiſh or wound the Honour of any Perſon; which happens two ways, either by an injurious treatment of the Perſon, or by aſſaulting the Reputation: for one may abuſe another and offend

b A good Name is rather to be choſen than great Riches. Prov. 22. 1.

him in his Honour by Actions, or by opprobrious and injurious Language, without leſſening his Reputation; and one may caſt a blemiſh on another's Honour by words, by writing, and by other attempts againſt his Reputation; or one may attack by one and the ſame way, both the Reputation and Perſon of another, either by an Action, or by an Injury, which may have the double Character of offending and diſcrediting.

Beſides theſe three ſorts of Crimes againſt theſe three Kinds of Goods, there are ſome which affect differently, either one or two of the three Kinds of Goods, or all the three together, and which are ſo much the more grievous, altho they often go the rather unpuniſhed, becauſe they ariſe from the Adminiſtration of Juſtice, and becauſe they are peculiar to the three ſorts of Perſons who exerciſe the ſaid Miniſtry. Thoſe three ſorts of Perſons are, the Judges, the Parties, and thoſe who defend in Judgment the Intereſts of the Parties.

The Crimes peculiar to Judges, are Extortion, the taking of Bribes, and other Miſdemeanours.

The Crimes peculiar to the Parties, are Calumny, and all unfair Practices to make out a Right; ſuch as Forgery, and others of the like nature. And the Crimes peculiar to thoſe who defend the Parties in Judgment, are Prevarication, and advancing for Truths what they know to be falſe. And all theſe Crimes attack indifferently, either the Life, or the Perſon, or the Honour, or the Eſtate, or two of them, or all three together; as if the Calumny of the Party, or the Prevarication of the Advocate, or the Corruption of the Judge relate to an Accuſation of a Crime, which endangers the Perſon, the Honour, and the Eſtate.

All theſe different Kinds of Crimes comprehend under them all Crimes of what nature ſoever they may be; and there is not any one which may not be reduced to ſome one or other of theſe ſix Kinds, altho there be ſome Crimes which belong to ſeveral of the Kinds together; as for example, the Theft of a thing dedicated to a ſacred Uſe, which is a Crime compoſed of the double Character of the firſt and ſixth Kind; the counterfeiting of the Publick Coin, which has the double Character of the ſecond and ſixth Kind, and others of the like nature. And altho there be ſome Crimes which ſeem not to come under any one of theſe Kinds, as for example, the change of Name; it is nevertheleſs true that this Crime is never committed by any private Perſon, but out of ſome View which gives it the Character of one of theſe ſix Kinds. Thus when he who changes his Name diſguiſes himſelf with a deſign to corrupt the Wife of one who is abſent, and to give himſelf out for the Husband; the Crime of changing the Name takes the Character of the Crime of Adultery: and if this Change is made with an intention to ſteal, to kill, or to commit other Crimes, it takes its Character from the Crime with which it is connected as a Circumſtance; and the changing of one's Name has always in general the Character of deceiving ſome body, if it is not done with the Circumſtances which may render it lawful *c*.

Seeing there is not any one of all theſe Crimes and Offences of all the ſeveral Kinds, but what deſerves ſome Puniſhment in the Order of the Civil Policy, and that all Crimes are not equal, as the Stoicks falſly imagined, not even the Crimes of the ſame Kind; it is of moment to enquire a little what it is that makes this difference, and renders Crimes more or leſs heinous, and more or leſs puniſhable in the Civil Policy.

There are three Cauſes of the differences between Crimes, or Offences: The Character of each Crime, and of each Offence; the Motive which induced the Perſon to commit it; and the condition of the things which accompany the Crime or Offence, which is called the Circumſtances.

The Character of each Crime, is what is called the quality of the Crime; and it is firſt of all by the quality of the Crime, that we diſtinguiſh between the enormity and heinouſneſs of a Murder, and the ſmallneſs in compariſon of a blow with the hand in a ſcuffle. Thus in the other Crimes and Offences, the motive of the Perſon who commits the Crime, is the Principle which moved him to do it, and made him act. And there are three ways in which one is moved, or engaged to commit a Crime, or an Offence, either out of a

c l. 13. *ff. de fal. Paulus* 5. *Senten.* 25. 20. *Cod. de mutat. nom.*

preme-

premeditated deſign, in the heat of Paſſion, or thro Imprudence. And it is eaſy to imagine that in the ſame Kind of Crime, a tranſport of Paſſion is much more grievous than Imprudence, and a premeditated Deſign much more heinous than a tranſport of Paſſion.

There are ſome Crimes which cannot be committed but out of a premeditated Deſign, ſuch as Aſſaſſinations, Duelling, Poiſoning, a Rape, Robbery, Theft, and many others; and there are ſome which may be committed, either out of a premeditated Deſign, or in the heat of Paſſion, or through Imprudence, ſuch as Homicide; for one may kill another with a premeditated Deſign to kill; one may kill in the heat of Paſſion, or through Imprudence, without any premeditated Deſign, and only out of a Deſign ariſing in the height of ones Paſſion; and one may kill through Imprudence, as for example, if one ſhould kill his Friend thinking to kill a Beaſt behind a Buſh. And it is this difference of the Principles and Motives which engage Perſons in the commiſſion of a Crime, or an Offence, which is the ſecond Cauſe that diſtinguiſhes between Crimes and Offences, and which renders them more or leſs heinous, according to what paſſes in the Mind and in the Heart of the Perſon who commits the Crime.

The Circumſtances, which are the diſpoſition and condition of the things which attend the Action, and which may have any relation to it, make a third Cauſe of the diſtinction of Crimes or Offences, and produce theſe two Effects; one, to make ſome Actions either criminal or innocent by the bare difference of the Circumſtances; and the other, to make thoſe which are in reality Crimes, more or leſs heinous and puniſhable. Thus for example, Homicide is an Action which under the Circumſtances of a lawful War is innocent, and which is a Crime in the caſe of a Riot or Sedition. Thus it is a ſmaller Crime to ſteal a common thing out of the Houſe of a private Perſon, than to ſteal a thing dedicated to a ſacred Uſe out of the Church.

We do not enlarge here on the ſeveral Kinds of Circumſtances, which are to be conſidered in judging of Crimes, ſuch as thoſe relating to the Perſons, the Place, the Time, and others; reſerving this matter to be treated of when we come to the detail thereof: but it was neceſſary to make theſe general Remarks, in order to give the firſt Ideas of this matter, and to ſettle its Order; and we ſhall only add two Reflections in relation to the Circumſtances. The firſt, that according to the common acceptation of this Word, there are two ſorts of Circumſtances; thoſe which happen in the Perſon who does the Action, of which it is neceſſary to judge, in order to know whether it be criminal or not, or if it be more or leſs heinous; and thoſe Circumſtances which occur outwardly. Thus we conſider in the Perſon his Quality with reſpect to his Actions; and if it is, for example, a Perſon who has been already reprimanded for the ſame Crime, that Circumſtance renders the ſecond Crime more heinous and more worthy of Puniſhment than the firſt. Thus we conſider independently of the Perſon, the Time, the Place, and the other outward Circumſtances, where the Crime has been committed; and theſe two ſorts of Circumſtances, either in the Perſon, or without the Perſon, have this in common, that they diſcover the diſpoſition in which the Criminal was, by the Views and Deſigns which he may have had, and the Circumſtances in which he was.

The ſecond Reflection, is that among the divers Views which we ought to have in the matter of Crimes, one of the chief is that of the Events, which the Laws place in the number of the Circumſtances *d* which aggravate or leſſen the Crime and the Puniſhment: for it is of importance to obſerve, as the foundation of ſome Principles, that altho the Event of an Action be a Circumſtance before God who judges the Heart, and that his Juſtice conſiders only the Views of the Motives, which are the Principles of our Actions, and which give them the Character on which God judges them without mixing in his Judgments the Views of the Events, which he orders and directs without any regard to our Views and to our Deſigns; yet it is nevertheleſs true that in the Civil Policy the Events are conſidered; and it is likewiſe juſt that they ſhould be conſidered, and that of two Actions which are of the ſame Character, both by the quality of the Action, and by the motives of the Criminal, that which is followed by an Event which gives greater diſturbance

d V. l. 16. *ff. de pœnis.*

to

to the external Order of the Society, ought to be otherwiſe conſidered by the Civil Policy than that which gives a leſs diſturbance. Thus for example, if we compare in two Quarrels two paſſionate Men who intend to kill, and make a Paſs at their Adverſary with that intent; and if we ſuppoſe that one wounds only, and that the other kills, the Event of Homicide in one of theſe two Quarrels, and the Event of a bare Wound in the other, make in the Civil Policy ſuch a difference between theſe two Crimes, that he who has only wounded will be but ſlightly puniſhed, and he who has killed will be proſecuted for Murder, and cannot eſcape the Puniſhment of Death, unleſs the Circumſtances of the Action may intitle him to the Prince's Mercy. And there is no reaſon to think that there is any thing unjuſt in this Conduct, which treats in ſo different a manner theſe two Criminals, whom nothing diſtinguiſhes but the Event; for altho in the Heart and before God theſe two Actions are equal, yet there are two eſſential Reaſons in the external Order of the Civil Policy for making a difference between them.

The firſt is, that as the Spirit of the Civil Policy tends to regulate the external Order of the Society, ſo it applies it ſelf to the finding out and puniſhing of Crimes, in proportion to the diſturbance which they give to the ſaid Order: and therefore it is but reaſonable that it ſhould conſider in another manner, and puniſh more ſeverely the Actions which produce a much greater diſturbance in the Society than thoſe which are attended with leſſer Conſequences; leaving it to the rigour of the Divine Juſtice to diſcern, and to puniſh more ſeverely the Actions which occaſion the leaſt diſorder in the Society, altho they be as much or more criminal in the Heart as the others.

The other Reaſon is, that it is ſometimes difficult, and even impoſſible to diſcern what has been the Motive and the Principle, which has induced him to act who is fallen into ſome Crime, or ſome Offence; and if there is either more Imprudence, or Paſſion, or a real and true Deſign, when the Action and the Event, and the other Circumſtances leave room to doubt of the diſpoſition and intention of the Perſon who has offended, it would be unjuſt to ſuppoſe that his deſign was more criminal than it appears to have been by the Event and by the Circumſtances; and according as there is room for doubting, it is preſumed, if poſſible, that he has offended out of Imprudence rather than out of Paſſion, and rather out of Paſſion than out of a premeditated Deſign.

But when the Crime is ſuch that it cannot be committed either out of the heat of Paſſion, or through Imprudence, and when it is the effect of a premeditated Deſign, ſuch as Robbery, Theft, Aſſaſſination, and other the like Crimes; if the deſign which is conceived in the Mind, and formed in the Heart, hath produced ſome Motion that hath appeared outwardly, this Motion is conſidered in the Civil Policy as a Trouble which diſturbs the Order of the Society; and although the Event has not enſued according to the Intention, that the Murderer has not killed, that the Robber has not carried any thing away, yet the Law takes for the Event the bare attempts of Crimes of this nature, becauſe thoſe Attempts trouble the external Order of the Society, and ſhew that the Perſons who made them, are of ſuch a Character as to endanger the Life and Eſtate of all Men; and the ſaid Attempts are puniſhed in proportion to their Malignity, and their Conſequences.

By this time the Reader may perceive that all theſe matters of which we have juſt now ſpoken, ought to enter into this Treatiſe of Crimes and Offences, and that it ought to contain the ſeveral Kinds of Crimes and Offences, the three different manners in which they are committed, and the Circumſtances; and it remains that we ſhould conſider in general the other matters which this third Book ought likewiſe to contain.

After this firſt View of the Cauſes and Circumſtances of Crimes and Offences, we muſt in the next place proceed to the matters which are the Conſequences thereof, which are all thoſe which relate to the Puniſhment of Crimes; the Accuſation, the Arreſt, the Cuſtody of the Perſons who are accuſed, the Proofs, the Torture, the Sentence of Condemnation, the Writings exhibited, the Defence and Acquittal of Perſons accuſed, Pardons and Abolitions, or Acts of Indemnity. And it is firſt of all neceſſary to give the general Ideas of all theſe matters, in order to explain them in ſuch a manner as that

that they may be underſtood, both according to our Uſage, and according to the Uſage of the Roman Law, and that they may ſerve as a Foundation to the Principles which are peculiar to them, and alſo in order to ſettle the Rank of every one of them in this Treatiſe.

Seeing Crimes and Offences ought to be puniſhed, it is neceſſary that there ſhould be not only Judges to decree the Puniſhment of them, but alſo Perſons to carry on the Proſecutions againſt the Criminals; becauſe thoſe who are to judge, cannot exerciſe the double Function of Judges and Parties, no more than they can be Judges in their own Cauſes; and let them be Perſons of ever ſo great Integrity, yet they cannot be both Proſecutors and Judges, according to the Rules and Reaſons, which ſhall be ſet down in the matter of Accuſers.

This Proſecution of Crimes may have two Views, one for the Puniſhment of the Crime, and for the publick Example, and the other for the Reparation of the Damage which the particular Perſon who has been injured has ſuſtained: and as we have already obſerved that according to the Conſtitution of our Government, the particular Perſons who have been injured can demand only the Reparation of their Damage, and that Vengeance and the publick Example are the Care of the Publick Officer; we have therefore, according to our Uſage, two ſorts of Perſons who concur with theſe two Views in the Proſecution of Criminals; the Party intereſted who complains, and demands Reparation of his Damage, and the Officer who for the good of the Publick ſues for the Puniſhment of the Criminal: and they concur differently in this Proſecution.

The particular Perſons who are intereſted in the Crimes or Offences may proſecute, or not proſecute, as they pleaſe; but when they proſecute, the Publick Officer ought to be joined with them in the Proſecution, and he cannot refuſe to exerciſe his Miniſtry in conjunction with the injured Party who complains, becauſe every Crime and every Offence deſerves a Puniſhment: and ſince the injured Party cannot demand a publick Puniſhment of the Crime, it is neceſſary that the publick Officer ſhould on his part proſecute the Criminal in order to Puniſhment, while the injured Party ſues for Reparation of his Damage; and it is for this Reaſon that he is called the Civil Party, becauſe altho he proſecutes a Criminal, yet he ſues only for Satisfaction to be made to him of the Damage he has ſuſtained, or the Reparation of his Loſs, which is called Civil Intereſt, and he can never demand the Puniſhment of the Criminal. If the injured Party declines to make his Complaint, the publick Officer is obliged, or not obliged, to proſecute on his part according to the quality of the Crime; for if it is heinous, and deſerves that the Criminal ſhould be made an Example of, the publick Officer ought to carry on the Proſecution, altho the injured Party makes no Complaint; and there are Rules by which he may be able to diſtinguiſh between the Caſes where he may be ſilent, and thoſe where his Duty obliges him to proſecute, altho the injured Party makes no Complaint.

There are therefore in *France* two ways, by which the publick Officer ought to proſecute the Puniſhment of a Criminal; one, when he is joined with the Perſon who has been injured, and the other, when he ſues alone, and without the Concurrence of the injured Party: and there are alſo two ways by which private Perſons may accuſe a Criminal; one, when they accuſe publickly, making themſelves Parties, and proſecuting the Criminal; and the other, when they are only Informers without making themſelves Parties. And this Information may be given by two ſorts of Perſons; for it may be given by the Party intereſted, when he either cannot or will not carry on the Proſecution, and only gives in a bare Information: and this is received alſo in great Crimes from thoſe who without any perſonal Intereſt accuſe Criminals, and by this Accuſation they engage themſelves to furniſh the Proofs of the Crime: and altho many Informers are excited more by Paſſion than a Zeal for Juſtice and the Publick Good, and that a Court of Juſtice ought not to give ear to thoſe who are acted only by Paſſion; yet two Conſiderations of importance oblige Magiſtrates to liſten to Informers; one, becauſe there may be ſome Informers who act out of a juſt and lawful Motive, and the other, becauſe the Order of the Government requires for the publick Good that Governours ſhould imitate the Divine Providence which knows

knows how to draw Good out of Evil, and that they ſhould make uſe for the Conviction and Puniſhment of Criminals, of the Lights and Diſcoveries that are to be had from thoſe Perſons who contribute towards it only out of a bad Intention.

The Accuſation being formed, the next ſtep to be taken is to find out the Proofs of the Crime; and when there appears to be Proof enough for bringing the Criminal to his Trial, that he may either clear himſelf or undergo the Puniſhment of the Crime, he is required to give an appearance; and if the Crime be ſuch as that it may be prudent to arreſt his Perſon, at the time that an Order iſſues for his Appearance, he is immediately ordered to be taken into Cuſtody and impriſoned: and in both theſe Caſes, either of Impriſonment, or of his giving an Appearance without any Confinement of his Perſon, he is examined touching the Accuſation that is brought againſt him, with a View to diſcover and find out the Truth, that he may be either acquitted, or convicted.

If the Criminal confeſſes the Crime, and the Crime be capital, yet nevertheleſs the Court proceeds to hear the Proofs; for it would not be juſt to condemn an innocent Perſon on a falſe Confeſſion: If the Party accuſed denies the Crime, they go on with the Proof of it; and in order to finiſh the Proofs, the Witneſſes are again called, and they ſhew them what they have already declared touching the Fact, to give them an opportunity either to perſiſt in the Truth, if they have told the whole Truth, without making any alteration, or to explain and amend ſuch part of their Depoſitions as they may think neceſſary to be altered: after which the Criminal and the Witneſs are brought face to face, and the Criminal is made acquainted with what the Witneſs has declared, and with the other Proofs; and when the Proofs are ſuch as to make it neceſſary to uſe the Torture, according to the Rules which ſhall be explained in their proper Place, the Criminal is put to the Torture; and afterwards they proceed to give Judgment, and to condemn him to the Puniſhment which his Crime may deſerve.

Puniſhments are the ſeveral Evils which Criminals are made to ſuffer, and which Juſtice uſes, according to the three Views, which we have already taken notice of, either to amend the Offender, or to prevent his falling into the ſame Crime again, and always to make an Example; for Puniſhments are the only means whereby it is poſſible to reſtrain the Licentiouſneſs of Malefactors. And altho this Remedy is imperfect, and that the force of Paſſion ſurmounts in many the fear of Puniſhment, yet it is the only way that can be practiſed, for reſtraining the greateſt part of Mankind: for ſince no one is moved to the commiſſion of a Crime except it be by ſome unlawful deſire of an Object which excites his Paſſion, there is no ſtopping the Violence of the Paſſion but by ſubſtituting in the place of the Object which the Perſon ſets his Heart upon, a contrary Event, which may be ſo diſagreeable as to allay the vehemence of the Paſſion: and it is in order to give to Malefactors a View of this Event, that exemplary Puniſhments are made, by which ſuch a Change is wrought in thoſe who take warning from the Example, that the Motion of Self-Love and of the Paſſion which ſtirs them up to the commiſſion of the Crime, is changed into a contrary Motion of the ſame Self-Love, which without extinguiſhing the Paſſion, avoids either the Crime, or at leaſt the Puniſhment. And it may likewiſe happen that the uſe of Examples may contribute to keep ſome Perſons within the bounds of a true Moderation, and work in them a ſincere Averſion, as well to the Crime it ſelf as to the Puniſhment.

It is for this uſe of Puniſhments, according to theſe three Views, of amending the Criminals, or of putting them out of a condition of committing new Crimes, and of making an Example, that the Laws have eſtabliſhed that great multitude of ſeveral different Puniſhments, not only according to the different Crimes, but differently eſtabliſhed in divers Places and at divers Times for the ſame Crimes.

Seeing all theſe different Puniſhments ought to have this Character, of making thoſe who are puniſhed to feel an Evil which the Crime draws upon them, and of ſtriking a Terrour into others, all Puniſhments may be reduced to the three Kinds of Evils already remarked, which Men may be made to ſuffer: and according to this View the firſt Kind of Puniſhments conſiſts of thoſe which are inflicted on the Perſon, as Condemnation to Death, to the Galleys, Whipping,

ping, Baniſhment, the cutting off a Member, and others of the like nature: the ſecond Kind, is that of the Puniſhments which particularly affect the Honour; for altho every Puniſhment deſtroys or diminiſhes the Honour of the Perſon who is condemned, yet there are ſome Puniſhments which affect particularly the Honour, ſuch as that ignominious publick Confeſſion of the Crime which in *France* is called *Amande Honorable*, and a publick Reprimand given by the Judge to the Criminal in open Court; both which Puniſhments brand the Criminal with Infamy, altho they do not touch either his Perſon, or his Eſtate, as in the caſe of a Judicial Reprimand: and the third Kind of Puniſhments conſiſts of thoſe which take away the Goods of the Criminal, or a part of them; as when he is condemned to make reſtitution, to repair the Damage he has done, to pay a Fine, or when all his Eſtate is declared to be forfeited.

All theſe Puniſhments have this in common, that altho they do not all of them directly affect the Honour of the Perſon that is condemned, yet there is not any one of them but what carries Diſhonour along with it; and even thoſe Puniſhments which are the ſlighteſt, ſuch as the being condemned to give ſome Alms to the Poor, the receiving an Admonition, and which do not inflict that Infamy which is called Legal Infamy, and which renders the Perſons who are noted therewith, incapable of certain Functions, do nevertheleſs ſtain, or blemiſh the Honour in the general Eſteem of Men: And ſometimes the three Kinds of Puniſhments are all accumulated together, as in the caſe of thoſe who are condemned firſt to make a publick Confeſſion of their Crime in an ignominious manner, and afterwards ſuffer Death, and their Eſtates confiſcated, which always attends the Puniſhment of Death.

The Perſons who are accuſed may avoid the Puniſhments three ways, by juſtifying their Innocence, by a particular Pardon from the Prince, and by an Abolition or general Act of Indemnity.

When the Perſon who is accuſed juſtifies his Innocence, he is not only freed from the Puniſhment, but acquitted of the Crime; and there needs no Pardon from the Prince, nor Indulgence from the Judge, to him againſt whom no Crime is proved, or who clears himſelf againſt the Proofs which have been offered againſt him; and he is acquitted either for the want of Proof to convict him, or by the effect of the Proofs which he alledges for his Innocence, and which he confirms.

The Pardon of the Prince, which would be ſuperfluous to ſuch as are wrongfully accuſed of a Crime which they have not committed, is neceſſary to thoſe who have committed a Crime, which in its nature may deſerve Death, or who have been Accomplices in the Commiſſion of ſuch Crime, but who are under Circumſtances which may intitle them to the Prince's Pardon, and to have the Puniſhment remitted. Thus for example, if he who has killed a Man, which is a Crime that deſerves Death, has killed without any fore-thought Malice, by a mere Accident; or if he has killed him to ſave his own Life, defending himſelf in that manner which in the Civil Policy is called a lawful Defence, becauſe in the external Order of the Civil Policy the ſame is excuſed, or forgiven; or if he was privy to the deſign of the Perſon who killed one in his Company; it is neceſſary in theſe Caſes that the Criminal ſhould have recourſe to the Prince, to obtain from him a Pardon of the Crime, and a Remiſſion of the Puniſhment: Which ſhews plainly the difference between the innocent Perſon who has not killed, and him who has killed, or has contributed to the killing of another, with whatever Circumſtances the Homicide may be attended; becauſe the one is abſolutely free from all manner of Crime and from all manner of Fault, and the other is ſo far involved in the Crime, or in the Fault, that he ſtands in need of a Pardon.

An Abolition, or Act of Indemnity, is neceſſary for thoſe who are convicted, and who cannot plead an excuſe from any of the Circumſtances; for in that caſe if the Prince is diſpoſed to Pardon, he muſt do it by another way than that of a ſpecial Pardon and Remiſſion, which are founded upon Circumſtances, and he muſt of his own free Will and Pleaſure, and by virtue of his abſolute Authority, aboliſh the Crime, and the Puniſhment, out of Motives which induce him to prefer Impunity to Puniſhment; ſuch as the Conſideration of the perſonal Merit of the Criminal, or the Regard which the Prince has for his

Family, or upon other Views, of which he is to render an account to God alone.

Seeing Pardons, Remiſſions, and Abolitions are in uſe only for Crimes which of their own nature deſerve to be puniſhed with Death, we have not ſet down among the ways by which Perſons who are accuſed avoid the Puniſhments, that of Death, and Flight; for there are ſome Crimes which Death it ſelf does not prevent an Enquiry to be made into them, and Puniſhments to be inflicted for them; and Flight is it ſelf a Puniſhment, and does not free one from all the other Puniſhments.

THE

THE

PUBLICK LAW;

BEING A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

BOOK IV.

Of the Ways of terminating Law-Suits, and Differences, and of the Order of Judicial Proceedings.

IT is not enough for the Knowledge and Exercise of the Science of Law, to know throughly the Nature, the Principles, and the Detail of all the several Matters which are the Subject of Contests, of Differences, of Crimes and Offences, and all the Divisions which trouble and molest the Peace and Union that ought to link the Members of a Society together; but it is likewise necessary to know the Ways that are made use of for judging and deciding these Differences, these Divisions, and Affairs of all kinds.

There are three different ways by which an end may be put to all sorts of Affairs and Disputes between particular Persons, comprehending under these Words of particular Persons, all sort of Persons whatsoever, without excepting even Communities.

The first is the voluntary Agreement which the Parties make among themselves, either wholly by themselves, or by the Mediation of their Friends, by their Counsel, or by the Advice of some third Person, without waiting for any formal Judgment or Award.

The second is the choice of some Persons to whom they give power to regulate and to adjust their Differences.

The third, which becomes necessary when those who have any Dispute together, where one of them will not hearken to any of the two first Ways, is to go before the Judges, whether it be that one Party is drawn thither, or that he inclines to draw his Adversary into Judgment.

We do not place in this Rank of the Ways of terminating Differences, two other Ways, which seem to produce the same Effect. One is Tyrannical, when one of the Parties imposes Silence on the other by his Violence; and the other full of good Nature, and of Christian Patience, when one of the Parties being desirous of Peace, and despising that which is the Ground of the Difference, abandons, not out of Negligence, but out of Prudence and a Principle of Virtue, either that which he has a right to demand, or that which is unjustly ravished from him. These two Expedients cannot be reckoned among the Ways of ending Differences; for one of them is a Crime liable to Punishment, altho it be very frequent, and yet seldom punished; and the other is a Virtue so little known, that many give it another Name; and few of those who know it are willing to practise it: And besides, the Violence of some, and the Patience of others, not rendring to every one what belongs to him, are not Ways of terminating Differences, no more than an Inability to go to Law, and the other Ways by which People may abandon their Right.

We have restrained these three Ways of terminating Differences to such as are between particular Persons, of what Nature soever they may be; for in Crimes where the publick Concern for Punishment is mixed with the private Interest of particular Persons, altho the particular Persons may, as to what concerns their private Interests, make an end thereof by any of these three Ways which they please to make choice of, yet they cannot meddle with any thing that relates to the publick Interest; for the Officer who is charged with the care of it can use only the Way of a Judicial Prosecution, because he is not Master of the publick Interest, so as to dispose of it, as private Persons are at liberty to do with their Interests what they please; for this Officer being obliged by the Duty of his Office, to sue for the Punishment of the Crime, he cannot faithfully discharge this Duty, but by prosecuting the Criminal without any Terms of Accommodation, and before the Judge, who is the only Person to whom the publick Interest has been intrusted.

These three Ways of putting an end to the Differences between particular Persons, have their Names, their Natures, and their Principles wholly different.

The first, which is the voluntary Accommodation to which the Parties agree, is called a Transaction, that is to say, a Treaty concerning a Difference that is either begun, or ready to begin, and which puts an end to it.

The second, which is the Choice of one or more Persons who are taken for Judges, is called Arbitration, because they give the Name of Arbitrators to the Persons who are taken for Judges, and to whom they give power to terminate the Difference by a Sentence, which is called for that reason an Award or Arbitrament, and the Treaty by which they give them this Power is called a Compromise, because the Parties promise mutually to execute whatever the Arbitrators shall decree. And because the Arbitrators being chosen only by Persons in a private Capacity, have not the Authority of real Judges, who exercise the publick Function of judging, it was necessary to give unto their Sentences another Force than that of the publick Authority, and such as might be proportionable to the Power which the Arbitrators derive only from the Parties who have named them. And it is for this reason that whereas the Sentences of Judges are executed by the natural force which they have from Authority, the Want of Authority which private Persons cannot give to those whom they chuse for their Arbitrators, is supplied by another Way which is in the power of the private Persons themselves, and that is, the agreeing to a Penalty to which they bind and engage themselves by the Com-

Compromiſe, promiſing thereby that he who ſhall refuſe to execute the Award, ſhall be bound to pay the Penalty to the other; ſo that the whole Effect of Compromiſes is reduced to the Payment of this Penalty *a*, which is called the Penalty of the Bond; and he who is not ſatisfy'd with the Award, may chuſe either to pay the Penalty, or to perform the Award.

The third Way of terminating Differences and Law-Suits, and which is much more frequent than the two others, is the Recourſe which is had to the Judges, which is called the Way of Juſtice; not that it is more juſt to have recourſe to this Method, than to make an end by an Arbitration, or by a Tranſaction: for on the contrary, it is infinitely more conformable to the Divine Law, and conſequently more juſt, and likewiſe more profitable, to ſhun this Way, and to ſeek for Peace, even with the Hazard of ſome Loſs, rather than to go to Law, and expoſe ones ſelf to the Conſequences which all Law-Suits are attended with, and which are equally contrary to Charity and to Self-Love. But this third Way of ending Law-Suits and Differences is called the Way of Juſtice, becauſe it is juſt that the lawful Authority ſhould judge and determine the Law-Suits and Differences which the Parties themſelves would not make an end of another Way, and that it ought to be Juſtice which accompanies that Authority, and alſo becauſe it is Juſtice which the Parties ought to expect by this Way: And laſtly, altho it ſhould happen that the Judges who judge in the laſt Reſort, and who have the Authority of putting the laſt end to all Law-Suits, ſhould render a Judgment that were not juſt, yet it is juſt to abide by it; and there would be no likelier Way of introducing Rebellions and Seditions, and conſequently nothing more unjuſt, than to leave particular Perſons at liberty to reſiſt Authority, and to render to themſelves the Juſtice which they had not been able to find in the Place where they ought to have had it. And it is only Sovereign Princes, who owning no common Superior from whom they may demand Juſtice, when they cannot agree among themſelves, are naturally engaged in the way of War, which is a kind of Recourſe to the Judgment which God, who alone is their common Maſter, ſhall think fit to pronounce between them, by the Succeſs which he ſhall give to the Arms of the contending Parties.

Theſe are therefore the three Ways of terminating Law-Suits and Differences, by Tranſaction, by Arbitration, and by the Way of Juſtice, which ſhall be the Subject of this laſt Treatiſe; and becauſe the particular Matters of Tranſactions and Arbitrations are of no large Extent, and that it is natural to come to the Way of Juſtice, when none of the other two Ways ſucceed, this general Treatiſe of the Ways of terminating Law-Suits and Differences, and of the Order of Judicial Proceedings, ſhall be preceded by two particular Treatiſes, one of Tranſactions, and the other of Compromiſes and Arbitrations, and that of the Order of Judicial Proceedings ſhall follow afterwards.

We ſhall not point out here the particular Matters which ought to come into the Treatiſe of Tranſactions and Arbitrations; for beſides that they are of no great Extent, it ſufficeth to give here theſe general Ideas, to ſhew the Nature and Order of the ſaid Matters; but as to what concerns the Order of Judicial Proceedings, the multitude and variety of the Matters which it contains, have obliged us to ſet down here the Ideas that are neceſſary, for conceiving aright the Nature thereof, and digeſting them in their proper Order.

As we have ſeen at the beginning of the general Diviſion of all the Matters of the Law, that it is neceſſary to conſider Perſons, Things, and the Ways by which Perſons make uſe of the Things; ſo likewiſe it is neceſſary to conſider in the Matter of the Order of Judicial Proceedings, the Perſons who are concerned therein, the Things that are there tranſacted, and the Ways in which they are tranſacted.

The Perſons who are to be conſider'd in the Order of Judicial Proceedings, are the Parties who are at variance with one another, the Judges who are to render them Juſtice, and all thoſe whoſe Miniſtry is neceſſary, either to act for the Parties, and to defend their Rights, or to demand that Juſtice may be done them.

The Parties come into Judgment four Ways, which give ſo many different Names to thoſe who are at Law. He who

a Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2. *ff. de recept.*

who comes to demand Juſtice, and who calls another into Judgment, againſt whom he demands Juſtice, is named the Plaintiff or Demandant; he againſt whom Juſtice is demanded is called the Defendant; and when it happens that a third Perſon pretends ſome Right in a thing that is conteſted between the Plaintiff and Defendant, and that without citing any one, or being cited himſelf, he comes in for his Intereſt, he is called the Party intervening; and when he from whom any thing is demanded, pretends that another is bound for him, and cauſes him to be ſummoned, that he may put him in his Place, in order to warrant him in his Title and Poſſeſſion, or that the ſaid Perſon offers himſelf without being ſummoned, and becomes a Party, and he is called the Guarantee or Vouchee, he being called or vouched to Warranty. Thus to ſhew in one Example theſe four Parts, Plaintiff, Defendant, the Party intervening, and the Guarantee: If *John* has ſold to *Peter* an Eſtate which belongs to *James*, and *Peter* being in poſſeſſion, *James* ſummons *Peter* to give him back his Eſtate, and *Peter* ſummons *John* of whom he bought it, to warrant and defend him in his Poſſeſſion; *James* will be the Plaintiff or Demandant, *Peter* the Defendant, and *John* the Guarantee; and if *Andrew* being a Creditor to *James*, and having a Mortgage on the ſaid Eſtate, oppoſes *James* his being put into poſſeſſion, and demands of him that he be allowed to enjoy the Fruits of the Eſtate for the Debt that is due to him, he will be the Party intervening.

Theſe four Ways of going to Law, either as Plaintiff, as Defendant, as Guarantee, and as a Party intervening, are the Ways by which Law-Suits are begun before the Judges in the firſt Inſtance, to whom the Parties ought firſt to addreſs themſelves; but the Law-Suit being decided by the Sentence of the firſt Judges, if one of the Parties is not willing to abide by it, he ought to have recourſe to the ſuperior Judges, and the Way of coming to the ſuperior Judge for obtaining a Reformation of the Sentence, is called Appeal; and the Party who uſes this Way is called the Appellant, whether he was Plaintiff or Defendant, Guarantee or a Party intervening in the firſt Inſtance, and he who defends the Sentence is called the Party Appellate or Reſpondent.

The Judges are of ſeveral ſorts, and differently diſtinguiſhed; either by the Difference of Authority in the ſame kind of Juriſdiction between the inferior Judges from whom the Cauſe is appealed, and the ſuperior Judges before whom the Appeal is brought: And there are many other Differences between the Judges. But as to what relates to the Order in Judicial Proceedings, it ſufficeth to conſider in the Perſon of every Judge his Function to adminiſter Juſtice to the Parties in the full extent of his Miniſtry, which comprehends every thing that he ought to regulate, both during the Inſtruction of the Cauſe, and at putting an end to it by a final Sentence, as alſo that which concerns the Execution of his Judgment.

Beſides the Miniſtry of the Judges, we are to conſider in the Order of Judicial Proceedings that of another kind of Officers, which is of ſingular importance and neceſſity in all the Affairs where the Publick is any way concerned, whether they be Civil or Criminal, and who in theſe kinds of Affairs, and in all thoſe which are committed to their Charge, are in the place of Parties.

Next to theſe firſt Officers whoſe Functions are accompanied with Authority and Dignity, we conſider in the Order of Judicial Proceedings the other Officers whoſe Miniſtry is neceſſary either to the Judges or to the Parties. Thus Regiſters are neceſſary both to the Judges and to the Parties, to write down every thing that the Judge orders and decrees; and Apparitors and Bailiffs are neceſſary for executing it, and for making Intimations to the Parties.

Beſides the Perſons already mentioned who are neceſſarily to be conſider'd in the Order of Judicial Proceedings, there are likewiſe two other ſorts of Perſons neceſſary for the Parties; for the greateſt part of Mankind being either unfit or unwilling to appear in Judgment, or occaſioning a great many Inconveniences when they do appear in Perſon before the Judges, by the Tranſport of their Paſſions, their Eagerneſs in defending their Intereſts, and being alſo for the moſt part ignorant of their Rights, and of the proper Arguments to ſupport them, all theſe Conſiderations of the Intereſt of the Parties, and of the Decorum which ought to be obſerved in the Diſtribution

of

of Juſtice, have made it neceſſary to employ in moſt Tribunals Perſons who may give conſtant Attendance, and who are throughly verſed in the ſeveral Steps that are to be taken, in order to have a final Deciſion of Differences and Law-Suits: for which reaſon Proctors have been eſtabliſhed to repreſent the Parties; and out of the number of thoſe who exerciſe this Miniſtry, each Party may and ought to chuſe one who may perform for him all the Functions for which they are eſtabliſhed, unleſs it be in ſuch Tribunals, where the Parties are allowed to inſtruct and plead their own Cauſe, without the Aſſiſtance of Proctors.

And becauſe there are many Differences and many Law-Suits relating to Matters, which require the Knowledge of the Principles of Law, which cannot be had without much Study and Experience, and which neither the Parties themſelves, nor their Proctors, have had an opportunity of acquiring; it was neceſſary that there ſhould be Perſons who had a thorough Knowledge of all theſe Matters and Principles, and who might be able to explain and defend the Right of the Parties, either by word of mouth, or by writing, according as there is occaſion to inſtruct the Cauſes in one or other of theſe two Ways; and theſe are the Perſons who are called Advocates, who exerciſe, or may exerciſe, theſe three Functions, of giving Counſel and Advice to the Parties, of writing in defence of their Rights, and of pleading their Cauſes for them.

Having taken this general view of the Perſons who are concerned in the Order of Judicial Proceedings, it is proper in the next place to conſider the things which are there tranſacted.

It is uſual to give the general Names of Acts and Proceedings to every thing that paſſes in the Order of Judicial Proceedings; and becauſe the ſaid Acts and Proceedings are ſped by certain Forms regulated by Uſage, or preſcribed by the Ordinances, we call the manner of ſpeeding the ſaid Acts, Forms, and we give alſo the ſame Name to the Acts themſelves. Thus, for example, we ſay that a Proceeding is according to form, or that all the Forms and Formalities have been obſerved therein, when it has all the Acts that are neceſſary for making it regular: And it is in this ſenſe that we ſay that the Libels, the Anſwers, and the other Acts, are the Formalities neceſſary to be obſerved. And we ſay in another ſenſe, that an Act is according to Form, when it is done after the manner that the Laws preſcribe, and the Forms or Formalities ſignify in this ſenſe the right Ways of ſpeeding the Acts.

It is not only to explain the Meaning of theſe Words of Forms and Formalities that we make here this Remark; it is neceſſary upon another account, which is of much greater Importance, and that is, for diſcovering an Abuſe that is very common, which is occaſioned by theſe two Words, and for ſhowing the right uſe that ought to be made of them.

Seeing theſe Words of Forms and Formalities ſignify indifferently both the Acts or Proceedings themſelves, and the Ways of ſpeeding the ſaid Acts and Proceedings, and that often the ſaid Ways are indifferent, altho the Acts themſelves be moſt neceſſary; it is dangerous to confound the Meaning of theſe Words, and to imagine that becauſe the Ways of ſpeeding ſome Acts are indifferent, we may ſay the Forms are alſo indifferent, becauſe there are Forms which are very eſſential, whether we underſtand by this Word the Acts themſelves, or the Ways of ſpeeding them.

In order therefore to conceive the right Idea which we ought to have of theſe two Words, Forms and Formalities, it is neceſſary to diſtinguiſh and to conſider in each Act that which is natural and eſſential in it, and which makes it neceſſary in the Proceeding, and that which is eſſential or indifferent in the way or manner of doing it. One ſingle Example will be ſufficient to illuſtrate all that has been ſaid of Acts, and of the Ways of ſpeeding them.

Every body knows that in order to decide a Difference between two Parties, it is neceſſary to know the Truth of the Facts which are eſſential to the Difference; and that in order to know the ſaid Truth, it is neceſſary to hear both Parties, that each of them may be able to ſhew what the other has falſly advanced or concealed. It follows from theſe Principles, that he who intends to make any Demand before a Judge, ought to bring his Adverſary before him, and that it is neceſſary to have ſome Way of obliging him to come before the Judge, either to deny or to confeſs the Truth, and to own the

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Juſtice of the Demand brought againſt him, or to defend himſelf againſt it. And this Way that is neceſſary for obliging the Party to appear before the Judge, is the firſt Act that begins all the Law-Suits, and which is ſo natural and ſo neceſſary, for the important Reaſons which we have juſt now taken notice of, that there is no Government whatſoever where the Party who pretends to make any Demand is not obliged to give notice, or cauſe notice to be given to his Adverſary to appear before the Judge; but the Ways of giving notice may be different, and are ſo in effect. Thus in former times at *Rome* the Plaintiff himſelf conducted the Defendant before the Judge; and now it is a publick Officer who cites the Party to appear before the Judge, and makes an Act which is called a Certificate of the Service of the Proceſs, and which contains a recital of the Time and Place where the Proceſs was ſerved; and this Certificate may be made ſeveral Ways, which have been varied with us according to the Inconveniences which have made the ſaid Variation neceſſary.

We ſee by this Example that the Certificate of the Service of a Proceſs, is an Act ſo natural and ſo eſſential, that we cannot have Juſtice on a Demand unleſs it be made after this manner; and we likewiſe ſee that the Ways of citing the adverſe Party are indifferent, but become neceſſary according as they are eſtabliſhed by Law and by Uſage: from whence it follows that it would be falſe and very unjuſt to imagine that Forms have nothing eſſential in them, taking this Word in the common ordinary Acceptation thereof, according to which it ſignifies both the Acts themſelves, and the Ways of ſpeeding them; and the only true Meaning of this Expreſſion which is ſo common, that we ought not to adhere too nicely to Forms, ought to be reſtrained to the Ways and Manners which are indifferent, and which are not eſſential to the Acts. Thus, for example, in the Service of a Proceſs, it is neceſſary that it be done by a publick Officer, that it ſhould have a Date, that it ſhould explain the Demand, that it ſhould be ſerved on the Perſon himſelf who is cited, or that a Copy thereof be left at the Place of his Abode; and ſo for the reſt. But it is indifferent, whether it be conceived in certain Terms, and according to a certain Style; and one may vary, without cauſing a Nullity, the Order and the Terms thereof as one pleaſes. And it is the ſame thing with reſpect to all other Judicial Acts; for in every one of them it is neceſſary to conſider what it has that is natural and eſſential to it, and what belongs only to the Way and Manner in which it ought to be ſped; as to which it remains only that we obſerve concerning this external Form of Acts, that there is in every Place a certain Style, and ſtated and uniform Ways for every kind of Acts, and that the ſaid Stiles and Ways have nothing in them that is of abſolute neceſſity, except what ſerves to expreſs that which is natural and eſſential in the Act; and it ought to ſubſiſt, provided it be done in this manner, altho the Form thereof in other reſpects be different from that of the Style.

What is ſaid here is not to be underſtood of certain Acts, in which ſome Cuſtoms have preſcribed certain Terms to be uſed, and which cannot be alter'd without making the Act null and void, not even altho other Terms of the ſame Signification be ſubſtituted in their room, which the ſaid Cuſtoms obſerve in certain Matters; as in the Cuſtom of *Paris*, with reſpect to the Form of Teſtaments, in the ſame manner as formerly at *Rome*, every Demand was to be made in certain ſolemn Terms, which were ſo neceſſary, that he who erred in one Syllable, loſt his Demand; which ſcrupulous and odious Formalities were firſt aboliſhed by the Emperor *Conſtantine*. But excepting theſe particular Caſes, People are at liberty to make uſe of what Expreſſions they pleaſe, provided they contain what is natural and eſſential in the Acts.

It remains that we ſhould make one Remark more in relation to what is tranſacted in the Order of Judicial Proceedings; that all the Acts ought to be ſet down in Writing, to the end there may remain a Proof of what has been well or ill done, and that nothing be altered to the prejudice of Truth.

It was neceſſary to diſtinguiſh theſe ſeveral Ideas of Acts, of Forms and Formalities, becauſe the ſaid Acts and Forms make up the whole matter of the Order of Judicial Proceedings, and becauſe it is of importance to know how to diſcern aright what is natural, eſſential and neceſſary in every Act, and what part of the Way and Manner thereof

thereof it is which ought to anſwer the Nature of the Act, and the Uſe for which it was intended; and it is for that reaſon that we have thought it proper to make here all theſe general Remarks on this Subject, in order to give an Idea of the Nature and Foundations of this Matter; and we ſhall go through in the ſame manner, and in general the Nature and the eſſential Parts of the ſeveral ſorts of Acts which compoſe the Order of Judicial Proceedings, and which are neceſſary in all Courts of Judicature: But as to what relates to the Way and Manner of ſpeeding the ſaid Acts, we confine our ſelves to what has been ſaid thereof here in general; for it is not the deſign of this Book to lay down a Style of Judicial Proceedings. And ſince our Style and Method in Judicial Proceedings is different from that which was obſerved in the *Roman* Law; and ſeeing we have confined our ſelves to what is common to the *Roman* Law and to our Uſage, it will be ſufficient if we conſider what is eſſential in the Order of Judicial Proceedings.

Seeing the Order of Judicial Proceedings ought to tend only to the Diſcovery of the Truth, and to give an opportunity to the Parties to make it known, and to eſtabliſh their Rights, the moſt ſimple and moſt natural Manner whereof this Order ought to conſiſt, would be for the Parties themſelves to come before the Judge, and to explain their ſeveral Pretenſions; and for the Judge after having heard them to adminiſter to them on the ſpot the Juſtice that ſhould be due to them. But this Way is not in uſe with us, except for ſome ſlight Differences between poor People, where the Matter in debate is very trivial, and which the Parties themſelves are able to ſtate ſufficiently to the Judge; but all the other Affairs of what nature ſoever they may be, are not terminated in ſo ſhort a time, nor ſo eaſily, but they are uſually protracted and embaraſs'd by all the Difficulties which we ſee multiplied in ſo many different manners. And it is not ſtrange that God has ſcatter'd theſe Thorns in a Way wherein the greateſt part of Mankind are led wholly by the Impulſe of Avarice, Ambition, Hatred, Revenge, and of other Paſſions, and in which they walk in a manner ſuitable to the Impulſe that firſt moved them, and which engages them in Lying, in Calumny, in Cavilling and Tricking, and in all the kinds of Injuſtices which we ſee multiplied in all Law-Suits.

The Paſſions of the Parties are not the only cauſe of ſo great, and ſo extenſive an Evil; for if they are the firſt Cauſe that draws down all theſe Evils, as ſo many Puniſhments which God inflicts on them, yet there are other Cauſes mixed with them, which are as it were the Hands which ſcatter among thoſe who go to Law all theſe ſeveral Evils, for the Puniſhment of ſuch as deſerve them, and for exerciſing the Patience of thoſe who make a good uſe of them.

It is eaſy to judge that theſe other Cauſes of the multitude of Querks and Cavils that are ſo frequent in Law-Suits, ariſing from ſomething elſe than the Parties, can proceed only from the other Perſons, who have a ſhare in the Adminiſtration of Juſtice; and that if thoſe who have this Honour, whatever Place they may occupy therein, have not in their Hearts a ſteddy and ſincere Love of Juſtice and Truth, and if they conſider their Miniſtry with any other Views, they will be ſo far from diſſuading the Parties from making uſe of unfair Practices, that they will be ready to ſuggeſt and to countenance them according to the Quality of their Miniſtry, they finding their account in multiplying unfair Practices, and in prolonging the Steps that are neceſſary to be taken. It is not ſtrange therefore that ſuch a Concurrence of Paſſion in the Parties, and of Intereſt in the Perſons who exerciſe the Functions of Juſtice, and the Eaſineſs of the Opportunity, ſhould produce all theſe horrible Conſequences, which the beſt concerted Laws in the World are not able to put a ſtop to, and which on the contrary make the Laws an occaſion of new Inventions, for multiplying Law-Suits and the Proceedings therein.

We could not forbear making this Reflection, and it ought not to be looked upon as a Digreſſion, either uſeleſs or ſuperfluous; for it is eſſential to the Deſign which we have laid down of conſidering the Nature of each Matter.

Thus we have been obliged to make this general Remark, which is abſolutely neceſſary for diſtinguiſhing the Proceedings which are natural and ne-

ceſſary from thoſe which are the effect, either of the Paſſion of the Parties, or of the Miſdemeanour of thoſe who are concerned in the Adminiſtration of Juſtice; and for ſhewing the Difference between thoſe who exerciſe their Miniſtry according to the Spirit of the Laws, which is the Spirit of Truth and of Juſtice, and who bound their Intereſts by the juſt Rules of their Miniſtry, and thoſe who abuſe their Miniſtry to advance their Intereſt.

That we may be able therefore to judge of what is natural and eſſential in the Order of Judicial Proceedings, and by the knowledge of that to diſcern what is mixed therewith that is vicious or ſuperfluous, it is neceſſary to run over the natural Order which ought to be obſerved in informing the Judges of Juſtice and of Truth.

We have ſeen that the firſt Step by which all Law-Suits are begun, is that of the Summons, or Citation, which he who commences the Suit procures to be ſerved on the Party againſt whom he has ſome Pretenſion; and the ſaid Step is followed, either by the Silence of him who is ſummoned, or by his Appearance; if he continues in Silence till the delay which the Law allows him is expired, it is but juſt that he who cauſed him to be cited ſhould have juſtice done him without hearing his Adverſary, ſeeing he has neglected to make uſe of that Right: and in this caſe, if the Demand be ſufficiently eſtabliſhed by what appears, the Judge may condemn him whoſe Silence is a Preſumption that he has no defence to make.

But when he who is cited, and who is called the Defendant, appears to defend himſelf, that is to ſay, according to our Uſage, conſtitutes a Proctor; the firſt Step on his part, which is the ſecond in the Order of Judicial Proceedings, is that he defend himſelf, or if he has any thing to demand that may be neceſſary for his Defence, that he explain it, and ſo proceed to his Defence, and that his Defence be made known to his Adverſary, to the end he may either conteſt it, or confeſs it; and if by the Demand, and the Defences that are made to it, the Fact and the Pretenſions on both ſides are fully ſtated and underſtood, the Judge may then proceed to give his Sentence.

But if the Defence made by the Defendant obliges the Plaintiff to anſwer it on his part, this Anſwer is called a Reply; and thus the Parties eſtabliſh on both ſides each of them his Right by Writings.

All the Conteſts of the Parties are of two ſorts; for they can conteſt but one of two things, either the Truth of the Fact, or the Conſequences which are drawn from it. We call thoſe Queſtions of Fact where the Buſineſs is to know the Truth of Facts; and we call thoſe Queſtions of Law, where the Matter is about reaſoning on Facts that are agreed on, in order to draw from them the Conſequences which may ſerve to eſtabliſh the Right of the Parties.

The Queſtions of Facts are reſolved and decided by the Proofs which diſcover the Truth of the Facts in diſpute.

The Proofs of Facts are of ſeveral ſorts; for as we give the Name of Proof to every thing that makes a Truth known, and as there are ſeveral Ways of making known the Truth of Facts, ſo there are alſo ſeveral kinds of Proofs.

All the Ways of proving Facts in a Court of Juſtice are of four ſorts; the Confeſſion of the Party, the Teſtimony of Perſons who know the Fact, the Evidence which ariſes from Deeds and Writings, and the Knowledge of certain Facts, which are linked in ſuch a manner with that whereof we ſearch the Truth, that one may gather the ſaid Truth from the Connection there is between the Fact in queſtion and thoſe of which the Truth is proved. Theſe four kinds of Proofs are common to Matters both Civil and Criminal.

The Confeſſion of the Party againſt himſelf is always a certain Proof of the Fact which he owns, unleſs the contrary Truth were eſtabliſhed in ſuch a manner as that there might be reaſon to think that the Confeſſion is an Effect of Folly or Stupidity in the Perſon who ſhould confeſs againſt himſelf that which is falſe: And this Rule has only one Exception in Accuſations of Capital Crimes, where it is not enough that the Party who is accuſed confeſſes a Crime which is not proved; but other Proofs are neceſſary for putting him to Death beſides his own Confeſſion, which might be an Effect of Melancholy or Deſpair, or proceed from ſome other Cauſe than the Force of Truth.

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In order to come at this Proof, which is drawn from the Confeſſion of the Party, leave is given to thoſe who are deſirous to proceed this way, to propoſe the Facts; wherein it is of importance to them to have either the Confeſſion of the Party, or Anſwers, which may diſcover his Inſincerity, when they ſhall oppoſe to his Anſwers the Proofs of the Facts which he ſhall have denied, or that they ſhall draw from his Prevarications, and the other Defects or Circumſtances of his Anſwers, the Conſequences that diſcover the Truth. And according to the Uſage eſtabliſhed in *France* by the Ordinances, each Party is at liberty to propoſe Facts, and to demand that the adverſe Party be obliged to anſwer them upon Oath, and to declare what he knows concerning each Fact; and they draw afterwards from the Interrogatories and Confeſſions, the Denials, and the other Circumſtances, the Conſequences which may ſerve to prove the Facts, the Truth of which they intend to make appear.

The Proof by Witneſſes is that which reſults from the Declaration of two, three, or more Perſons, who have Knowledge either of the Facts in queſtion, or of others which may ſerve towards the Proof of the ſaid principal Facts; and this Proof hath its full Force when the Credit of the Witneſſes is not deſtroyed by any Blemiſh or Imputation, which may render their Teſtimony null or ſuſpicious: for altho it may happen that Witneſſes may give a falſe Teſtimony, and that nothing can be objected againſt them, yet it is of abſolute neceſſity in the Order of the Society of Mankind, that in the infinite multitude of Facts, of which the Proofs are neceſſary, and which depend on the relation made by Perſons who are Witneſſes thereof, to ſuppoſe that thoſe who relate the Facts declare the Truth, when nothing obliges them to make a declaration contrary to it. And this Method of Proof is not only grounded upon this Neceſſity, and upon the natural Order of Things, but it is alſo eſtabliſhed by the Divine Law, which hath made it a Rule.

Written Evidences are of ſeveral ſorts, according to the ſeveral kinds of Acts which People are deſirous to preſerve the Memory of after this manner, in order to make proof of the Truth of them; and alſo according to the ſeveral Ways of preſerving the Acts, and of proving them by the means of Writing.

If the Acts whereof the Memory is to be preſerved, paſs in a Court of Juſtice, the only way of proving the Truth of them is to have them taken down in Writing, and to have the Writing ſigned by a publick Officer, who may by his Signature bear teſtimony of the Truth of the Act which he ſigns. Thus in *France*, Apparitors and Bailiffs ſign the Certificates and Returns which they make of the Proceſſes that they have ſerved. Thus the Judges ſign their Sentences. Thus the Regiſters, who are the Depoſitaries of the Sentences, and who ought to give Exemplifications of them to the Parties, ſign the ſaid Exemplifications; and every Officer ſigns the Acts which are to receive their Form and their Proof from his Miniſtry, according to the Rules which the Ordinances and Uſages of Places have eſtabliſhed, both for the Quality of the Acts, and for the Functions of each Officer. If the Acts are not ſped in a Court of Juſtice, but are ſuch as that it is eaſy to foreſee that they may be neceſſary, either for proving the Truth when it ſhall be required, or that there be other Cauſes which make it neceſſary to have a written Proof, as will appear by the Examples; there are two Ways of writing the ſaid Acts according to two kinds thereof which may be made; for there are ſome Acts which in their Nature relate only to particular Perſons who have Buſineſs together, or to their Heirs: as if one borrows of another that which he owes him; if they have any Account to adjuſt between them, if they ſell, exchange, tranſact, and treat together in any other manner: and there are ſome Acts which in their Nature regard other Perſons beſides thoſe who make them, ſuch as Teſtaments, Codicils, Publick Regiſters, in which ought to be recorded the Proof of the Birth of Perſons, of their Marriage, of their Promotion to Holy Orders, of their Death, the Deliberations of Communities, the Collations of Offices, of Benefices, and in general all the Acts whereof

whereof the truth ought to be made manifeſt by an Authentick Proof, and to which People may have recourſe on all occaſions, wherein this Proof becomes neceſſary, whether it be in Judicial Proceedings or on other occaſions: and all the Acts of theſe two Kinds have their particular manners in which they are written.

The Acts which in their Nature relate only to particular Perſons, who treat together, or to their Heirs, ſuch as a Loan, a Sale, an Account, an Acquittance, and others of the like Nature, for proving of Covenants, and other Affairs, may be written in two manners, either by the Parties themſelves, if they can write their Names, or by a Publick Officer, who is the Notary, for Perſons who cannot write. And it is free likewiſe, and often convenient, and even neceſſary for Perſons who can write, to have the Acts ſped in the preſence of a Notary, whoſe Miniſtry hath in *France*, among other Effects, this principal one; that the Acts ſped by a Notary, carry their Proof along with them by the publick Authority which the Character of the Officer gives them, whereas private Writings may be denied, and oblige thoſe who make uſe of them to prove them; and the other, that the Acts ſped by Publick Notaries give a Right of Mortgage on the Eſtate of the Perſon who obliges himſelf, and which a private Writing does not give; becauſe if any private Deed or Writing ſhould be allowed to convey ſuch a Right, it would be an eaſy matter for private Perſons to defeat prior Mortgages, by antedating poſterior Mortgages for Debts contracted after the Settlement of the firſt Mortgage.

All the other Acts which regard other Perſons beſides thoſe who are Parties to them, ſuch as the Acts which have been juſt now taken notice of, as Teſtaments, publick Regiſters, Collations of Benefices, Patents or Commiſſions, and others of the like Nature, ought to be written by Perſons who are veſted with the publick Character and Miniſtry, which impowers them to draw or ſpeed all theſe different Kinds of Acts. Thus, in *France*, Notaries Publick and the Curates of the Pariſh draw up laſt Wills and Teſtaments, and Codicils; the Curates keep the Regiſters of Chriſtenings, Marriages, and Burials: thus Patrons of Benefices give the Preſentations; and all the other different Acts ought to be ſped by the proper Officer who has the Charge thereof, and Notaries Publick ſpeed all Contracts and other Acts between private Perſons.

All theſe ſeveral Acts, of what Nature ſoever they be, have this in common, that they are written Proofs, and that the Truth of the Acts being proved by the Character which either the publick Form and the Signature of the proper Officer, or the Signature of the private Perſons who are Parties to them gives them, they ſerve as a Proof of the Truth of the Fact which they declare and ſet forth.

There is likewiſe a fourth Kind of Proofs, which are called Preſumptions, that is to ſay, Conſequences which are drawn from certain Facts that are known and proved, whereby to gueſs at or infer the certainty of the Fact in diſpute, and of which the ſaid known Facts are Marks and Signs; and theſe ſorts of Proofs are called Preſumptions, becauſe they do not demonſtrate the Fact it ſelf which is to be proved, but prove the Truth of other Facts, the Knowledge whereof diſcovers, points out, and gives room to conjecture and preſume the Fact in queſtion, becauſe of the natural and neceſſary Connection between the Facts that are known and thoſe which we want to know the Truth of. Preſumptions being Conſequences that are drawn from known Facts to the Fact which is to be proved, they are certain or doubtful according as the Connection between the known Facts and the unknown Fact is certain or doubtful: and as there are ſome Facts whereof the Connection with others is indubitable, ſo there are likewiſe Preſumptions which make certain and undoubted Proofs; but thoſe which are founded only upon Facts whereof the Connection with others is uncertain, are not Proofs. Thus for a firſt Example of a certain Preſumption, if it is in proof that two Men having quarrelled, the one followed the other who fled, and that he who fled having taken ſhelter in a Houſe, the other went into it, and came out with his Sword bloody, the Man who was purſued in this manner, being found wounded with a Sword in that Houſe wherein there was no other Perſon; all theſe Facts

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put together carry with them a Proof, that it was this Aggreſſor who killed the ſaid Man; and altho no body ſaw him kill him, yet it is enough that People ſaw the Aggreſſor purſuing the deceaſed with his naked Sword, follow him into the Houſe, and come out again with his Sword all bloody, that they ſaw that the Perſon was dead of his Wounds, and that no body elſe was in the Houſe; for theſe Facts which are proved have a natural and neceſſary Connection with the only Fact which remains to be proved, that it was that Perſon who gave the thruſt which no body ſaw given: this Connection between the ſaid Fact and the others, makes a very ſufficient Proof, from which we may certainly conclude that it was this Aggreſſor who gave the Wound of which the Party died: and this Proof of a Fact which is not known, either by Confeſſion, if the Aggreſſor denies it, or by Witneſſes who ſaw the wound given, or by other ways, is reduced to Conjecture, and Preſumption, that is to ſay, to the natural Conſequence by which we gather from theſe Signs and Tokens, that it being impoſſible on one part, that it ſhould be any other Perſon who gave the Wound, and natural on the other part that it might be given by him who followed in this manner, it is neceſſary to conclude, and impoſſible not to judge him to have been the Author of the Murder.

But for a ſecond Example of a Preſumption that is uncertain, if it is proved that a Man was found all alone near to the dead Body of one who was killed on the High-way, the Conſequence is not certain that he is the Perſon who killed him; for he may perhaps have come there after the Murder was committed, and his Preſence not having a neceſſary Connection with the Murder, the Preſumption remains uncertain, and does not make an undeniable Proof. It appears by theſe two Examples, that Preſumptions may be either certain and unqueſtionable, or doubtful and uncertain; they are certain when they are ſuch, that they make a full and perfect Proof, and that altho no Perſon did ſee the Fact in queſtion, yet one may certainly conclude that it has happened, when they ſee its Cauſes, its Signs, its Effects, its Conſequences, and the other Facts which are inſeparable from it, and ſo connected with it, that it is not to be imagined that the Fact in Controverſy has not happened when we ſee the others, as in the firſt Example: and on the contrary the Preſumptions are doubtful, when they are grounded upon uncertain or falſe Signs, and from which no certain Conſequence can be gathered. So that the whole Force of this kind of Proof by Preſumptions, conſiſts in the neceſſity of the Connection between the known Facts and the Fact that is not known; and the Proofs of this nature are ſtrong or weak, certain or uncertain, in proportion as this Connection is natural and neceſſary, ſure and certain, or as it is doubtful.

It follows from theſe Remarks on this laſt Kind of Proofs by Preſumptions, that ſeeing they depend on the Judgment that is to be made of the neceſſity of the Connexion between the known Facts and the unknown Facts, the Truth of which we want to know, or of the uncertainty of the ſaid Connection, they depend conſequently on making a right judgment of the Cauſes from which the ſaid Connection may be gathered, or not gathered. And whereas there is no great clearneſs of Underſtanding required for diſcovering the Truth of a Fact when it is proved, either by thoſe who ſaw it, or by ſome Writing, a great deal of Underſtanding and Prudence is neceſſary, and alſo Experience; in the Caſes where it is neceſſary to judge by Preſumption, in order to diſcern among the Signs and Tokens which appear, thoſe which are doubtful, from thoſe which are certain; and there is ſtill a greater degree of Underſtanding and Prudence required, when the Signs and Tokens do not appear, in order to find them out and diſcover them.

It is becauſe of this difficulty that the World has juſtly admired the Knowledge and Wiſdom of *Solomon* in that renowned Judgment which he pronounced between the Mother of the Child which was alive, and her who had ſtrangled her own Child; for the matter was to diſcover the truth of a hidden Fact, and of which not the leaſt Circumſtance was known; ſo that no Sign or Token did appear, from which Preſumptions might be formed; and the Wiſdom of this Judgment conſiſted in finding out a Fact which might be known, and which might diſcover who was the Mother: and it was with this View that *Solomon* expoſed

expoſed the two Women to the danger of ſeeing the Child, which they both pretended to be the Mother of, put to Death, being perſuaded that this danger would ſurprize and trouble the Mother, and that the other could not feel the like Impreſſion, nor ſhew the like Marks; it was the ſurprize and concern which appeared in the Mother, which diſcovered the love and tenderneſs which Nature had given her for her Child, and which made *Solomon* to judge upon a ſure foundation that ſhe was the Mother, becauſe there was a natural and neceſſary Connection between the quality of a Mother and that tenderneſs, and between the ſaid tenderneſs and the trouble at the ſight of ſuch a Danger: and it was this Connection between theſe neceſſary Effects and their natural Cauſes, which diſcovered the Mother with greater certainty than could have been had from the Teſtimony of many Witneſſes: for whereas Witneſſes may deceive, or be deceived, and that the whole force of the Proof by Witneſſes conſiſts in the Preſumption of their having ſufficient Underſtanding and Capacity to know the Facts to which they bear Teſtimony, and of their Fidelity in relating them, and that this Preſumption may be ill grounded, as was that of the Teſtimony of the two Elders againſt *Suſanna*; the Proofs which are drawn from the neceſſary Conſequences of natural Effects to their Cauſes, and of Cauſes to their Effects, are much more certain and more infallible. Thus, for example, the ſudden motion of a Paſſion in him who had forgot his deſign to diſſemble, is a moſt certain proof of the Paſſion which produced that Motion; and the other Effects point out their Cauſes; and the only buſineſs is to know how to diſcern the neceſſity of the Connection between the Effects and their Cauſes, and the neceſſity of the Conſequence between the Facts which do appear, and that which we endeavour to come at the knowledge of: ſo that the common ſaying, that we ought not to judge on Preſumptions, is both falſe and true, according to the two ways of preſuming which we have juſt now taken notice of; for we conclude moſt certainly the truth of the Cauſe from the truth of the Effect, or the truth of the Effect from the truth of the Cauſe, when the Connection is infallible between the one and the other: but we make a falſe Concluſion, when we attribute to one Cauſe the Effect of another, or we conclude without certainty under pretext of an apparent Connection between that Cauſe and the Effect of the other, when we attribute the Effect to its Cauſe, but in a ſlight manner, if the Signs or Tokens thereof are uncertain; or if in the caſe of a Man being killed on the High-way, where one ſingle Perſon is found near to the dead body, if we judge that the ſaid Perſon killed him, we ſhall be in danger, either of judging falſly, becauſe it may be that the ſaid Perſon came there after the flight of the Murderer; or of judging without certainty, and condemning him wrongfully, if there be no other Tokens or Signs which may certainly determine us to judge that the ſaid Perſon is guilty of the Murder; becauſe the caſe being doubtful, it would be unjuſt to condemn him; and it is better to leave to the Judgment of God the Perſon who is truly guilty, when his Crime is not ſufficiently proved, than to run the hazard of condemning unjuſtly one who perhaps may be innocent.

Preſumptions are therefore only certain and concluding, when the Connection between the known Fact and the unknown Fact is ſo neceſſary, that it makes us judge with certainty of the truth of the unknown Fact by the knowledge of the other; and this kind of Proof is ſo natural and concluding, that the Laws have eſtabliſhed certain Preſumptions for Truth. Thus, for example, in the Roman Law *b*, if a Man and a Woman being accuſed of Adultery, had defended themſelves againſt the Accuſation on the head of their being too nearly related, and having been for that reaſon acquitted, had afterwards intermarried with one another, they were puniſhed for Adultery upon the bare Preſumption that their Marriage was only an effect of the ſame Paſſion which had brought them under the ſuſpicion of Adultery. Thus in *France*, a Woman who conceals her big Belly and her being brought to Bed, is preſumed to have murdered her Child,

b l. 34. *C. de adult.*

if

if it does not appear that it was buried or chriſtened publickly; upon this Preſumption, that ſhe who was unwilling to be known to be a Mother, has made away with the Child, whoſe Birth brought a Diſhonour upon her.

Theſe are the ſorts of Preſumptions which are called violent, according to the Expreſſion of Pope *Alexander* the Third *c* in another Example, upon which may be grounded a ſure and certain Judgment.

c Alexand. 3. C. 12. *de præſ.*

F I N I S.

Of the Ways of terminating Law-Suits, &c. 653

A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

BOOK III.

Of the PUBLICK LAW.

TITLE I.

Of Hereſies, Blaſphemy, Sacriledge, and other Impieties.

The CONTENTS.

1. *What is Hereſy.*
2. *Canonical Puniſhments inflicted on Hereticks.*
3. *How far Hereticks may be reſtrained by the Civil Power.*
4. *They may take their Churches from them, and prohibit their Aſſemblies.*
5. *They may ſend their Miniſters into remote Parts, and forbid the reading of their Books.*
6. *They may exclude them from all publick Offices, and from exerciſing certain Profeſſions.*
7. *If the* Jews *may hold Aſſemblies.*
8. *What conduct they ought to obſerve, when they are tolerated.*
9. *What is Blaſphemy, and its different kinds.*
10. *The Puniſhments to which Blaſphemers are liable.*
11. *Of Sacriledge, and the Puniſhments of thoſe who are guilty of it.*
12. *Of thoſe who violate the Sepulchres of the Dead.*

I.

HERESY is a Crime of High Treaſon againſt the Divine Majeſty, whereof one is guilty, when he abandons the true Catholick Faith, and obſtinately maintains an Error which the univerſal Church hath condemned [a]. 1. *What is Hereſy.*

[a] Hæreticorum autem vocabulo continentur, & latis adverſus eos ſanctionibus ſuccumbere debent, qui vel levi argumento a judicio Catholicæ Religionis, & tramite detecti fuerint deviare. *l.* 2. *Cod. de Hæreticis & Manichæis, & Samaritis.*

Manifeſtum facimus veſtræ ſanctitati, quod pauci quidam infideles, & alieni ſanctæ Dei Catholicæ atque Apoſtolicæ Eccleſiæ, contradicere Judaicè atque Apoſtaticè auſi ſunt adverſus ea, quæ ab omnibus ſacerdotibus ſecundùm veſtram doctrinam (Joannis Papæ) recte tenentur, & glorificantur, atque prædicantur. *l.* 8. § 1. *Cod. de ſumma Trinitate.*

In England, *before the Reformation from Popery, many Opinions having been unjuſtly extended by the Romiſh Clergy to be Hereſy, which really were not, an Act of*

Parliament was made in the first Year of the Reign of Queen Elizabeth, *declaring that from thence forward no Matter or Doctrine should be adjudged to be Heresy, but only such as before that Time had been determined, ordered or adjudged to be Heresy, by the Authority of the Canonical Scriptures, or by the first four general Councils, or any of them, or by any other general Council wherein the same was declared Heresy, by the express and plain Words of the said Canonical Scriptures, or such as should thereafter be ordered, judged or determined to be Heresy, by the High Court of Parliament, with the Assent of the Clergy in their Convocation.* Stat. 1. Eliz. chap. 1. §. 36.

II.

2. Canonical Punishments inflicted on Hereticks.

They who will not hearken to the Church, which is the pillar of Truth, and against which the Gates of Hell shall never prevail, ought to be treated as Heathens and Publicans. For which Reason it is, that the Church cuts them off from its Communion, in excluding them from the Participation of the Sacraments, from joining in the publick Prayers, and from Christian Burial. But the Church, like a tender Mother, is always ready to receive them again into her Arms, when they retract their erroneous Tenets, and submit to the Decisions of the Church [b].

[b] Hæc est igitur vera vestra fides: hæc certa religio: hoc beatæ recordationis, ut diximus, patres omnes, præsulesque Romanæ Ecclesiæ, quos in omnibus sequimur, hoc sedes Apostolica prædicavit hactenus, & inconcussè custodivit; huic confessioni, huic fidei quisquis contradictor extiterit, alienum se ipse a sanctâ Communione, alienum ab Ecclesia judicabit esse Catholica. — Sed obduratum est cor eorum, ut scriptum est, ut non intelligerent; & pastoris voeem oves, quæ meæ non erant, audire minimè voluerunt, in quibus observantes ea, quæ ab ipsorum sunt statuta pontifice, eos minime in nostrâ communione recipimus, & ab omni Ecclesia Catholica esse jussimus alienos: nisi errore damnato, nostram doctrinam quantocius sequi, habitâ regulari professione signaverint. Æquum quippe est, ut qui nostris minime obedientiam accommodant statutis, ab Ecclesiis habeantur extorres. Sed quia gremium nunquam redeuntibus claudit Ecclesia; obsecro Clementiam vestram, ut si proprio depositio errore, & pravâ intentione depulsâ ad unitatem Ecclesiæ reverti voluerint, in vestram communionem receptis, indignationis vestræ removeatis aculeos. *l.* 8. *inter.* §. 6. *Liquet. Cod. de summa Trinitate.*

III.

3. How far Hereticks may be restrained by the Civil Power.

The Power which Jesus Christ hath committed to his Church being altogether Spiritual, she can inflict upon Hereticks none other but Spiritual Punishments, the greatest whereof is that of Excommunication. But Sovereign Princes may employ the temporal Authority for the Suppression of Heresies, to prevent their spreading or being propagated in their Dominions. And this they are bound to do, not only in maintenance of the Decision of the Catholick Church, of which they are the Protectors and Defenders, but also that they may preserve Unity among their Subjects, which is often disturbed by the diversity of Opinions in Matters of Religion [c].

[c] Cunctos populos, quos Clementiæ nostræ regit imperium, in tali volumus religione versari, quam divum Petrum Apostolum tradidisse Romanis, religio usque adhuc ab ipso insinuata declarat, quamque Pontificem Damasum sequi claret, & Petrum Alexandriæ Episcopum, virum Apostolicæ Sanctitatis: hoc est, ut secundùm Apostolicam disciplinam, Evangelicamque doctrinam, Patris & Filii & Spiritus sancti unam Deitatem, sub pari Majestate, & sub pia Trinitate credamus. Hanc legem sequentes Christianorum Catholicorum nomen jubemus amplecti; reliquos vero dementes, vesanosque judicantes, hæretici dogmatis infamiam sustinere, divinâ primùm vindictâ, post etiam motus animi vestri, quem ex cælesti arbitrio sumserimus ultione plectendos. *l.* 1. *Cod. de summa Trinitate.*

Decere arbitramur nostrum imperium, subditos nostros de religione commonefacere: Ita enim & pleniorem acquiri Dei ac Salvatoris nostri Jesu Christi benignitatem possibile esse existimamus, si quando & nos pro viribus ipsi placere studuerimus, & nostros subditos ad eam rem instituerimus. *l.* 3. *Cod. de summa Trinitate.*

IV.

4. They may take their Churches from them, and prohibit their Assemblies.

One of the most effectual Ways which Sovereign Princes can take to hinder the Progress of Heresy, is to take from the Hereticks the Places where they assemble for the Exercise of their pretended Religion, whether it be Churches that they have taken from the Orthodox Christians, or Temples which they themselves have built, and to forbid their assembling together in private Houses. If they transgress these Laws, the Magistrates ought to punish them the more severely, in that the Civil Policy condemns all Assemblies which are not authorized by the Sovereign [d].

[d] Nullus hæreticis ministeriorum locus, nulla ad exercendam animi obstinacioris dementiam pateat occasio. Sciant omnes, etiam si quid speciali quolibet rescripto per fraudem elicito ab hujusmodi hominum genere impetratum sit, non valere. Arceantur cunctorum hæreticorum ab illicitis congregationibus turbæ. *l.* 2. *Cod. de summa Trinitate.*

Cuncti hæretici procul dubio noverint omnia sibi loca adimenda esse, sive sub Ecclesiarum nomine teneantur, sive diaconica appellentur, vel etiam decanica: Sive in privatis ædibus vel locis, hujusmodi cœtibus copiam præbere videantur: His ædibus vel locis privatis Ecclesiæ Catholicæ vindicandis. Ad hoc interdicantur his omnibus, ad litanias nocte vel die profanis coire conventibus, statutâ videlicet condemnatione —— si quid hujusmodi fieri vel in publico, vel in privatis ædibus concedatur. *l.* 3. *Cod. de Hæreticis & Manichæis.*

V.

V.

5. *They may send their Ministers into remote Parts, and forbid the reading of their Books.*

Another Means, which is not less effectual than the former, is to remove into distant Parts the Ministers who propagate the Error, and who seduce the Weak and Simple by their false Learning, or who encourage in their erroneous Opinions those who have embraced them; to prevent the Books of Hereticks from falling into the Hands of weak People who may be easily led astray by their subtil Notions; and to take care that the Children of Hereticks be educated in the Schools of the Orthodox [e].

[e] Sancimus ut qui affectant impiam Nestorii opinionem, vel nefariam ejus doctrinam sectantur; si Episcopi aut Clerici sint, ab Ecclesiis ejiciantur: si laici, anathematizentur, —— licentiam habituris Orthodoxis, quicunque voluerint, secundum nostram legislationem, absque metu, & damno ipsos propalare & accusare. *l.* 3. §. 2. *Cod. de summa Trinitate.*

Ut autem omnes re ipsâ discant, quantum nostra divinitas aversetur eos, qui impiam Nestorii fidem adsectant: Præcipimus Irenæum dudum ob hancce causam nostræ indignationi suppositum, & postea —— Tyriorum Civitatis Episcopum factum, ex Tyriorum quidem Ecclesiâ dejici, in suâ autem duntaxat patriâ degere quiescentem omnimodo, & schemate atque nomine sacerdotis exutum. *Ibid.* § 4.

Quoniam vero pervenit ad pias nostras aures, quòd quidam doctrinas quasdam conscripserunt, ediderunt ambiguas, & non per omnia ac præcise congruentes expositæ orthodoxæ fidei à sanctâ Synodo eorum sanctorum Patrum, qui Nicææ & Ephesi convenerunt,— jubemus, facta hujusmodi scripta, sive antea, sive nunc, (potissimum autem ea quæ Nestorii sunt) comburi, & perfectissimo interitui mancipari; ita ut in nullius cognitionem venire possint. *Ibid.* § 3.

Qui dicuntur ex ipsis Montanistis, Episcopi, aut Clerici, expelluntur urbe Constantinopolitanâ. *l.* 20. §. 2. *de Hæreticis & Manichæis.*

VI.

6. *They may exclude them from all publick Offices, and from exercising certain Professions.*

It is also very natural that a Catholick Prince should not suffer Hereticks who are in his Territories to bear there any publick Offices, any honourable Imployments, or to exercise some Professions which are the most in Repute, such as these of Advocates, Physicians, Professors in the Universities and Colleges [f].

[f] Qui tribuit eis (Montanistis) irrationabilem præfecturam, decem libris mulctatur, & decem quoque libris Præsides ex negligentiâ, & Comes privatorum, & officium eorum. *l.* 20. §. 3. *Cod. de Hæreticis & Manichæis.*

There are many Laws in the Code, in the Title de summa Trinitate, *and the Title* de Hæreticis & Manichæis, *by which the Emperors condemn Hereticks to corporal Punishments, and even to Death. The Ordinances of* Francis *the* 1*st, and of* Henry *the* 2*d, direct likewise Corporal Punishments to be inflicted on Hereticks. To these severe Edicts succeeded the Edicts of Pacification, to which the great Numbers of those professing the Reformed Religion in* France *gave Rise.* Lewis *the* XIV[th] *took a middle Way between those two Extremes. He took from the Reformed every Thing that might contribute to encourage them to go on in their own Opinions, he deprived them of all Honours, thinking to engage them by that Means to reflect on their State and Condition, and to forsake the Doctrines of the Reformed Church, and to become Members of the Church of* Rome. *This Method was said not to be a Command to them to imbrace the* Romish *Religion, but the Adding to the Instructions and Exhortations of the Ministers of the Church of* Rome, *temporal Means which they pretended could not be look'd upon as Acts of Violence. It is certain however that they treated with greater Severity, those among the Reformed who any way trangressed against the Rules which the* French *King had prescribed, for preventing the Growth of the Reformed Religion, and also such of the Reformed as held Assemblies contrary to the Laws in being. And it was pretended, that those punishments were not inflicted on them because of their Opinions in Matters of Religion, but because they had transgressed the Laws of the Civil Policy of the Kingdom.*

VII.

7. *If the* Jews *may hold Assemblies.*

The *Jews* cannot hold Assemblies, nor have the Exercise of their Religion, except in the Towns where the Sovereign Princes have expresly given them leave to do it. And they ought not to build any new Synagogues in those Towns, without leave from the Prince. They are excluded from all Dignites, and honourable Employments [g].

[g] Hac valiturâ in omne ævum lege sancimus, neminem Judæorum, quibus omnes administrationes & dignitates interdictæ sunt, nec defensoris civitatis fungi saltem officio, nec patriæ honorem arripere concedimus; ne adquisiti sibi officii autoritate muniti, adversùs Christianos, & ipsos plerumque sacræ Religionis antistites, veluti insultantes fidei nostræ, judicandi, vel pronunciandi quamlibet habent potestatem. §. 1. Illud etiam pari consideratione rationis arguentes, præcipimus, ne qua Judaica Synagoga in novam fabricam surgat: Fulciendi veteres permissa licentia, quæ ruinam minantur. §. 2. Quisquis igitur, vel insulas accepit, quæsitis dignitatibus non potiatur: vel si ad officia vetita irrepserit, ab his penitus repellatur: vel si Synagogam extruxerit, compendio Catholicæ Ecclesiæ noverit se laborasse. Et qui ad honores & dignitates irrepserit, habeatur, ut anteà conditionis extremæ, etsi honorariam illicite promeruerit dignitatem. Et qui Synagogæ fabricam cœperit, non studio reparandi, cum damno quinquaginta librarum auri, fraudetur ausibus suis. *l.* 19. *Cod. de Judæis.*

VIII.

8. *What Conduct they ought to observe,*

When the *Jews* are permitted to have the free Exercise of their Religion in any Town,

when they are tolerated.

Town, it is always upon condition, that they ſhall do nothing in Contempt of the Holy Myſteries of the Chriſtian Religion, and that they ſhall not any Way inſult the Chriſtians. On the other hand the Chriſtians are not to inſult the *Jews* when they aſſemble in their Synagogues, in caſe their Aſſemblies are tolerated by the Prince. The *Jews* are ſeverely puniſhed when they engage Chriſtians to be circumciſed, or when they inſult thoſe among them who have abandoned Judaiſm, in order to imbrace the Chriſtian Religion [h].

[h] Judæos quoſdam feſtivitatis ſuæ ſolemnia ad pœnæ quondam recordationem incendere, & ſanctæ crucis adſimulatam ſpeciem in contemptum Chriſtianæ fidei ſacrilega mente exurere, provinciarum Rectores prohibeant: neve locis ſuis fidei noſtræ ſignum immiſceant, ſed ritus ſuos citra contemptum Chriſtianæ legis retineant: amiſſuri ſine dubio permiſſa hactenus, niſi ab illicitis temperaverint. *l.* 11. *Cod. de Judæis.*

Nullus tanquam Judæus, cum ſit innocens, obteratur, nec expoſitam eum ad contumeliam religio qualiſcunque perficiat: non paſſim eorum Synagogæ, vel habitacula concrementur, vel perperam ſine ulla ratione cædantur. Cum alioquin, etiam ſi ſit aliquis ſceleribus implicitus, idcirco tamen judiciorum rigor, juriſque publici tutela videtur in medio conſtituta, ne quiſquam ſibi ipſi permittere valeat ultionem. Sed ut in hoc perſonis Judæorum volumus eſſe proviſum: ita id quoque monendum eſſe cenſemus, ne Judæi forſitan inſoleſcant, elatique ſui ſecuritate, quicquam præcipites in Chriſtianam reverentiam ultionis admittant. *l.* 14. *Cod. de Judæis.*

Judæi & bonorum proſcriptione, & perpetuo exilio damnabuntur, ſi noſtræ fidei hominem circumcidiſſe eos, vel circumcidendum mandaſſe conſtiterit. *l.* 16. *Cod. de Judæis.*

Judæus, qui eum qui Judaicæ Religionis non eſſet, contrariâ doctrinâ ad ſuam Religionem traducere præſumpſerit, bonorum proſcriptione damnetur, miſerumque in modum puniatur. *l.* 18. *Cod. de Judæis.*

In England, *it is provided by an Act of Parliament,* 1. Annæ, Cap. 30. *that if any* Jewiſh *Parent, in order to the Compelling their Proteſtant Children to change their Religion, ſhall refuſe to allow ſuch Child a fitting Maintenance, ſuitable to the Degree and Ability of ſuch Parent, and to the Age and Education of ſuch Child, upon complaint thereof to the Lord High Chancellor, he may make ſuch order therein, for the Maintenance of ſuch Proteſtant Child, as he ſhall think fit.*

IX.

9. What is Blaſphemy, and its different kinds.

Blaſphemy is, when any Reproaches, Injuries and Execrations are uttered againſt God, and the Perſons of the Holy Trinity; whether it be that they deny the Almighty Power of God, or that they attribute to him ſome Failings and Imperfections, or that they ſay that he has not ſome of the Perfections which are eſſentially united to the Divine Nature, or whether it be that they attack the principal Myſteries of Religion. There are two ways of committing this horrible Crime, one by Words, and the other by Writing. Blaſphemy is commonly attended with execrable Oaths. It is prohibited both by the Law of God, and alſo by the Laws of Man [i].

[i] Quoniam quidem ad hæc quæ diximus, & blaſphema verba, & ſacramenta de Deo jurant, Deum ad iracundiam provocantes: iſtis injungimus abſtinere ab hujuſmodi, & aliis blaſphemis verbis, & non jurare *per capillos, & caput, & his proxima verba.* Si enim contra homines factæ blaſphemiæ impunitæ non relinquuntur; multo magis qui ipſum Deum blaſphemant digni ſunt ſupplicia ſuſtinere. Propterea igitur omnibus hominibus hujuſmodi præcipimus à prædictis delictis abſtinere, & Dei timorem in corde accipere, & ſequi eos qui bene vivunt. Propter talia enim delicta, & fames, & terræ motus, & peſtilentiæ fiunt: Et propterea admonemus abſtinere ab hujuſmodi prædictis illicitis, ut non ſuas perdant animas. Sin autem & poſt hujuſmodi noſtram admonitionem inveniantur aliqui in talibus permanentes delictis: Primùm quidem indignos ſemet ipſos faciunt Dei miſericordia: Poſt hæc autem & legibus conſtitutis ſubjiciuntur tormentis. *Nov.* 77. *cap.* 1. §. 1.

X.

10. The Puniſhments to which Blaſphemers are liable.

Blaſphemers are puniſhed the firſt Time by Fine, or publick Penance, and in Caſe of frequent Relapſes their Lips are peirced with a hot Iron, their Tongue is cut out, and they are condemned to the Pillory, to Baniſhment or to the Gallies. Sometimes the Blaſphemies are ſo enormous, or have been uttered with ſome Circumſtances which do ſo greatly aggravate the Heinouſneſs of the Crime, that he who has been guilty thereof may be Condemned for the firſt Time to ſome Corporal Puniſhment, and even to Death it ſelf. The Writings which contain Blaſphemies, are ordered to be burnt by the Hands of the common Hangman [k].

[k] Judices prohibeant, ut à blaſphemiis, & perjuriis, quæ ipſorum inhibitionibus debent comprimi, omnes homines penitus conquieſcant. *l.* 3. *in fine Cod. de aleatoribus.*

Præcipimus enim glorioſiſſimo Præfecto regiæ Civitatis, permanentes in prædictis illicitis & impiis actibus poſt hanc admonitionem noſtram comprehendere, & ultimis ſubdere ſuppliciis, ut non ex contemptu talium inveniatur & Civitas & Reſpublica per hos impios actus lædi. Si enim & poſt hanc noſtram ſuaſionem quidam tales invenientes, hoc ſubtercelaverint; ſimiliter à Domino Deo condemnabuntur. Ipſe etenim glorioſiſſimus præfectus ſi invenerit quoſdam tale aliquid delinquentes, & vindictam in eos non intulerit ſecundum noſtras leges: Primùm quidem obligatus erit Dei judicio, poſt hæc autem & noſtram indignationem ſuſtinebit. *Nov.* 77. *cap.* 1. §. 2.

See the Ordinances of the Kings of France, *St.* Lewis, Philip VI. Charles VII. Lewis XII. Francis I. Henry II. Charles IX. Henry III. *againſt Blaſphemers, collected in the ninth Book of the Compariſon of the Ordinances of* Guenois, *and the Declaration of* Lewis XIV. *of the* 30th *of* July 1666, *againſt thoſe who imprecate and blaſpheme the holy Name of God.*

[By an Act of Parliament in *England,* 9 & 10 *W.* 3. *cap.* 32. for ſuppreſſing Blaſphemy and Prophaneneſs, it is enacted, That ſuch Perſons as having been educated in, or having made Profeſſion of the

the Chriſtian Religion within the ſaid Realm, and ſhall by writing, printing, teaching, or adviſed ſpeaking, deny any one of the Perſons in the Holy Trinity to be God, or ſhall aſſert or maintain there are more Gods than one, or ſhall deny the Chriſtian Religion to be true, or the Holy Scriptures of the Old and New Teſtament to be of Divine Authority, and be thereof lawfully convicted, ſhall for the firſt Offence be incapable to have and enjoy any Offices or Employments Eccleſiaſtical, Civil or Military. And being a ſecond Time convicted of any of the aforeſaid Crimes, ſhall be diſabled to ſue, proſecute, plead or uſe any Action or Information in Law or Equity, or be Guardian of any Child, or Executor or Adminiſtrator of any Perſon, or capable of any Legacy or Deed of Gift, or to bear any Office, Civil or Military, or Benefice Eccleſiaſtical, for ever, within the ſaid Realm; and ſhall ſuffer three Years Impriſonment, from the Time of ſuch Conviction, without Bail or Mainprize.

XI.

11. *Of Sacriledge, and the Puniſhments of thoſe who are guilty of it.*

Sacriledge is an Abuſe and Prophanation of Things that are holy, or a Crime committed againſt the Perſons and Things which are conſecrated and ſet apart for the Worſhip of God. Thoſe Perſons are puniſhed as guilty of Sacriledge, who ſteal the Communion Plate, and the Ornaments ſet apart for the Service of the Altar, thoſe who ſteal common Moveables out of a Place that is holy, thoſe who are ſo wicked as to prophane the conſecrated Elements, thoſe who take upon them to adminiſter the Sacrament without having received the Order of Prieſthood; thoſe who ſtrike, maim, or kill any one in Holy Orders. Thoſe who are guilty of Sacriledge, are condemned to Death, unleſs there be ſome particular circumſtances in their caſe which may engage the Judges to mitigate the Puniſhment [l].

[l] Mandatis autem cavetur de ſacrilegis, ut Præſides ſacrilegos, latrones, plagiarios, conquirant, & ut prout quiſque deliquerit, in eum animadvertant. Et ſic Conſtitutionibus cavetur, ut ſacrilegi extra ordinem dignâ pœnâ puniantur. *l.* 4. §. 2. *ff. ad Legem Juliam peculatus, & de ſacrilegis.*

Sacrilegi capite puniuntur. Sunt autem ſacrilegi, qui publica ſacra compilaverunt. *l.* 9. *princ. ff. ibid.*

XII.

12. *Of thoſe who violate the Sepulchres of the Dead.*

It is a kind of Sacriledge to violate the Sepulchres of dead Perſons, whether it be that the Bodies of the Dead are dug up by way of Inſult, or to put them to ſome unlawful uſes; or whether it be that the Bodies are only dug up, or that they carry away the Ornaments of the Tombs. The Law declares thoſe who are guilty of this Crime to be infamous Perſons, and the Judges condemn them to Corporal Puniſhments, which are different according as the Circumſtances of the Caſe are different [m]. It ought not to be ſuffered that a Creditor ſhall hinder the Interment of the Corps of his Debtor; and if any one ſhould be ſo raſh as to ſtop the burying of a Perſon deceaſed under this pretext, he would be fined very ſeverely. And if he had taken notes from the preſumptive Heirs of the Deceaſed in their own Names, or had taken pledges before he would conſent that the Corps of the Deceaſed ſhould be carried away, all the precautions taken by him would be null and void, and the Preſumptive Heirs would be relieved againſt an Obligation ſo contrary to good Manners [n].

[m] Pergit audacia ad buſta defunctorum, & aggeres conſecratos: Cum & lapidem hinc movere, & terram evertere, & ceſpitem evellere, proximum ſacrilegio majores noſtri ſemper habuerint: Sed & ornamenta quædam tricliniis, aut porticibus auferre de ſepulchris. Quibus primo conſulentes, ne in piaculum incidat contaminata religio defunctorum, hoc fieri prohibemus, pœna ſacrilegii cohibentes. *l.* 6. *Cod. de ſepulchro violato.*

Huic autem pœnæ ſubjacebunt, & qui corpora ſepulta, aut reliquias contrectaverint. *l.* 4. *in fine Cod. ibid.*

Adverſus eos qui cadavera ſpoliant, Præſides ſeverius intervenire ſolent; maxime ſi manu armata adgrediantur: Ut ſi armati more latronum id egerint, etiam capite plectantur, ut divus Severus reſcripſit; ſi ſine armis, uſque ad pœnam metalli procedunt. Qui de ſepulchri violati actione judicant, æſtimabunt, quatenus interſit: Scilicet ex injuria quæ facta eſt, item ex lucro ejus qui violavit, vel ex damno quod contigit, vel ex temeritate ejus qui fecit. *l.* 3. §. 7. 8. *ff. de ſepulchro violato.*

Rei ſepulchrorum violatorum, ſi corpora ipſa extraxerint, vel oſſa eruerint, humiliores quidem fortunæ ſummo ſupplicio afficiuntur, honeſtiores in inſulam deportantur: alias autem relegantur, aut in metallum damnantur. *l.* 11. *ff. de ſepulchro violato.*

Sepulchri violati actio infamiam irrogat. *l.* 1. *ff. de ſepulchro violato.*

[n] Cum ſit injuſtum, & noſtris alienum temporibus, injuriam fieri reliquiis defunctorum, ab his qui debitorem ſibi eſſe mortuum dicendo, debitumque exigendo, ſepulturam ejus impediunt: Ne in poſterum eadem injuria procederet, cogendis his, ad quos funus mortui pertinent, ſua jura perdere: Ea quidem, quæ mortuo poſito ante ſepulturam ejus facta fuerint, vel exigendo quod debitum eſſe dicitur, vel confeſſiones aliquas, aut fidejuſſorem, aut pignora capiendo, penitus amputari præcipimus. Redditis vero pignoribus, vel pecuniis, quæ ſolutæ ſunt, vel abſolutis fidejuſſoribus, & generaliter omnibus ſine ulla innovatione in priſtinum ſtatum reducendis, principale negotium ex integro diſceptari. Eum vero, qui in hujuſmodi fuerit deprehenſus flagitio, quinquaginta libras auri dependere, vel ſi minus idoneus ad eas perſolvendas ſit, ſuo corpore ſub competenti judice pœnas luere. *l.* 6. *Cod. de ſepulchro violato.*

TITLE II.

Of the Crime of High Treaſon.

The CONTENTS.

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2. *Attempts againſt the Queens, and againſt the Princes of the Royal Family.*
3. *Different ways of falling under the Crime of High Treaſon.*
4. *The ſame.*
5. *Of the Accomplices in this Crime, and of thoſe who being privy to the Deſign of the Criminal, have not revealed it.*
6. *The Puniſhments of thoſe who have attempted to take away the Life of the Sovereign.*
7. *Other Puniſhments inflicted on thoſe who are guilty of High Treaſon.*
8. *This Crime is not extinguiſhed by the Death of the Criminal.*

I.

1. *What is High Treaſon.*

HIGH Treaſon is, when any Attempt is made againſt the ſacred Perſon of the King, and againſt the State. This Crime is the moſt heinous of all thoſe that can be committed againſt the Order of Civil Society. It is a kind of Sacrilege, becauſe Sovereign Princes are upon the Earth the Images of God himſelf [a].

[a] Proximum ſacrilegio eſt, quod Majeſtatis dicitur. Majeſtatis autem crimen eſt, quod adverſus populum Romanum, vel adverſus ſecuritatem ejus committitur. *l.* 1. *ff. ad Legem Juliam Majeſtatis.*

Publica autem Judicia hæc ſunt: Lex Julia Majeſtatis, quæ in eos qui contra Imperatorem vel Rempublicam aliquid moliti ſunt ſuum vigorem extendit. Cujus pœna animæ amiſſionem ſuſtinet, & memoria rei etiam poſt mortem damnatur. *Inſtit. de publ. judiciis.* §. *publica.*

II.

2. *Attempts againſt the Queens, and againſt the Princes of the Royal Family.*

We ought to place among the Number of Crimes of High Treaſon, Attempts againſt the Queens, againſt the King's Children, and againſt the Princes of the Royal Family. Attempts may be made againſt them as well as againſt the Kings two different manner of Ways, by Actions, or by Writings, and even by Deſigns formed againſt their Life [b].

[b] De nece etiam virorum illuſtrium qui conciliis & conſiſtorio noſtro interſunt, Senatorum etiam (nam & ipſi pars corporis noſtri ſunt) vel cujuſlibet poſtremo qui nobis militat cogitaverit, (eâdem enim ſeveritate voluntatem ſceleris quâ effectum, puniri jura voluerunt) ipſe quidem utpote majeſtatis reus, gladio feriatur, bonis ejus omnibus fiſco noſtro addictis. *l.* 5. *Cod. ad L. Juliam Majeſtatis.*

We may apply to the Princes of the Blood Royal, more properly than to Senators, theſe Words of the Emperors Arcadius *and* Honorius, Nam & ipſi pars corporis noſtri ſunt. *Thoſe who make any Attempt againſt Magiſtrates are puniſhed more ſeverely, than if they had attacked private Perſons; and the Puniſhment inflicted on them is more or leſs ſevere, according to the quality of the Magiſtrates who have been offended. But the ſaid Offenders are not treated as if they were guilty of High Treaſon.*

III.

All Perſons, of whatſoever State and Condition they be, may render themſelves guilty of the Crime of High Treaſon; and they are prohibited to hold Correſpondence, and to enter into Leagues and Confederacies directly or indirectly, by Word of Mouth or by Writing, within or without the Kingdom, with Foreign Princes, to levy Troops without the King's expreſs Leave, to excite the Subjects to take up Arms againſt their Sovereign, to hinder the Execution of his Orders, to aſſume to themſelves a Sovereign Authority in any Province [c].

3. *Different ways of falling under the Crime of High Treaſon.*

[c] Quo tenetur (crimine Majeſtatis) is cujus operâ dolo malo concilium initum erit, quo obſides injuſſu principis intercideren, quo armati homines cum telis, lapidibuſve in urbe ſint, conveniant adverſus rempublicam, locave occupentur vel templa. Quove cœtus, conventuſve fiat, hominesque ad ſeditionem convocentur ——— quove quis contra rempublicam arma ferat. Quive hoſtibus populi Romani nuntium, literaſve miſerit, ſignumve dederit, feceritve dolo malo, quo hoſtes populi Romani conſilio juventur adverſus rempublicam. Quive milites ſollicitaverit, concitaveritve: quo ſeditio, tumultuſve adverſus rempublicam fiat. *l.* 1. *ff. ad legem Juliam Majeſtatis.*

Eâdem lege tenetur, & qui injuſſu principis bellum geſſerit, delectumve habuerit, exercitum comparaverit, quive cum ei in provincia ſucceſſum eſſet, exercitum ſucceſſori non tradidit. *l.* 3. *ff. ad L. Juliam Majeſtatis.*

IV.

It is High Treaſon to deſert from the Army to the Enemies of the State, to deliver up to them by treachery Places or Poſts which might be defended, to give them admiſſion into the Towns of the Kingdom, or within the Camp [d].

4. *The ſame.*

[d] (Majeſtatis crimine tenetur) qui exercitum deſeruit, vel privatus ad hoſtes perfugit. *l.* 2. *ff. ad L. Juliam Majeſtatis.*

Lex autem Julia Majeſtatis præcipit, eum qui Majeſtatem publicam læſerit, teneri: qualis eſt ille qui in bellis ceſſerit, hoſtemve arcere renuerit, aut arcem non tenuerit, aut caſtra conceſſerit. *l.* 3. *ff. ad L. Juliam Majeſtatis.*

Majeſtatis crimine accuſari poteſt, cujus ope, conſilio, dolo malo provincia vel civitas hoſtibus prodita eſt. *l.* 10. *ff. ad L. Juliam Majeſtatis.*

V.

In Crimes of High Treaſon, they puniſh not only the Perſons who have committed the Fact, but likewiſe thoſe who have

5. *Of the Accomplices in this Crime, and of thoſe*

who being privy to the Design of the Criminal, have not revealed it.

have formed the Design of committing it, when there are ſufficient Proofs againſt them. They likewiſe condemn as guilty of High Treaſon, thoſe who having had ſome Knowledge of the wicked Deſigns formed againſt the King, and the State, did not reveal them, although they had no hand in the ſaid criminal Aſſociations. One becomes an Accomplice of the Crime, by not taking all the neceſſary Meaſures to prevent it. One ought not to give the leaſt Ground for any Suſpicion againſt him, in a Matter of ſo great Importance. It is for this Reaſon that Officers who receive Meſſages, or Letters from the Enemies of the State, are obliged to acquaint their Superiors therewith, upon pain of being treated as Traitors [e].

[e] Majeſtatis rei etiam poſt mortem tenentur, & confiſcatur eorum ſubſtantia: & poſt mortem hoc crimen moveri incipit, & memoria defuncti damnatur: & res ejus hæredibus auferuntur. Nam ex eo tempore, quo hanc cogitationem ſubiit, propter cogitationem dignus eſt pœna. *l.* 6. *Cod. ad L. Juliam Majeſtatis.*

Id quod de prædictis (reis Majeſtatis) etiam de *ſatellitibus*, conſciis, ac miniſtris eorum ſimili ſeveritate cenſemus. Sanè ſi quis ex his in exordio initæ factionis, ſtudio verò laudis accenſus, initam prodiderit factionem, & præmio & honore a nobis donabitur. Is verò qui uſus fuerit factione, ſi vel ſerò (incognita tamen adhuc) conſiliorum arcana patefecerit: abſolutione tantum, ac veniâ dignus habebitur. *l.* 5. §. 6. 7. *Cod. ad L. Juliam Majeſtatis.*

VI.

6. The Puniſhments of thoſe who have attempted to take away the Life of the Sovereign.

Thoſe who have attempted to take away the Life of the King are condemned to the ſevereſt Puniſhments. And in *France* the Puniſhment is after this Manner. The Criminals having firſt made a publick Acknowledgment of this Offence at the Church Door, being bareheaded, in a white Sheet, and having a lighted Torch in their Hands, their Hands are cut off, they then tear off with red-hot Pincers the Fleſh on their Breaſts, on their Arms, and on their Thighs, and they afterwards throw hot burning Lead, Oyl, Roſin, Wax and Brimſtone, all melted together, upon the Places where the Fleſh has been tore off with Pincers. Afterwards their Bodies are drawn and diſmembred by four Horſes; their Members are burnt to Aſhes, and thrown into the Air. All their Goods are confiſcated; even thoſe which are ſituated in the Provinces where Confiſcation does not take Place. The Houſes in which they were born are demoliſhed, and it is not ſo much as lawful to erect any new Edifice on the ſame Spot of Ground for the future. Their Father, and Mother and Children are baniſhed out of the Kingdom for ever. Thoſe who bear the ſame Name are obliged to quit it. It is impoſſible to join too great a Number of different Puniſhments for puniſhing a Crime that comprehends a great Number of other Crimes, and that is attened with ſo fatal Conſequences. One cannot without horror think of the Crime, or its Puniſhment [f].

[f] Filii verò ejus (rei Majeſtatis) quibus vitam Imperatoriâ ſpecialiter lenitate concedimus, (paterno enim deberent perire ſupplicio, in quibus paterni, hoc eſt, hereditarii criminis exempla metuuntur) à paternâ vel avitâ omnium etiam proximorum hæreditate ac ſucceſſione habeantur alieni, teſtamentis extraneorum nihil capiant, ſint perpetuò egentes & pauperes, infamia eos paterna ſemper comitetur, ad nullos prorſus honores, ad nulla ſacramenta perveniant: ſint poſtremò tales, ut iis perpetuâ egeſtate ſordentibus, ſit & mors ſolatium, & vita ſupplicium. *l.* 5. *Cod. ad legem Juliam Majeſtatis.*

[*In* England *the ſtated Judgment for High Treaſon, in all caſes except counterfeiting the Coin, is for the Offender to be drawn to the Place of Execution, to be there hanged by the Neck, to be cut down alive, his Entrails to be taken out and burnt, his Head cut off, his Body quartered, his Head and Quarters to be put up where the King ſhall direct. The Judgment of a Woman in thoſe caſes, is to be drawn and burnt.*

In this Judgment is implied the Forfeiture of all the Offender's Manors, Lands, Tenements, and Hereditaments. His Wife loſes her Dower. His Children become baſe and ignoble. He loſes his Poſterity; for his Blood is ſtained and corrupted, and they cannot inherit to him, or any other Anceſtor. All his Goods and Chattels are likewiſe forfeited. And the Reaſon why all theſe ſeveral Puniſhments are inflicted for this Crime of High Treaſon is, that his Body, Lands, Goods, Poſterity, &c. *ſhould be torn, pulled aſunder, and deſtroyed, that intended to tear and deſtroy the Majeſty of Government.* Coke 3d. Inſt. Pag. 210. 211. *Hales*'s Pleas of the Crown Pag. 268.]

VII.

7. Other Puniſhments inflicted on thoſe who are guilty of High Treaſon.

As to the other kinds of High Treaſon, the Puniſhment is always Forfeiture of Goods, and Death; but the kind of Puniſhment is different according to the nature of the Crime. That which is moſt common is to quarter the Bodies of the Criminals, and to ſet up their Members in ſome Place where they may be expoſed to publick View. Sometimes they are only beheaded, if they are Perſons who are diſtinguiſhed by their Quality, or by their Imployments. When their Children are not baniſhed out of the Kingdom, they and their Poſterity

are degraded from their Nobility, and they are declared incapable of enjoying any dignity, and of having any honourable Imployment within the Kingdom.

VIII.

8. This Crime is not extinguiſhed by the Death of the Criminal.

The Crime of High Treaſon is not extinguiſhed by the Death of the Criminal; a Proſecution is carried on againſt his Corpſe, or againſt his Memory; his Goods are confiſcated for the King's uſe; and his Deſcendants are condemned to the ſame Penalties, as if he had been convicted in his own lifetime of the Crime of High Treaſon [z].

[z] Poſt divi Marci conſtitutionem hoc jure uti cœpimus, ut etiam poſt mortem nocentium hoc crimen inchoari poſſit: ut convicto mortuo, memoria ejus damnetur, & ejus bona ſucceſſori ejus eripiantur. *l.* 8. *Cod. ad Legem Juliam Majeſtatis.*

Is qui in reatu decedit, integri ſtatûs decedit; extinguitur enim crimen mortalitate. Niſi forte quis majeſtatis reus fuit. Nam hoc crimine, niſi a ſucceſſoribus purgetur, hæreditas fiſco vindicatur. *l.* 11. *ff. ad Legem Juliam Majeſtatis.*

[*The Law of* England *does not extend the Puniſhment of High Treaſon after the Death of the Offender unleſs he has been lawfully attaint thereof in his lifetime. And therefore if a Perſon be ſlain in open Rebellion, he forfeits nothing, neither can he be attaint in ſuch caſe, but by Parliament.* Hales's Pleas of the Crown. Pag. 17. Coke 3. Inſt. Pag. 12.]

TITLE III.

Of Rebellions againſt Courts of Juſtice.

The CONTENTS.

1. *Of thoſe who inſult Judges in the diſcharge of the Functions of their Office.*
2. *Of thoſe who commit any violence againſt Judges.*
3. *Of breach of Priſon.*
4. *Of thoſe who are aiding and aſſiſting in breaking the Priſon.*
5. *Of Jaylers, who let their Priſoners eſcape.*

I.

1. Of thoſe who inſult Judges in the diſcharge of the Functions of their Office.

THOSE who inſult Judges in the diſcharge of the Functions of their Office are to be puniſhed very ſeverely. Their puniſhment ought to be either Pecuniary or Corporal, according to the Nature of the Inſult, the quality of the Judge that is inſulted, or of the Perſon who has committed the Crime. The Judge himſelf who is inſulted in the Seat of Juſtice ought to take the Matter into his own Cognizance, and to pronounce Sentence againſt the Offender [a].

[a] Omnibus Magiſtratibus —— ſecundum jus poteſtatis ſuæ conceſſum eſt juriſdictionem ſuam defendere pœnali judicio. *l. un. ff. ſi quis jus dicenti non obtemperaverit.*

II.

2. Of thoſe who commit any violence againſt Judges.

All Perſons are forbid upon pain of Death to uſe any Violence againſt Magiſtrates, and againſt the Officers of Juſtice, Serjeants, Bailiffs, and others who execute the Decrees of Courts of Juſtice.

See in the 9th Book of the Collection of the Ordinances of France, *thoſe of* Charles IX. *and* Henry III. *relating to this Matter.*

III.

3. Of breach of Priſon.

If one that is accuſed of a Crime makes his eſcape out of Priſon, he may be proceeded againſt as contumacious, not only for the Crime laid to his charge, but alſo for the Breach of Priſon. In caſe the Proof be clear of the Crime for which he was committed, they inflict the ſeverer Puniſhment upon him becauſe of his breaking the Priſon, which implies a very ſtrong preſumption of his guilt. In caſe the Priſoner that has made his eſcape be not found guilty of the Crime, then they only inflict upon him the Puniſhment that is due for the Breach of Priſon. This Puniſhment depends on the different Circumſtances of the Offence, by which the Judge is to govern himſelf. A Proſecution is likewiſe inſtituted againſt Priſoners who have attempted by Force to make their eſcape out of Priſon, although their Attempt was unſucceſsful [b].

[b] In eos qui cum recepti eſſent in carcerem, conſpiraverint, ut ruptis vinculis & effracto carcere evadant, amplius quam cauſa ex qua recepti ſunt repoſcit, conſtituendum eſt: quamvis innocentes inveniantur ex eo crimine propter quod impacti ſunt in carcere, tamen puniendi ſunt. *l.* 13. *ff. de cuſtod. & exhibit. reorum.*

See the Ordinance of 1670. *Tit.* 17. *Art.* 24, 25.

[It appears by the ancient Authors of the Common Law of *England*, that if a Priſoner, whatſoever the Cauſe was for which he was committed, had broken the King's Priſon, and made his eſcape out of it, it was Felony. But by the Statute *de frangentibus Priſonam*, made the firſt Year of *Ed.* 2. it is enacted, that none that breaketh Priſon ſhall have judgment of Life and Member for breaking of Priſon, except the Cauſes, for which he was taken and impriſoned, did require ſuch Judgment, if he had been convicted. *Bracton, lib.*

lib. 3. *Fol.* 124. *a.* Stamford's *Pleas of the Crown, Fol.* 30. Coke 2. Inſtit. *Pag.* 589.]

IV.

4. Of thoſe who were aiding and aſſiſting in breaking the Priſon.

The Perſons who furniſh the Priſoners with iron Tools, or other Inſtruments, by the help of which they make any Breach in Order to their eſcape, are to be puniſhed in the ſame Manner as if they themſelves had broken the Priſon, or reſcued the Criminals out of the Hands of the Officers of Juſtice.

See the Ordinance of Francis I. *at* Ys *upon* Thille *in* 1525.

V.

5. Of Jaylers, who let their Priſoners eſcape.

When the Jayler is in confederacy with the Priſoners to help them to make their eſcape out of the Priſon, or when the Jayler contributes to their Eſcape, by neglecting to uſe the neceſſary Means to watch them, he ought to be condemned to ſuffer the ſame Puniſhment, which the Criminals who have made their eſcape would have been liable to, if they had been convicted of the Crimes for which they were impriſon'd. [c] But if the Priſoner makes his eſcape without any connivance or negligence on the part of the Jayler, they cannot trouble him on account of the Eſcape of the Criminals. It is the ſame Thing with reſpect to the Sheriff's Officers who conduct to the Gallies the Criminals who were condemned to undergo that Puniſhment. But thoſe who by force of Arms attack the Guards on the Highway, in order to ſet the Galley Slaves at Liberty, are puniſhed with Death [d].

[c] Carceri præpoſitus ſi pretio corruptus, ſine vinculis agere cuſtodiam, vel ferrum, venenumque in carcerem inferri paſſus eſt, officio Judicis puniendus eſt: ſi neſcit, ob negligentiam removendus eſt ab officio. *l.* 8. *ff. de cuſtod. & exhibitione reorum.*

[d] Milites ſi amiſerint cuſtodias, ipſi in periculum deducuntur: nam divus Hadrianus Statilio ſecundo legato reſcripſit, quoties cuſtodia militibus evaſerit, exquiri oportere utrum nimiâ negligentiâ militum evaſerit, an caſu: & utrum unus ex pluribus, an unâ plures. Et ita demum adficiendos ſuppliicio milites, quibus cuſtodiæ evaſerint, ſi culpa eorum nimia deprehendatur, alioquin pro modo culpæ in eos ſtatuendum. *l.* 12. *ff, de cuſtod. & exhibit. reorum.*

[*In* England, *the Puniſhment of the Jayler for a negligent Eſcape of his Priſoner, is a Fine: But for a voluntary Eſcape; the Jayler is eſteemed to be guilty of the ſame Crime that the Perſon permitted to eſcape ſtood committed for, whether for Treaſon, or Felony.* Hales's Pleas of the Crown, *pag.* 113. 114.]

TITLE IV.

Of unlawful Aſſemblies, taking up of Arms, and of Force.

The CONTENTS.

1. *Of unlawful Aſſemblies.*
2. *Of ſuch Aſſemblies, when they are attended with Acts of Violence.*
3. *All Acts of Violence prohibited.*
4. *Private Priſons forbidden.*

I.

1 Of unlawful Aſſemblies.

ALL thoſe Aſſemblies are called unlawful, which are held contrary to the Regulations of the Civil Government, or with a formed Deſign to inſult and affront others. Thoſe who join in ſuch Aſſemblies are puniſhed, as diſturbers of the publick Peace [a]. The Crime is the more heinous, when thoſe who are aſſembled with an evil Deſign, are armed, or when they intend to raiſe ſome popular Commotion [b].

[a] In eadem cauſa ſunt, (Legis Juliæ de vi) qui turbæ ſeditioniſve faciendæ conſilium inierint, ſervoſve aut Liberos homines in armis habuerint. —— In eadem cauſa ſunt, qui peſſimo exemplo, convocatâ ſeditione villas expugnaverint, & cum telis & armis bona rapuerint. —— Eâdem Lege tenentur, qui hominibus armatis, poſſeſſionem domo, agrove ſuo, aut navi ſuâ dejecerit, expugnaverit concurſu. *l.* 3. *ff. ad Legem Juliam de vi publica.*

[b] Qui cœtu, concurſu, turbâ, ſeditione, incendium fecerit: quique hominem dolo malo incluſerit, obſederit: quive fecerit, quo minus ſepeliatur, quo magis funus diripiatur, diſtrahatur: quive per vim ſibi aliquem obligaverit: nam eam obligationem Lex reſcindit. *l.* 5. *ff. ad Legem Juliam de vi publica.*

Hac Lege tenetur, & qui convocatis hominibus vim fecerit, quo quis verberetur & pulſetur, neque homo occiſus ſit. *l.* 10. § 1. *ibid.*

Armatos non utique eos intelligere debemus, qui tela habuerint: ſed etiam quid aliud, quod nocere poteſt. *l.* 9. *ibid.*

[*The Diſtinction which the Law of* England *makes between a* Riot, *and an* unlawful Aſſembly, *is this. A* Riot *is, when three or more meet to do ſome unlawful Act, and do act it; as to beat any Man, or to hunt in his Park, Chaſe, or Warren, or to enter or take Poſſeſſion of another Man's Land, or to cut or deſtroy his Corn, Graſs, or other thing belonging to him. An* unlawful Aſſembly *is, when three or more aſſemble themſelves together to do ſome unlawful Act, and do it not. And the Juſtices are to take care to ſuppreſs them, to prevent the Miſchief which they intended.*

Coke's 3d. Inſt. chap. 79. Hales's Pleas of the Crown, *pag.* 137.]

II.

2. Of ſuch Aſſemblies when they are attended with Acts of Violence.

When the unlawful Aſſemblies are attended with popular Commotions, or with Acts of Violence, as if any Perſons have been wounded, Houſes pillaged, the Criminals are condemned to Death [c]. In all other Caſes, thoſe who have aſſembled themſelves together in an unlawful Manner, even although they be armed, are condemned to milder Puniſhments, ſuch as the Gallies, or perpetual Baniſhment [d].

[c] Hi qui ædes alienas aut villas expilaverint, effregerint, expugnaverint: ſi quidem in turbâ cum telo fecerint, capite puniuntur. *l.* 10. *ff. ad Legem Juliam de vi publica.*

[d] Damnato de vi publicâ, aquâ & igni interdicitur. *l.* 10. § 2. *ibid.*

[*Offences of this Nature are puniſhable by the Common Law of* England, *as Treſpaſſes, by Fine and Impriſonment only; yet ſometimes, where they have been very enormous, they have been puniſhed with Pillory.* Hawkins's Pleas of the Crown, *Book* 1. *Chap.* 65. *Pag.* 159.

But the Puniſhment of ſuch Offences is now made Capital in ſome Caſes, by an Act of Parliament 1° Geo. Cap. 5. *intituled,* An Act for preventing Tumults and riotous Aſſemblies, and for the more ſpeedy and effectual puniſhing the Rioters. *By which Act it is Felony without benefit of Clergy, if any Perſons, to the Number of twelve or more, being unlawfully, riotouſly and tumultuouſly aſſembled together, to the Diſturbance of the publick Peace, and do not diſperſe themſelves after Proclamation made in the King's Name, by a proper Officer of the Peace. And it is farther enacted by the ſaid Act, that if any Perſons aſſembled together in this riotous and tumultuous Manner, ſhall with Force demoliſh or pull down, or begin to demoliſh or pull down any Church or Chapel, or any Building for religious Worſhip allowed by Law, or any Dwelling Houſe, Barn, Stable, or other Out-houſe, the Offenders therein ſhall be adjudged Felons, and ſhall ſuffer Death as in Caſe of Felony, without benefit of Clergy.*]

III.

3. All Acts of Violence prohibited.

All Acts of Violence are prohibited; it is not allowed that any one ſhould make uſe of them to do himſelf juſtice [e]. And therefore if any one who pretends Right to a Piece of Ground, or to a Houſe, has taken poſſeſſion of it by Force he is puniſhed in the firſt Place with a Puniſhment ſuitable to the Nature of the Violence which he has uſed. After which a proper Enquiry is made, to ſee whether the Ground or Houſe belongs to him.

[e] Si de vi, & poſſeſſione, vel dominio quæratur: ante cognoſcendum de vi, quàm de proprietate rei, Divus Pius τῳ κοινῳ των Θεσσαλων, id eſt, *Univerſitati Theſſalorum*, Græce reſcripſit. Sed & decrevit ut de vi prius quæratur, quàm de jure dominii ſive poſſeſſionis. *l.* 5. *ff. ad Legem Juliam de vi publica.*

Si quis aliquem dejecit ex agro ſuo hominibus congregatis ſine armis, vis privatæ poſtulari poſſit. *l.* 5. *ff. ad Legem Juliam de vi privata.*

Sed etſi nulli convocati, nullique pulſati ſint; per injuriam tamen ex bonis alienis quid ablatum ſit: hac Lege teneri eum, qui id fecerit. *l.* 3. § 2. *ff. ad Legem Juliam de vi privata.*

Si creditor ſine auctoritate Judicis res debitoris occupet, hac lege tenetur, & tertiâ parte bonorum mulctatur, & infamis fit. *l. ult. ff. ibid.*

At preſent this Law would not take place in its full rigour, unleſs the Force was accompanied with Circumſtances which aggravated the Offence.

IV.

4. Private Priſons forbidden.

No Perſon of what Quality ſoever he be, may by his own proper Authority Arreſt his Debtor, or him by whom he pretends to have been inſulted; and much leſs may he confine him in a private Houſe as in a Priſon [f]. Thoſe who are ſo audacious as to tranſgreſs this Law ought to be puniſhed with the utmoſt ſeverity, for it is to uſurp a Branch of the Sovereign Authority, to attempt to do juſtice to one's ſelf, and to pretend to a Right of having a Priſon.

[f] Jubemus, nemini penitus licere, —— in quibuslibet imperii noſtri provinciis, vel in agris ſuis, aut ubicunque domi, privati carceris exercere cuſtodiam, —— viris clariſſimis omnium provinciarum rectoribus daturis operam —— ut ſæpedicta nefandiſſimorum hominum arrogantia modis omnibus opprimatur. Nam poſt hanc ſaluberrimam conſtitutionem, & vir ſpectabilis pro tempore Præfectus Auguſtalis, & quicunque Provinciæ Moderator, Majeſtatis crimen proculdubio incurſurus eſt, qui cognito hujuſmodi ſcelere, læſam non vindicaverit Majeſtatem. *l.* 1. *Cod. de privatis carceribus cohibendis.*

[*In* England, *no Subject can have a Priſon of their own; for all Priſons or Jails are the King's Priſons or Jails, but a Subject may have the cuſtody or keeping of them.* Coke 2. Inſt. pag. 100. 589.]

TITLE

TITLE V.

Of the Imbezlement of the Publick Money.

The CONTENTS.

1. *What comes under the Notion of this ſort of Imbezlement.*
2. *Of the Officers of the Mint, who alter the Standard of the Coin.*
3. *Of the Officers of the Revenue, who waſte or detain in their Hands the Publick Monies.*
4. *The Puniſhments inflicted on thoſe who are guilty of this Crime, and their Accomplices.*
5. *If this Puniſhment is extinct by the Death of the Offender.*
6. *A Particular kind of this ſort of Imbezlement.*

I.

1. *What comes under the Notion of this Sort of Imbezlement.*

THE Imbezlement of the Publick Money, which the *Romans* called *Peculatus*, is when the Perſons who have the Direction thereof, or the Cuſtody of it, do either convert any Part of the ſaid Money to their own private Uſes [a], or apply it to other Purpoſes than thoſe for which the Sovereign intended it [b].

[a] Lege Juliâ peculatus cavetur, ne quis ex pecunia ſacra, religioſa, publicave auferat, neve intercipiat, neve in rem ſuam vertat, neve faciat, quo quis auferat, intercipiat, vel in rem ſuam vertat; niſi cui utique Lege licebit. *l.* 1. *ff. ad Legem Juliam peculatus.*

[b] Qui publicam pecuniam in uſus aliquos acceptam retinuerit, nec erogaverit, hac Lege tenetur. *l.* 4. § 4. *ff. ad L. Juliam peculatus.*

Is, qui prædam ab hoſtibus captam ſubripuit, Lege peculatus tenetur, & in quadruplum damnatur. *l.* 13. *ff. ibid.*

II.

2. *Of the Officers of the Mint who alter the Standard of the Coin.*

Thoſe Perſons fall likewiſe under the Guilt of this Crime, who having the direction of the Mint do alter the Standard of the Coin, or cauſe it to be alter'd by the Workmen who are imploy'd under them [c].

[c] Lege Juliâ peculatus cavetur, —— nequis in aurum, argentum, æs publicum quid indet, neve immiſceat: neve quod quid indatur, immiſceatur, faciat ſciens dolo malo, quò id pejus fiat. *l.* 1. *ff. ad Legem Juliam peculatus.*

III.

3. *Of the Officers of the Revenue who waſte, or detain in their Hands, the publick Monies.*

The Officers of the Revenue who loſe the King's Money at Play, or who retire into Foreign Countries, not having made up their Accounts, are proſecuted as being guilty of imbezling the Publick Money, in caſe they be in arrear either to the King, or to the Publick.

See the Collation of the Ordinances relating to Imbezlements of the publick Money, and the Declarations of 1690, 1699, *and* 1701, *againſt thoſe who run away with the King's Money.*

IV.

4. *The Puniſhments inflicted on thoſe who are guilty of this Crime, and their Accomplices.*

As there are different Ways of committing this Crime of Imbezlement of the Publick Money, ſome of which are more heinous than others, thoſe who are guilty thereof are condemned to different Puniſhments according to the different Circumſtances of their Crimes [d]. In ſome Caſes the Offenders are condemned to Death, in others to the Gallies and to perpetual Baniſhment, with Confiſcation of their Goods; and in other Caſes to Puniſhments leſs ſevere, ſuch as making conſiderable Reſtitutions in Money, and Fines to the King, and to the Publick. The Accomplices in this Crime are to be puniſhed, as well as thoſe who are the principal Actors in it.

[d] Judices qui tempore adminiſtrationis publicas pecunias ſubtraxerunt, lege Julia peculatus obnoxii ſunt, & capitali animadverſioni eos ſubdi jubemus. His quoque nihilominus, qui miniſterium eis ad hoc adhibuerunt, vel qui ſubtractas ab his ſcienter ſuſceperunt, eadem pœnâ percellendis. *l.* 1. *Cod. de crimine peculatus.*

Peculatûs pœna aquæ & ignis interdictionem, in quam hodie ſucceſſit deportatio, continet. Porro qui in eum ſtatum deducitur, ſicut omnia priſtina jura, ita & bona amittit. *l.* 3. *ff. ad Legem Juliam peculatus.*

The Law Peculatus 7. ff. ad Legem Juliam peculatus, *forbad Proſecutions againſt thoſe who were guilty of imbezling the Publick Money, unleſs they were commenced within five Years after the Commiſſion of the Crime. But there is no reaſon why one ſhould preſcribe againſt the Puniſhment of this Crime, in leſs Time than in other Crimes of leſs importance. Hence it is that at preſent the Preſcription againſt the Puniſhment of this Crime does not take place till after the Expiration of twenty Years. As to the Reſtitution due to the King, or to the Publick, from him who is guilty of this ſort of Imbezlement; the ſame may be recovered by a perſonal Action, which laſts thirty Years, and even forty Years, when the perſonal Action is joined with the Action Hypothecary.*

V.

5. *If this Puniſhment is extinct by the Death of the Offender.*

The Crime of Imbezlement of the publick Money is extinguiſhed by the Death of the Offender, with regard to the Corporal Puniſhments, and to Fines. But there lies a Civil Action againſt his Heirs, Executors or Adminiſtrators, for obtaining Reſtitution of the Monies which have been

been ſecreted, diſſipated, or applied contrary to the Intention of the King [f]. And this Action lies even againſt the Children of Farmers of the Revenue whom their Fathers who have been guilty of this Imbezlement have advanced either by Offices or Portions, although they be not their Heirs. They are obliged to make Reſtitution to the Value of the Offices, or of the Portion which they have received from their Father, ſince the Time that they have been intruſted with the Direction of the Publick Money.

[f] Publica judicia peculatus, & de reſiduis, & repetundarum, ſimiliter adverſus hæredem exercentur, nec immerito: cum in his quæſtio principalis ablatæ pecuniæ moveatur. *l. ult. ff. ad Legem Juliam peculatus.*

VI.

6. A particular Kind of this Sort of Imbezlement.

The Perſons who are charged with collecting and receiving the Publick Money, and who ſet down in their Books leſs than they have received, are guilty of this Crime of Imbezlement [g]. It is the ſame Thing with reſpect to thoſe who being intruſted with the Care of letting out the Demeſne Lands of the Crown, or of a Community, make private Bargains with the Leſſees, whereby they ſecure to themſelves ſome particular Profits and Advantages.

[g] Hac lege tenetur, qui in tabulis publicis minorem pecuniam, quam quid venierit, aut locaverit, ſcripſerit. Aliudve quid ſimile commiſerit. *l.* 10. *ff. ad Legem Juliam peculatus.*

TITLE VI.

Of EXTORTION, and other Miſdemeanors of Officers.

The CONTENTS.

1. *What is meant by Extortion.*
2. *Different Kinds of Extortion.*
3. *The ſame.*
4. *The Puniſhments of Extortion.*
5. *Nullity of that which is done by Extortion.*
6. *For what Extortions the Judge is anſwerable.*
7. *Of him that is the Occaſion of the Extortion.*
8. *The Executors or Adminiſtrators of the Perſon that is guilty of Extortion, may be ſued in a Civil Action.*

I.

1. What is meant by Extortion.

EXTORTION is a Crime committed by the Officers of Juſtice, of the Revenue, or of War, when they exact more than is due to them, or when they take greater Fees than what belong to them according to Law and Uſage [a].

[a] Lex Julia repetundarum pertinet ad eas pecunias, quas quis in Magiſtratu, Poteſtate, Curatione, Legatione, vel quo alio Officio, munere, miniſteriove publico cepit, vel cum ex cohorte cujus eorum eſt. Excipit Lex, a quibus licet accipere, a *ſobrinis, propioreve gradu cognatis ſuis,* uxore. *l.* 1. *ff. de Lege Julia repetundarum.*

II.

2. Different Kinds of Extortion.

Judges are guilty of Extortion, or Bribery, when they ſuffer themſelves to be corrupted by Money, or Preſents, to condemn or acquit contrary to the Rules of Juſtice, whether it be in Civil or Criminal Actions [b]; to exempt from Publick Offices thoſe who are bound to ſerve them, or to compel thoſe to ſerve who are exempted from them [c]; to defer the rendring of Juſtice to thoſe to whom the ſame is due; or when they concert Meaſures ſo as that the Sales, Leaſes and other Acts which paſs under their Authority turn to their own private Advantage, or that of their near Relations.

5. Nullity of that which is done by Extortion.

[b] Lege Julia repetundarum tenentur, qui cum aliquam poteſtatem haberet, pecuniam ob judicandum, decernendumve acceperit. *l.* 3. *ff. de Lege Julia repetundarum.*

Lege Julia repetundarum cavetur, ne quis ob militem legendum mittendumve æs accipiat: neve quis ob ſententiam in ſenatu conſiliove publico dicendam, pecuniam accipiat: vel ob accuſandum, vel non accuſandum utque Urbani Magiſtratus ab omni ſorde ſe abſtineant. *l.* 6. § 2. *ff. ibid.*

[c] Lex Julia de repetundis præcipit, ne quis ob judicem, arbitrumve dandum, mutandum, jubendumve, ut judicet; neve ob non dandum, non mutandum, non jubendum, ut judicet neve ob hominem in vincula publica conjiciendum, vinciendum, vincirive jubendum, exve vinculis dimittendum: neve quis ob hominem condemnandum, abſolvendumve; neve ob litem æſtimandam, judiciumve capitis, pecuniave faciendum vel non faciendum, aliquid acceperit. *l.* 7. *ff. de Lege Julia repetundarum.*

III.

3. The ſame.

Officers of the Army who take Money for diſcharging Soldiers from the Service, are to be puniſhed as guilty of Extortion, whether the Soldiers be capable, or incapable of ſerving any longer [d].

[d] Lege Julia cavetur, ne quis ob militem legendum, mittendumve, æs accipiat. *l.* 6. § 2. *de Lege Julia repetundarum.*

IV.

4. The Puniſhment of the Extortion.

The Puniſhment of Extortion is different according to the Circumſtances and

the Enormity of the Offence [e]. The ſmalleſt Puniſhment to which Perſons, who are guilty of this Crime, can be condemned, is to make Reſtitution of what they have unjuſtly received, to pay the Damages of the Perſon who has ſuffer'd by their Means, and a Fine to the King, to be deprived of the Office in which they have acted contrary to their Duty, and to be declared incapable of ſerving in any other Office. To theſe Puniſhments may be added, according to the Circumſtances of the Caſe; a publick Acknowledgment of his Offence in the moſt ignominious Manner, Baniſhment, the Gallies. There are ſome Caſes where the Puniſhment of Extortion, or Bribery, would extend even to Death. Such would be, for Inſtance, the Caſe of a Judge who ſhould take Money to condemn an innocent Perſon to ſome corporal Puniſhment.

[e] Hodie ex Lege repetundarum extra ordinem puniuntur, & plerumque vel exilio puniuntur, vel etiam durius, prout admiſerint. Quid enim ſi ad hominem necandum pecuniam acceperint: vel licet non acceperint, calore tamen inducti interfecerint vel innocentem, vel quem punire non deberent, capite plecti debent, vel certe in inſulam deportari, ut plerique puniti ſunt. *l.* 7. § 3. *de lege Julia repetundarum.*

V.

5. Nullity of that which is done by Extortion.

Preſcription cannot give a legal Title to the Poſſeſſion of any thing which a Judge has acquired by Extortion [f]. And all the Acts of Juſtice which have been done in Conſequence of this Crime are abſolutely null. Thus the Party whoſe Goods have been ſold at a publick Sale by Order of Court, or his Creditors, may procure the ſaid Sale to be declared null, upon their making Proof that the Judge was bribed to procure the Goods to be ſold at a low Price, either by diſcouraging Bidders, or by ſome other Means.

[f] Quod contra legem repetundarum, Proconſuli, vel Conſuli donatum eſt; non poterit uſucapi. Eadem Lex venditiones, locationes ejus rei causâ, pluris minoriſve factas, irritas facit: impeditque uſucapionem, priuſquam in poteſtatem ejus, a quo profecta res ſit, hærediſve ejus veniat. *l.* 8. *ff. de Lege Julia repetundarum.*

VI.

6. For what Extortions the Judge is anſwerable.

A Judge is anſwerable not only for the Extortion which he himſelf is guilty of, but alſo for thoſe which he procures to be done by Perſons under his Authority [g], and of thoſe which they do without his Order, when he having had notice of the Crime, has not taken the neceſſary Meaſures to prevent it. If the Judge himſelf knew nothing of the Extortion, in that Caſe they puniſh only the Officers who have committed the Crime.

[g] Ut unius pœna, metus poſſit eſſe multorum; Ducem qui male egit ad provinciam, quam nudaverit, cum cuſtodiâ competenti ire præcipimus: ut non ſolum, quod ejus non dicam domeſticus, ſed manipularius & miniſter acceperit: verum etiam quod ipſe a provincialibus noſtris rapuerit, aut ſuſtulerit, in quadruplum exolvat invitus. *l.* 1. *Cod. ad Legem Juliam repetundarum.*

VII.

7. Of him that is the Occaſion of the Extortion.

He who gives Money, or who makes other Preſents to a Judge, in order to engage him to prevaricate in the Functions of his Office, is guilty of the Crime of Extortion, or Bribery, as well as the Judge who receives the Preſents [h]. Both the one and the other ought to be puniſhed very ſeverely, as well as all thoſe who are Accomplices in the Crime [i].

[h] Omnes Cognitores, & Judices a pecuniis, atque patrimoniis manus abſtineant, neque alienum jurgium putent ſuam prædam. Etenim privatarum quoque litium cognitor, idemque mercator ſtatutam legibus cogetur ſubire jacturam. *l.* 3. *Cod. ad Legem Juliam repetundarum.*

[i] Non modo adverſus accipientem, ſed etiam adverſus dantem, accuſandi cunctis tanquam crimen publicum concedimus facultatem: quadrupli pœnâ eo qui convictus fuerit, modis omnibus feriendo. *l. ult. ibid.*

VIII.

8. The Executors or Adminiſtrators of the Perſon that is guilty of Extortion, may be ſued in a Civil Action.

A Criminal Proſecution is not carried on for the Crime of Extortion after the Death of the Offender; but a Civil Action lies againſt his Executors or Adminiſtrators, who are condemned to make reſtitution of the Sums which the Extortioners had received contrary to Law, and to indemnify the Parties for the Damages they have ſuſtained [k].

[k] Sciant judices ſuper amiſſis propriis, aut a ſe, aut ab hæredibus ſuis pœnam eſſe repetendam. *l.* 2. *Cod. ad Legem Juliam repetundarum.*

TITLE VII.

Of Aſſaſſinations, Homicides, Poiſoning, and other Attempts againſt the Life of other Perſons, or one's own Life; of dropping Children in the Streets; of Duels.

The CONTENTS.

1. *Different Kinds of Homicide.*
2. *Caſual Homicide.*
3. *Other Kinds of caſual Homicide.*
4. *Homi-*

4. *Homicide which happens through negligence.*
5. *Voluntary Homicide without any premeditated Deſign.*
6. *The Caſe of lawful Self-defence.*
7. *Homicide of a Wife taken in Adultery.*
8. *Homicide in a Fray.*
9. *Homicide committed with premeditated Deſign.*
10. *Of lying in wait with Deſign to kill.*
11. *Of Aſſaſſination.*
12. *Of Poiſoning.*
13. *Of Medicines which deſtroy Children in the Mother's Womb.*
14. *Of Parricide.*
15. *Of Women who conceal their being with Child.*
16. *Of thoſe who drop their Children in the Streets.*
17. *Of Accomplices in the Crime of Parricide.*
18. *Whether one guilty of Parricide is proſecuted after his Death.*
19. *As they are who kill themſelves.*
20. *The Puniſhments inflicted on thoſe who fight Duels.*
21. *The ſame.*

I.

1. *Different kinds of Homicide.*

HOMICIDE is ſo different according to the Circumſtances of Time, Place, and Perſons, that it comprehends ſeveral kinds of Crimes and Offences.

II.

2. *Caſual Homicide.*

Caſual Homicide is that which happens without any Intention to kill, without any fault, or negligence on the Part of him who has been the Occaſion of the Death of another. [a] As in this Caſe there is neither Crime nor Offence, one cannot inflict any Puniſhment on the Perſon who is accuſed of this ſort of Homicide. If it happens, for Inſtance, that one is cutting down the Branches of a Tree growing on the High-way, and that one of the Branches falls upon a Man that is paſſing by, and kills him, he who was cutting down the Branches is not guilty, provided he gave warning to the Perſon that was paſſing by. [b] If the Tree was not on the High-way, the Homicide would ſtill be looked upon as caſual, even although he who was lopping the Boughs did not give warning, becauſe he could not foreſee that any Perſon would leave the High-road, to croſs through the midſt of a Field. He would not be thought guilty of any crime, unleſs he threw down the Bough on ſet purpoſe on the Perſon that was paſſing by.

[a] Frater veſter rectius fecerit, ſi ſe præſidi provinciæ obtulerit. Qui ſi probaverit non occidendi animo hominem à ſe percuſſum eſſe, remiſsâ homicidii pœnâ, ſecundum diſciplinam militarem ſententiam proferet: crimen enim contrahitur, ſi & voluntas nocendi intercedat. Cæterùm ea quæ ex improviſo caſu, potius quam fraude accidunt, fato plerumque, non noxæ imputantur. *l.* 1. *Cod. ad Legem Corneliam de ſicariis.*

[b] Si putator, ex arbore ramum cum dejiceret, vel machinarius hominem prætereuntem occidit: ita tenetur, ſi is in publicum decidat; nec ille proclamavit, ut caſus evitari poſſit. Sed Mutius etiam dixit, ſi in privato idem accidiſſet, poſſe de culpâ agi: Culpam autem eſſe. quod cum a diligente provideri poterit, non eſſe, proviſum; aut tum denunciatum eſſet, cum periculum evitari non poſſit. Secundum quam rationem non multum refert, per publicum, an per privatum iter fieret: Cum plerumque per privata loca vulgo iter fiat. Quod ſi nullum iter erit; dolum duntaxat præſtare debet, ne immittat in eum, quem viderit tranſeuntem. Nam culpa ab eo exigenda non eſt: cum divinare non potuerit, an per eum locum aliquis tranſiturus ſit. *l.* 31. *ff. ad Legem Aquiliam.*

III.

3. *Other kinds of caſual Homicide.*

We place among the Number of caſual Homicides, thoſe which are committed by Mad-men and Fools, when there are undoubted Proofs that the Madneſs or Folly preceded the Action, and that the ſaid Infirmities deprived thoſe who were attacked with them of their freedom in acting. [c] It is the ſame Thing with reſpect to Homicide committed by Children, when it appears by the Circumſtances that they could not have formed the Deſign of killing; but if it appears from the Proofs that the Child was ſenſible of the Heinouſneſs of his Action, that he acted with premeditated Deſign, he may be puniſhed corporally, even although he had not attain'd the Age of Puberty. [d] The Puniſhment nevertheleſs is mitigated by reaſon of the Tenderneſs of the Age of the Offender.

[c] Infans vel furioſus, ſi hominem occiderint, Lege Corneliâ non tenentur: Cum alterum innocentia conſilii tuetur, alterum fati infelicitas excuſat. *l.* 12. *ff. ad Legem Cornelium de ſicariis.*

[d] Quærimus, ſi furioſus damnum dederit, an Legis Aquiliæ actio ſit? Et Pegaſus negavit. Quæ enim in eo culpa ſit, cum ſuæ mentis non ſit? Et hoc eſt veriſſimum. —— Sed & ſi infans damnum dederit, idem erit dicendum. Quod ſi impubes id fecerit, Labeo ait, quia furti tenetur, teneri & Aquiliâ eum: & hoc puto verum, ſi ſit jam injuriæ capax. *l.* 5. §. 2. *ff. ad Legem Aquiliam.*

IV.

4. *Homicide which happens through negligence.*

If there is any Negligence and Fault on the Part of him who has given Occaſion to the Homicide, that is, if he has not taken all the Meaſures which a prudent Perſon ought to have taken to prevent the Accidents, he ought to be condemned to make good the Damages, to the Heirs of the Deceaſed, and even to ſuffer bodily Puniſhment, unleſs he does get a Pardon from the Sovereign. It is upon the Foundation of this Principle, that Nurſes are corporally puniſhed, when Children

are

are found overlaid that lay in the Bed with them [e].

[e] Mulionem quoque, ſi per imperitiam impetum mularum retinere non potuerit, ſi eæ alienum hominem obtriverint, vulgo dicitur culpæ nomine teneri. Idem dicitur & ſi propter infirmitatem ſuſtinere mularum impetum non potuerit. Nec videtur iniquum ſi infirmitas culpæ adnumeretur: cum affectari quiſque non debeat, in quo vel intelligit, vel intelligere debet, infirmitatem ſuam alii periculoſam futuram. Idem juris eſt in perſona ejus, qui impetum equi, quo vehebatur, propter imperitiam, vel infirmitatem retinere non poterit. *l.* 8. § 1. *ff. ad Legem Aquiliam.*

V.

5 Voluntary Homicide without any premeditated deſign.

Voluntary Homicide, but which is not out of premeditated Deſign, may be committed different ways, which it is neceſſary to examine carefully, becauſe the Circumſtances of the Fact either heighten or leſſen the Offence.

VI.

6. The Caſe of lawful ſelf defence.

He who is attacked by Robbers, or by other Perſons that are armed in ſuch a Manner as to put him in danger of his Life, in caſe he does not defend himſelf, may kill the Robber, or the Aggreſſor [f], without any fear of being puniſhed as a Murderer [g].

[f] Furem nocturnum ſi quis occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit. *l.* 9. *ff. ad Legem Corneliam de ſicariis.*

Is qui aggreſſorem vel quemcunque alium in dubio vitæ diſcrimine conſtitutus occiderit, nullum ob id factum calumniam metuere debet. *l.* 2. *Cod. ad Legem Corneliam de ſicariis.*

Si quis percuſſorem ad ſe venientem gladio repulerit, non ut homicida tenetur: quia defenſor propriæ ſalutis in nullo peccaſſe videtur. *l.* 3. *Cod. ibid.*

Si (ut allegas) latrocinantem peremiſti dubium non eſt, eum qui inferendæ cædis voluntate præceſſerat, jure cæſum videri. *l.* 4. *Cod. ibid.*

[g] Liceat cuilibet aggreſſorem nocturnum in agris, vel obſidentem vias, atque inſidiantem prætereuntibus, impune occidere, etiam ſi miles ſit: Melius namque eſt his occurrere, & mederi, quam injuriâ acceptâ vindictam perquirere. *l.* 5. *Cod. ibid.*

VII.

7. Homicide of a Wife taken in Adultery.

A Huſband who kills upon the Spot his Wife whom he ſurprizes in Adultery, and her Accomplice, does but follow the Motions of a juſtifiable Grief; for which reaſon he eaſily obtains his Pardon [h]. Nevertheleſs he cannot reap the Benefit of the Advantages which the Wife has granted him by her Marriage Contract.

[h] Si tamen maritus in adulterio deprehenſam (uxorem) occidat: Quia ignoſcitur ei, dicendum eſt, non tantum mariti ſed etiam uxoris ſervos liberandos, ſi juſtum dolorem exequenti domino non reſtiterunt. *l.* 3. § 3. *ff. de Senatus conſulto Silaniano.*

VIII.

8. Homicide in a Fray.

If it happens that in a Fray one Man kills another, the Puniſhment is mitigated, if he who has killed the other was aſſaulted by him, if he did not make uſe of offenſive Weapons, if he did not ſtrike, or had no Intention to ſtrike in any Part of the Body where the Strokes are mortal; becauſe the Homicide attended with theſe Circumſtances is much the ſame as caſual Homicide [i]. When the Circumſtances of the Fact are otherwiſe, the Offender ought to be puniſhed more ſeverely.

[i] Eum, qui adſeverat homicidium ſe non voluntate, ſed caſu fortuito feciſſe, cum calcis ictu mortis occaſio præbita videatur: ſi hoc ita eſt, neque ſuper hoc ambigi poterit, omni metu, ac ſuſpicione; quam ex admiſſæ rei diſcrimine ſuſtinet, ſecundum id, quod adnotatione noſtrâ comprehenſum eſt, volumus liberari. *l.* 5. *Cod. ad Legem Corneliam de ſicariis.*

According to the Law in France, *the Perſon who is guilty of Homicide, even when it is attended with the Circumſtances that have been obſerved in this Article, is condemned to death, unleſs he procures his Pardon, which is eaſily obtained under theſe Circumſtances. And if the Criminal himſelf had not aſked for a Pardon, the Judges who judge of theſe Crimes in the laſt reſort, would rather take the trouble upon themſelves to ſollicit for a Pardon to the Criminal than condemn him to death, when the Homicide is caſual, or that it has been committed in the Caſe of a lawful Self-defence.*

IX.

9. Homicide committed with premeditated deſign.

When Homicide is committed with premeditated Deſign, it is always puniſhed with Death, although there has been no lying in wait, nor Aſſaſſination, nor Poiſoning [l]. Thus a Man who having had a Diſpute with another, meets him ſometime afterwards, aſſaults and kills him, ought to be condemned to Death [m]. Not only is the Perſon who actually kills puniſhed in this Caſe, but even he who has formed a Deſign to kill, if he has begun to execute it, either by firing a Gun, or by wounding with a Sword the Perſon whom he had reſolved to kill.

[l] Is, qui cum telo ambulaverit hominis necandi cauſa, ſicut is, qui hominem occiderit, vel cujus dolo malo factum erit commiſſum, Legis Corneliæ de ſicariis pœnâ coercetur. *l.* 7. *Cod. ad Legem Corneliam de ſicariis.*

[m] Divus Hadrianus in hæc verba reſcripſit: In maleficiis voluntas ſpectatur, non exitus. *l.* 14. *ff. ad Legem Corneliam de ſicariis.*

Si quis necandi infantis piaculum aggreſſus, aggreſſave ſit, ſciat ſe capitali ſupplicio eſſe puniendum. *l.* 8. *Cod. ad Legem Corneliam de ſicariis.*

X.

10. Of lying in wait with deſign to kill.

The Law puniſhes ſtill more ſeverely the lying in wait with Deſign to kill; which is when a Man's Life is taken away with Malice forethought, by a Perſon who has formed a Deſign to kill another,

ther, and has concerted Measures for executing his Design, either by lying in wait for him in some Highway, or watching about his House in order to find a proper Opportunity to kill him when he should go abroad. In this Crime the bare Intention of committing it is punished, when there are external Proofs of it, from the Actions of the Criminal.

See the first Article of the 29th *Chapter of the Custom of* Auvergne.

By the Ordinances of France, *those who kill a Man with premeditated Design are to be broke upon the Wheel.*

[In *England*, all Homicides are divided into *Voluntary* and *Involuntary*. Involuntary Homicide is either by Misadventure, where a Man is doing a lawful Act without Intent of Hurt to another, and the Death of some Person doth by chance ensue. Or it is done out of *Necessity*, as where it is in the necessary Defence of one's Person, House or Goods; in which case the Homicide is *excusable*; or where it is occasioned by the due Execution of Publick Justice, in which Case it is *justifiable*.

Voluntary Homicide is either with Malice, or without Malice. If it is attended with Malice, it is called *Murder*, and the Punishment of it is Death. And the Malice may be either implied or expressed. Homicide without Malice, is where one kills another upon a sudden falling out, or Provocation, or in doing an unlawful Act. And this is called *Manslaughter*, the Punishment whereof is Burning in the Hand, and Forfeiture of Goods and Chattels. *Coke* 3. *Inst. pag.* 55. 56. 57. 220. *Hales's Pleas of the Crown, pag.* 43. 56. 269.]

XI.

11. *Of Assassination.*

Assassins are those who hire themselves for Money, or other Reward, to beat, abuse, or kill some Person. Assassins are punished with Death for the bare Attempt, altho' the Crime was not consummated [n]. Those who gave Money to the Assassins to kill, are punished in the same Manner as if they themselves had killed.

[n] Nihil interest, occidat quis, an causam mortis præbeat. Ὁ ἐντείλαμενῳ τινὶ φονεῦσαι, ὡς φονεὺς κεκρίσθαι. Mandator cædis pro homicida habetur. *l.* 15. *ff. ad Legem Corneliam de sicariis.*

The Word Assassination is sometimes taken in a larger Signification for all Homicides done with premeditated Design; but we thought proper to confine our selves here to the peculiar Meaning of the Word. It comes from certain Mahometans, *Subjects of* Vieil de la Montagne, *who went, by Order of their King, into Foreign Courts, there to kill General Officers, and even the Sovereign Princes.*

XII.

12. *Of Poison.*

There is no sort of Homicide of a blacker Die, and more odious, than that which is done by Poison [o]. Those who are guilty of this Crime are condemned to Death, and their Bodies are burnt after their Death, although the Poison had not worked its Effect, by reason the same had been prevented by taking Counter-Poison. They who sold the Poison, knowing what use was to be made of it, those who made the Person take it, knowing the Design, and those who ordered it to be given, are all of them punished as Poisoners.

[o] Plus est hominem extinguere veneno, quàm occidere gladio. *l.* 1. *Cod. de Maleficis & Mathematicis.*

There are some Drugs which may serve to poison Men, and which may likewise be imployed to other Uses that are lawful. Apothecaries ought not to sell these sorts of Drugs but to Persons that are known, and they ought to set down in their Books the Names of the Persons to whom they sell them, and make them sign the said Article. As to such Drugs as can serve to no other Use but to poison Men, an Apothecary who had deliver'd them, would be punished as an Accomplice of the Poisoner.

XIII.

13. *Of Medicines which destroy Children in their Mother's Womb.*

Those Persons are punished as Poisoners who give Medicines to Women with Child to make them miscarry, or to make them come before their Time, so as that the Child may perish in the Birth [p]. The Punishment of Death is also inflicted on married Women, or unmarried Women, who being with Child take these sorts of Drugs.

[p] Cicero in Oratione pro Cluentio Avito scripsit, Milesiam quandam mulierem, cùm esset in Asiâ quod ab hæredibus secundis acceptâ pecuniâ, partum sibi medicamentis ipsa abegisset, rei capitalis esse damnatam. *l.* 39. *ff. de pœnis.*

XIV.

14. *Of Parricide.*

The Tie of Blood between the Murderer and the Person whom he has killed, renders the Crime much more heinous, than if it had been committed upon a Stranger [q]. It is likewise certain that this heinousness augments or diminshes in proportion to the Degree of Kindred or Affinity. Thus he who kills his Father, his Mother, or his Grand-father, is condemned to a much more hideous Punishment than he who has killed his Brother, or some other more distant Relation [r]. However, under the general Name of Parricide are comprehended all those who kill their Relations even to the Degree of Cousin German, or

or their Children. As alſo Huſbands who kill their Wives, and Wives who kill their Huſbands.

[q] Lege Pompeia de parricidiis cavetur, ut ſi quis patrem, matrem, avum, aviam, fratrem, ſororem, patruelem, patruum, avunculum, amitam, conſobrinam, uxorem, virum, generum, ſocrum, vitricum, privignum, privignam, ——occiderit; cujuſve dolo malo id factum erit: Ut pœnâ eâ teneatur, quæ eſt Legis Corneliæ de ſicariis. Sed & mater quæ filium filiamve occiderit, ejus Legis pœnâ afficitur: & avus qui nepotem occiderit. Et præterea qui emit venenum, ut patri daret, quamvis non potuerit dare. *l.* 1. *ff. de Lege Pompeia de parricidiis.*

[r] Novercæ & ſponſæ perſonæ omiſſæ ſunt; ſententiæ tamen legis continentur. *l.* 3. *ibid.*

Cum pater & mater ſponſi, ſponſæ, ſocerorum, ut liberorum ſponſi, generorum appellatione continentur. *l.* 4. *ibid.*

The Puniſhment to which thoſe are condemned in France *who kill their Father or their Mother, is that of being broke on the Wheel. Before they are laid upon the Wheel they are obliged to make a publick Acknowledgment of their Offence in an ignominious Manner. Among the* Romans, *purſuant to the ſingle Law of the Code* de his qui parentes vel liberos occiderunt, *all Parricides, that is to ſay, all thoſe who had killed any one of their Aſcendants, Deſcendants, or neareſt Collateral Relations, were to be ſowed up in a Leathern Bag, together with a Dog, a Cock, a Viper, an Ape, and ſeveral Serpents, and thrown into the Sea, or into the River next adjoining to the Place where the Crime was committed.*

XV.

15. *Women who conceal their being with Child.*

Women who have concealed their being with Child, and whoſe Children are dead without receiving Baptiſm, are reputed to have murdered their Children, and are condemned to ſuffer death.

See the Edict of King Henry II. *of the Year* 1556, *and the Declaration of* Lewis XIV. *which revives the ſaid Edict.*

XVI.

16. *Of thoſe who drop their Children in the Streets.*

According to the Rigour of the Law, thoſe Perſons ought to be puniſhed as Parricides who drop their Children in the Streets, whether the ſaid Children be Baſtards, or lawfully begotten, as alſo the Accomplices in the ſaid Crime [s]. But the Puniſhment is mitigated when the Child has been found alive, leſt a more rigorous Puniſhment ſhould occaſion worſe Accidents.

[s] Crimen à ſenſu humano alienum, & quod nec ab ullis quidem barbaris admitti credible eſt, Dei amantiſſimus Theſſalonicenſis Eccleſiæ Apocriſiarius Andreas ad nos retulit, quod quidam vix ex utero progreſſos infantes abjiciant, —— æquum ſanè erat, ut qui talia perpetrarent, vindictam quæ proficiſcitur ex legibus non effugerent, ſed quo magis alii exemplo horum temperatiores fierent, extremis pœnis ſubjicerentur; ut qui per actionis impudentiam ſua detulerint flagitia. Id quod in poſterum cuſtodiri jubemus. *Nov.* 153.

XVII.

17. *Of the Accomplices in the Crime of Parricide.*

The Accomplices in the Crime of Parricide are to be puniſhed as Parricides, although they be no ways related to the Perſons, whoſe Death they have been acceſſory to [t]. It is the ſame Thing with reſpect to him who has received Money from one, to aſſaſſinate his Father, Mother, or Child [u]. Both the Aſſaſſin and he who has given him the Money are puniſhed as Parricides.

[t] Utrum qui occiderunt parentes, an etiam conſcii, pœnâ parricidii adficiantur, quæri poteſt? Et ait Mæcianus, etiam conſcios eâdem pœnâ adficiendos, non ſolum parricidas. Proinde conſcii etiam extranei eâdem pœnâ adficiendi ſunt. *l.* 6. *ff. de Lege Pomponia de parricidiis.*

[u] Si ſciente creditore, ad ſcelus committendum pecunia ſit ſubminiſtrata, (utputa ſi ad veneni mali comparationem, vel etiam ut latronibus agreſſoribuſque daretur, qui patrem interficerent) parricidii pœnâ tenebitur, qui quæſierit pecuniam, quique eorum ita crediderint, aut à quo ita caverunt. *l.* 7. *ibid.*

XVIII.

18. *Whether one guilty of Parricide is proſecuted after his death.*

Parricide is a Crime of ſo heinous a Nature, that the Puniſhment of Death is inflicted on thoſe who have formed a Deſign to commit it, and who have taken any ſtep towards the Commiſſion of it, although they had not accompliſhed the Deſign [x]. However, there are no Proceedings had againſt the Memory or Aſhes of thoſe who die after they have been judicially accuſed of this Crime, or even after they have been condemned as Parricides, by a former Judgment from which they had appealed.

[x] Parricidii poſtulatus ſi interim deceſſerit, ſi quidem ſibi mortem conſcivit, ſucceſſorem Fiſcum habere debebit. Si minus, eum quem voluit, ſi modo teſtamentum fecit. Si inteſtatus deceſſit eos hæredes habebit qui lege vocantur. *l.* 8. *ff. de Lege Pompeia de parricidiis.*

Preſcription takes place in the Crime of Parricide, as well as in other Crimes, with reſpect to the Criminal Proſecution. But the Offender who has acquired this Preſcription cannot inherit, nor even his Children, to the Perſon whom he has killed.

XIX.

19. *As they are who kill themſelves.*

A Proſecution is carried on againſt the dead Corpſe of thoſe who have laid violent Hands on themſelves. The Corpſe is drawn on a Hurdle, and afterwards hanged, and the Goods of him who has committed this Violence on himſelf are confiſcated. There is nothing but Folly or Madneſs that can be pleaded in excuſe for ſo barbarous an Act.

There is a Title in the Digeſts, and another in the Code in relation to the Goods of thoſe who have made away with themſelves. All the Laws which are collected under theſe two Titles diſtinguiſh between Perſons who have laid violent Hands on them-

themſelves, whilſt they are under an Accuſation of a Capital Crime, or having been taken in the Fact, and thoſe who have made away with themſelves, being weary of Life or for ſome other Reaſon. In the firſt Caſe the Goods of the Criminal were confiſcated, becauſe he was ſuppoſed by that Action to have acknowledged himſelf guilty of the Crime with which he was charged. In the ſecond Caſe the Criminal was not puniſhed, becauſe that Action was authorized among the Romans *by the example of illuſtrious Perſons, and by the Philoſophers. But both Reaſon and Religion having taught us that our Life is not our own, but belongs to God who gave it us, and to the State, it has been judged reaſonable to inflict a Puniſhment on thoſe who lay violent Hands on themſelves. It is not leſs barbarous to kill one's ſelf, than to kill another Perſon. That which the* Romans *looked upon as a Greatneſs of Soul, is one of the meaneſt Weakneſſes that a Man of Courage can be guilty of.*

XX.

20. *The Puniſhments inflicted on thoſe who fight Duels.*

Duelling is one of the Crimes that are moſt fatal to Society and to the State, for which the Law condemns to Death thoſe who fight Duels, either as Principals or Seconds, not only when they have killed or wounded their Adverſaries, but even when the Parties have retired from the fight, without any Blood ſhed. He who challenges another to fight a Duel, is to be impriſoned for the ſpace of two Years, to pay a Fine to the Hoſpital, to be ſuſpended from the Exerciſe of his Offices, and to be deprived of the Emoluments thereof for three Years, although the Challenge has not been accepted, and the Parties did not fight. Corporal Puniſhments are likewiſe inflicted on thoſe who carry Challenges, or who accompany the Parties to the Place of Combat.

XXI.

21. *The ſame.*

A Criminal Proſecution is carried on againſt the Memory of thoſe who have been killed in a Duel, or who have died ſince the Commiſſion of that Crime; and in caſe they do ſurvive they cannot preſcribe againſt the Puniſhment due for that Crime, by any lapſe of time whatſoever, after that the Proſecution has been once commenced againſt them as Duelliſts; and they can have no hopes of obtaining a Remiſſion, Pardon, or Abolition of that Crime.

TITLE VIII.

Of Robbery; Theft and fraudulent Bankruptcies.

The CONTENTS.

1. *Definition of Theft.*
2. *The Puniſhment depends on the Circumſtances of the Crime.*
3. *What are the Circumſtances.*
4. *The ſame.*
5. *Theft committed by an Infant.*
6. *Puniſhment of Theft although Reſtitution be made.*
7. *The Heirs or Executors of the Thief proſecuted in a Civil Action.*
8. *Puniſhments of thoſe who are Accomplices in a Theft.*
9. *Againſt thoſe who conceal the Effects ſtolen, and the Thieves.*
10. *The Thing ſtolen challenged in the Hands of a Purchaſer.*
11. *Of concealing and ſecreting Effects which do not belong to them, and of Accomplices in that Crime.*
12. *Of thoſe who take away Children.*
13. *Of fraudulent Bankrupts, and their Accomplices.*

I.

1. *Definition of Theft.*

THEFT is a fraudulent Subtraction of a Thing from the Perſon to whom it doth belong, in order to appropriate it to one's ſelf, or to make uſe of it againſt the Will of the Owner [a].

[a] Furtum eſt contrectatio rei fraudulosa lucri faciendi gratiâ, vel ipſius rei, vel etiam uſus ejus, poſſeſſionisve: quod lege naturali prohibitum eſt admittere. *l.* 1. *ff. de furtis.*

Furtum autem fit non ſolum cum quis intercipiendi cauſâ rem alienam amovet, ſed generaliter cum quis alienam rem invito domino contrectat. Itaque ſive creditor pignore, ſive is apud quem res depoſita eſt, eâ re utatur; ſive is qui rem utendam accepit, in alium uſum eam transferat, quam cujus gratiâ ei data eſt, furtum committit, veluti ſi quis argentum utendum acceperit, quaſi amicos ad cœnam invitaturus, & id peregrè ſecum tulerit: Aut ſi quis equum geſtandi cauſâ commodatum ſibi, longius aliquo duxerit. Quod veteres ſcripſerunt de eo, qui in aciem equum perduxiſſet. *Inſtit. lib.* 4. *tit.* 1. § 6.

II.

2. *The Puniſhments depending on the Circumſtances of the Crime.*

The Circumſtances of the Time and Place where the Theft was committed, of the Things which have been ſtolen, the Quality of the Perſons from whom one

one has fraudulently taken away any Thing, and that of the Thieves, increaſe or diminiſh the Puniſhment of this Crime.

III.

3. What are the Circumſtances.

Thoſe who wait for Paſſengers in the Highways to rob them, are condemned to be broke on the Wheel. Thoſe who commit theft in the Royal Palaces are likewiſe puniſhed with Death, as alſo Servants who rob their Maſters. It is a greater Crime to ſteal that which is in ſome Manner under the Publick Guard, and under the Protection of Juſtice, ſuch as the Inſtruments of Agriculture which are left in the open Fields, than to ſteal Effects that are uſually locked up in Houſes. The Theft of any Thing that is conſecrated to the Worſhip of God is Sacrilege. The Quality of the Thing ſtolen is alſo to be reckoned among the Circumſtances which the Judge ought to examine, before he gives his Judgment.

IV.

4. The ſame.

When the Theft has been committed without breaking any thing open, and without other aggravating Circumſtances, the Thief is ſentenced to be whipt, and to be marked with a Flower de Luce, to Baniſhment and to the Gallies for a certain Time; but if he is again guilty of the ſame Crime after his firſt Sentence, the Puniſhment is increaſed, which for the third Offence cannot be leſs than Death.

V.

5. Theft committed by an Infant.

An Infant which is near to the Age of Puberty may be puniſhed with Corporal Puniſhment, if he is found guilty of Theft, when he knows that he has committed a Crime in ſtealing [b]. For it is no Theft, if there is not a Deſign to do wrong to him from whom he takes any thing away.

[b] In ſumma ſciendum eſt, quæſitum eſſe, an impubes rem alienam amovendo, furtum faciat? Et placuit, quia furtum ex affectu furandi conſiſtit, ita demum obligari eo crimine impuberem, ſi proximus pubertati ſit, & ob id intelligat ſe delinquere. *Inſtit. lib.* 4. *tit.* 1. §. 18.

VI.

6. Puniſhment of Theft although Reſtitution be made.

Although the Thief have reſtored the Thing which he had fraudulently taken away, he may nevertheleſs be proſecuted and puniſhed extraordinarily, that he may make Reparation for the Crime he has committed [c].

[c] Qui eâ mente alienum quid contrectavit, ut lucri faceret; tametſi mutato conſilio, id poſtea domino reddidit, fur eſt: nemo enim tali peccato pœnitentiâ ſuâ nocens eſſe deſiit. *l.* 65. *ff. de furtis.*

VII.

7. The Heirs or Executors of the Thief proſecuted in a Civil Action.

The Heirs or Executors of the Thief cannot be proſecuted criminally on account of the Theft committed by the Perſon to whom they ſucceed; but they are condemned to make Reſtitution of the Thing ſtolen, or of the Value of it, and to make good all Damages [d].

[d] Furti actione minimè teneri ſucceſſores, ignorare non debueras; de inſtrumentis autem ablatis in rem actione tenentes convenire potes. *l.* 15. *Cod. de furtis.*

VIII.

8. Puniſhments of thoſe who are Accomplices in a Theft.

The Accomplices in a Theft, are puniſhed in the ſame Manner as the Thieves themſelves [e]. We are to look upon all thoſe to be Accomplices who have been aiding and aſſiſting to the Thief, and who have with a premeditated Deſign favoured him in the Execution of his Crime [f]; whether it be that they broke the Windows, by which the Thief entred the Houſe, or that they held the Ladder by which he mounted, or that knowing of the Crime which he intended to commit, they furniſhed him with falſe Keys, or other Inſtruments which he made uſe of to open Doors and Trunks, or whether it be that he let out the Beaſts out of the Stable or Park, to give the Thief an Opportunity of carrying them off. The Accomplice of the Thief is puniſhed corporally, although he received no Share of the Thing ſtolen; and he is condemned with the Thief, to make full Reſtitution of the Thing ſtolen.

[e] Interdum quoque furti tenetur, qui ipſe furtum non fecit: qualis eſt is cujus ope & conſilio furtum factum eſt. In quo numero eſt qui tibi nummos excuſſit, ut alius eos raperet; aut tibi obſtiterit, ut alius rem tuam exciperet. Et hoc veteres ſcripſerunt de eo, qui panno rubro fugavit armentum. Sed ſi quid eorum per laſciviam, & non datâ operâ, ut furtum admitteretur, factum eſt: in factum actio dari debet. At ubi ope Mævii Titius furtum fecerit: ambo furti tenentur. Ope & conſilio ejus quoque furtum admitti videtur, qui ſcalas forte feneſtris ſupponit, aut ipſas feneſtras vel oſtium effringit ut alius furtum facerit; quive ferramenta ad effringendum, aut ſcalas, ut feneſtris ſupponerentur commodaverit, ſciens cujus rei gratiâ commodaverit. *Inſtit. lib.* 4. *tit.* 1. §. 11.

[f] Qui ferramenta ſciens commodaverit ad effringendum oſtium vel armarium, vel ſcalam ſciens commodaverit ad aſcendendum, licet nullum ejus conſilium principaliter ad furtum faciendum intervenerit: tamen furti actione tenetur. *l.* 55. §. 4. *ff. de furtis.*

IX.

9. Againſt thoſe who conceal the Effects ſtolen, and the Thieves.

The Perſons who ſhelter Thieves in their Houſes, who conceal the Effects which have been ſtolen, or who buy them knowing them to be ſtolen [g], are puniſhed corporally, according to the Heinouſneſs of the Crimes which they have countenanced [h].

Peſſimum

[g] Peſſimum genus eſt receptorum, ſine quibus nemo latere diu poteſt. Et præcipitur ut perinde puniantur, atque latrones. In pari causâ habendi ſunt, qui cum apprehendere latrones poſſent, pecuniâ acceptâ, vel ſubreptorum parte, demiſerunt. *l.* 1. *ff. de receptatoribus.*

[h] Eos qui a ſervo furtim ablata ſcientes ſuſceperint, non tantum de ſuſceptis convenire, ſed etiam pænali furti actione potes. *l.* 14 *Cod. de furtis.*

X.

10. *The Thing ſtolen challenged in the Hands of a Purchaſer.*

The Owner of the Thing that has been ſtolen, may challenge it wherever he finds it, even in the Hands of one who has purchaſed it fairly and honeſtly [i]. But when the Queſtion is, whether the Owner who claims the Thing that has been ſtolen from him, is obliged to make Reſtitution to the Purchaſer of what he paid for it, it is neceſſary to diſtinguiſh two Caſes; the firſt is of him who has bought it of an unknown Perſon, who brought the Thing into his Houſe, of one of a ſuſpicious Character, of a poor Man who has ſold a good deal of ſilver Plate; the Second is of him who has bought it of a Perſon that is known, and who could not be readily ſuſpected to have ſtole it, or who bought the Thing that is challenged in a Market, and in a Shop, where they do not examine into the Quality of the Buyer [k]. In the firſt Caſe the Purchaſer ought to reſtore the Thing that is claimed without making any Reſtitution of the Price, becauſe the Purchaſer is guilty of a Neglect which ſavours very much of Deceit. But in the ſecond Caſe, where no Blame can be imputed to the Purchaſer, it is not reaſonable that he ſhould be at the ſame Time ſtripped both of the Thing which he has purchaſed, and alſo of the Price which he has paid for it.

[i] Incivilem rem deſideratis, ut agnitas res furtivas non prius reddatis, quam pretium fuerit ſolutum a dominis. Curate igitur cautiùs negotiari, ne non tantum in damna hujuſmodi, ſed etiam in criminis ſuſpicionem incidatis. *l.* 2. *Cod. de furtis.*

[k] Civile eſt quod à te adverſarius tuus exigit, ut rei quam apud te fuiſſe fateris, exhibeas venditorem: nam à tranſeunte & ignoto te emiſſe, dicere non convenit, volenti evitare alienam bono viro ſuſpicionem. *l.* 5. *ibid.*

XI.

11. *Of concealing and ſecreting Effects which do not belong to them, and of Accomplices in that Crime.*

A Wife who carries away out of the Houſe of her Huſband Effects belonging to him, cannot be proſecuted as being guilty of Theft, but the ſaid Action is called a Secreting and Miſimploying her Huſband's Effects [l]. It is the ſame Thing when a Widow conceals and detains any Effects belonging to the Eſtate of her Huſband, or to the Community between them, and this is becauſe of the Reſpect that is due to the Marriage which is newly diſſolved. The Puniſhment which is inflicted on the Widow who is convicted of ſuch Concealment, is that ſhe is deprived of the Share which ſhe might claim in the Thing which ſhe has concealed, whether it be that ſhe is intitled to it by virtue of any Grant, or as being Part of the Goods of the Community. The Accomplices in ſuch Concealments and Miſapplications committed by a married Woman, or a Widow, may be proſecuted and puniſhed as Thieves [m].

[l] Divortii causâ rebus uxoris à marito amotis, vel ab uxore mariti; rerum amotarum Edicto perpetuo permittur actio. Conſtante etenim matrimonio, neutri eorum neque pœnalis, neque famoſa actio competit, ſed de damno in factum datur actio. *l.* 2. *Cod. rerum amotarum.*

Uxor expilatæ hereditatis crimine idcirco non accuſatur, quia nec furti cum eâ agitur. *l.* 5. *ff. expilatæ hæreditatis.*

[m] Si quis uxori res mariti ſubtrahenti opem, conſiliumve accommodaverit furti tenebitur. Sed & ſi furtum cum eâ fecit, tenebitur furti, cum ipſa non teneatur. Ipſa quoque ſi opem furi tulit, furti non tenebitur, ſed rerum amotarum. *l.* 52 *ff. de furtis.*

The Roman *Law made a particular kind of Crime of the pillaging an Inheritance, which name it gave to the Action that was commenced againſt thoſe who had taken away the Effects belonging to the Inheritance, before the preſumptive Heir or Executor had taken that Quality upon him, or that he had taken Poſſeſſion of the Effects belonging to the Inheritance. Till then, it was ſaid, there was no Owner of the Effects which were the Deceaſed's, and conſequently no Action of Theft could be brought againſt him who had taken them away. But in* France *that Diſtinction ought not to take place, becauſe the dead Perſon gives Seiſin to the Living, both in the Provinces which are governed by their own Cuſtoms, and in thoſe which are governed by the Civil Law. Beſides, that was only a bare Formality, which had no great influence on the Matter it ſelf, becauſe he who had pillaged the Goods of a Succeſſion, was proſecuted and puniſhed in the ſame manner as Thieves.*

XII.

12. *Of thoſe who take away Children.*

The vagrant Beggars who carry away Children, and who maim them in order to make them Objects of Compaſſion, are to be puniſhed with Death [n]. It would be the ſame Thing, if there were any Perſon ſo barbarous, as to take away Children and ſell them to Infidels, who would make Slaves of them.

[n] Plagiarii qui viventium filiorum miſerandas infligunt parentibus orbitates, metalli pœnâ, cum cognitis ante ſuppliciis, teneantur. Si quis tamen hujuſmodi reus fuerit oblatus, poſteaquam ſuper crimine claruerit, ſervus quidem vel libertate donatus beſtiis ſubjiciatur, ingenuus autem gladio conſumatur. *l.* 16. *ad Legem Falcidiam de plagiariis.*

XIII.

XIII.

13. *Of fraudulent Bankrupts and their Accomplices.*

A fraudulent Bankruptcy is a kind of Theft, whether it be that the Bankrupt hath carried off his Effects, or that he has ſet up pretended Creditors, or that he has declared himſelf to be indebted more than really he was to true Creditors. Fraudulent Bankrupts are to be proſecuted and puniſhed in an extraordinary Manner; and it is the ſame Thing with regard to thoſe who have concealed the Effects belonging to Bankrupts. Thoſe who have countenanced the Bankruptcy, by accepting feigned Sales and Aſſignments, or by declaring themſelves to be Creditors, when really and truly they were not, are condemned to pay Fines, and to pay the double of what they demanded which was not due to them.

See the Ordinance relating to Commerce, Tit. 11.

[*In* England, *the Legiſlature has taken particular care to prevent the miſchiefs that happen to Trade and Credit by fraudulent Bankruptcies, and for that End ſeveral Acts of Parliament have been made to puniſh and reſtrain them. The Statue of the* 4th and 5th of Queen Anne, Chap. 17. *directs, That all Bankrupts ſhall make a true Diſcovery of all their Goods or Eſtate to Commiſſioners appointed to examine them, and deliver up to the ſaid Commiſſioners all their Eſtates and all Books, Papers and Writing relating thereunto, and in Caſe of any wilful Omiſſion, being thereof convicted by Indictment or Information, they are to ſuffer as Felons, without Benefit of Clergy. And by the Statute,* 5th of Queen Anne, Chap. 22. *it is provided, That if any Perſon who ſhall become Bankrupt, or any others, with their conſent or privity, ſhall remove, conceal or imbezil any Monies or Effects, whereof they, or any Perſons in truſt for them, are poſſeſſed of, or entitled to, to the Value of twenty Pounds, or any Books of Accounts, Bonds, Bills or any Writings relating thereunto, with intent to defraud their Creditors, every ſuch Perſon ſo becoming Bankrupt ſhall ſuffer as a Felon, without Benefit of Clergy, and his Eſtate ſhall be divided amongſt his Creditors.*]

TITLE IX.

Of Forgery, and of Counterfeiting the King's Coin.

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I.

1 *Different kinds of Forgery.*

THE Crime of Forgery may be committed in Acts or Deeds, by putting to them a falſe Subſcription, or by altering a Deed that has been ſigned by the Parties, whether it be by eraſing ſome Lines or ſome Words, nay even ſome Letters, to ſubſtitute others in their Place, or whether it be by altering the Date, or adding ſomething to what was written when the Parties ſigned it[a].

[a] Lex Cornelia de falſis, quæ etiam teſtamentaria vocatur, pœnam irrogat ei, qui teſtamentum, vel aliud inſtrumentum falſum ſcripſerit, ſignaverit, recitaverit, ſubjecerit, vel ſignum adulterinum fecerit, ſculpſerit, expreſſerit ſciens dolo malo. *Inſtit. lib.* 4. *tit.* 18. §. 7.

Qui teſtamentum amoverit, celaverit, eripuerit, deleverit, interleverit, ſubjecerit, reſignaverit, quive teſtamentum falſum ſcripſerit, ſignaverit, recitaverit dolo malo; cujuſve dolo malo id factum erit: Legis Corneliæ pœnâ damnatur. *l.* 2. *ff. ad Legem Corneliam de falſis.*

II.

2. Whence are drawn the proofs of the forgery of an Act.

The Proofs of the Forgery are drawn from the Inſtrument it ſelf, if it is ſuppoſed, for Example, to have been ſigned by a Perſon who was dead before the Date which the forged Inſtrument bears, from Depoſitions of Witneſſes who were privy to the Forgery, from the Report made by Perſons who are ſkilled in the Compariſon of Hands [b]. Sometimes the bare View of the forged Writing is ſufficient to diſcover the Forgery.

[b] Ubi falſi examen inciderit, tunc acerrima fiat indago argumentis, teſtibus, ſcripturarum collatione, aliiſque veſtigiis veritatis: Nec accuſatori tantum quæſtio incumbat, nec probationis ei tota neceſſitas indicatur. Sed inter utramque perſonam ſit Judex medius: nec ullâ interlocutione divulget quæ ſentiat: ſed tanquam ad imitationem relationis, quæ ſolum audiendi mandat officium, præbeat notionem: poſtremâ ſententiâ, quid ſibi liqueat, prodituruſ. *l.* 22. *Cod. ad Legem Corneliam de falſis.*

III.

3. Of verifying a Writing by compariſon of hands.

If the Judge orders that the Writing which is ſaid to be forged ſhall be verified by comparing it with other Writings; the Writings which are to found the Compariſon ought to be confeſſed by the Party that is charged with the Forgery, or Authentick, that is to ſay, atteſted by a publick Seal, or taken out of the publick Archives of a Court of Juſtice [c]. The Perſons who are to make the Compariſon, after they have been ſworn, are to compare at their leiſure the Writings upon which the Compariſon is founded with thoſe which are to be verified. They are afterwards to give in their Report, and to acknowledge it as ſuch before the Judge. Great Precautions are to be taken before the Judge gives ſentence upon their Report; for what they ſay concerning the Similitude or Diſſimilitude of the Hand-writing is commonly founded only upon Conjectures, or upon Preſumptions, the Force of which the Judge is to examine [d]. The diverſity of Ink and Pens, and the different Situation one's body is in when he is writing changes and alters the Character of the Hand-writing. A Man in Years, a ſick Man, does not write in the ſame Manner in which he wrote when he was Young, and whilſt he was in full Vigour of Health. There needs only a violent Exerciſe of the Hand, to make ſome alteration in the Hand-writing. In fine, there are Cheats ſo expert in counterfeiting of Hands, that it is almoſt impoſſible to convict them of Forgery by the Reaſonings of Men that are well verſed in the Compariſon of Hands.

[c] Comparationem litterarum ex chirographis fieri, & aliis inſtrumentis quæ non ſunt publicè confecta, ſatis abundèque occaſionem criminis falſitatis dare, & in judiciis & in contractibus manifeſtum eſt. Ideoque ſancimus non licere comparationes literarum ex chirographis fieri, niſi trium teſtium habuerint ſubſcriptiones, ut prius literis eorum fides imponatur, —— & tunc ex hujuſmodi cartulâ jam probatâ comparatio fiat, aliter etenim fieri comparationem nullo concedimus modo —— ſed tantum modo ex forenſibus vel publicis inſtrumentis, vel hujuſmodi chirographis quæ enumeravimus comparationem triturandum. Omnes autem comparationes non aliter fieri concedimus, niſi juramento antea præſtito ab iis qui comparationem faciunt, fuerit affirmatum, quod neque lucri causâ, neque inimicitiis, neque gratiâ tenti, hujuſmodi faciunt comparationem. *l.* 20. *Cod. de fide inſtrumentorum.*

Ad hæc ex literis quibus, adverſarius tuus utitur, & proſert, rectè petis examinationem fieri. Item & charta quæ profertur ex archivo publico, teſtimonium publicum habet. *Authent. ad hæc ibid.*

[d] Novimus noſtras leges quæ volunt ex collatione literarum fidem dari documentis, & quia quidam Imperatorum ſuper excreſcente jam malitiâ eorum qui adulterantur documenta, hæc talia prohibuerunt, illud ſtudium falſatoribus eſſe credentes, ut ad imitationem literarum ſemetipſos maxime exercerent, eo quod nihil eſt aliud falſitas, niſi veritatis imitatio, — videmus tamen naturam ejus crebro egentem rei examinatione, quando literarum diſſimilitudinem ſæpè quidem tempus facit. Non enim ita quis ſcribit juvenis & robuſtus, ac ſenex & fortè tremens, ſæpe autem & langor hoc facit. Et quidem hoc dicimus, quando calami & atramenti immutatio, ſimilitudinis per omnia aufert puritatem. *Novel.* 73. *in præfat.*

IV.

4. A forged Deed produced by one who did not commit the Forgery.

When a Party has produced in Court a forged Deed, in the Forgery whereof he had no Hand, he cannot be puniſhed for a Crime which he did not commit, but he is condemned to pay the Charges of proving the Forgery; and the Author of the Forgery may be proſecuted at the Inſtance of the Publick [e]. The King's Attornies General in his ſeveral Courts, and thoſe of Lords of Manors, may likewiſe proſecute out of the ordinary Courſe thoſe who are accuſed of having forged a counterfeit Deed, although he who produced it had declared that he would not make uſe of it, and that the ſaid Deed had been thrown out of the Proceedings in the Cauſe [f]. And this more eſpecially takes place when he who has produced the forged Writing is charged with being the Author of the Forgery.

[e] Divus Pius Claudio reſcripſit, pro menſura cujuſque delicti conſtituendum in eos, qui apud Judices inſtrumenta protulerunt, quæ probari non poſſint —— ſed Divus Marcus cum fratre ſuo pro humanitate hanc rem temperavit, ut ſi (quod plerumque evenit) per errorem hujuſmodi inſtrumenta proferantur, ignoſcatur eis qui tale quicquam protulerint. *l.* 31. *ff. ad Legem Corneliam de falſis.*

[f] Majorem ſeveritatem exigit, ut merita eorum, qui falſis reſcriptionibus utuntur, dignâ coerceantur pœnâ: ſed qui deceptus eſt per alium, ſi ſuam innocentiam probat, & eum à quo accepit, exhibet, ſe liberat. *l.* 4. *Cod. ad Legem Corneliam de falſis.*

Si falſos codicillos ab iis contra quos ſupplicas, factos eſſe contendis: non ideo accuſationem evadere poſſunt, quod ſe illis negent uti: nam illis prodeſt inſtrumenti uſu abſtinere, qui non ipſi falſi machinatores

tores esse dicuntur, & quos periculo solus usus adstrinxerit. Qui autem compositis per scelus codicillis, in severitatem legis Corneliæ inciderunt, non possunt defensiones ejus recusando, crimen evitare. *l.* 8. *Cod. ad Legem Corneliam de falsis.*

V.

5. *Punishments inflicted on publick Officers who are convicted of this Crime.*

Publick Officers, and their Clerks, who are guilty of Forgery in the Discharge of the Functions of their Office, or Commission, and those who counterfeit the King's Sign Manual, or Seals, are to be punished with Death, even although they are not Officers of the Chancery [g]. With respect to the Authors of other Forgeries, the Judges ought to proportion the Punishments to the Enormity of the Crimes, and even condemn the Guilty to suffer Death, according to the different Circumstances.

[g] Ejusque legis (Corneliæ de falsis) pœna in servos, ultimum supplicium est; (quod etiam in lege de ficariis & veneficiis servatur) in liberos vero deportatio. *Instit. lib.* 4. *tit.* 18. §. 7.

See the Edict of Francis I. *of* 1531, *and the Edict of the Month of* March, 1680.

See under the 4th *Article the Law* majorum *there quoted.*

[*In* England, *it is High Treason to counterfeit the King's Great or Privy Seal.* Stat. 25. Ed. 3. Cap. 2. *And by* Stat. 1. Mar. Cap. 6. *the foregoing and counterfeiting the King's Privy Signet, or the Sign Manuel, is made High Treason also.*]

VI.

6. *Punishments of those who are Accomplices in this Crime.*

The Punishment of Forgery extends not only to those who have forged the counterfeit Deed or Writing, but likewise to their Accomplices, whether it be that they were aiding or assisting in forging the Writing, or that they ordered it to be done, or that they gave Money for the doing of it [h].

[h] Pœna Legis Corneliæ irrogatur ei, qui quid aliud, quam in testamento, sciens dolo malo falsum signaverit, signarive curaverit. *l.* 9. *ff. ad Legem Corneliam de falsis.*

VII.

7. *Punishment of the Heir, or Executor, of the Forger.*

The Heir or Executor cannot be prosecuted criminally for the Crime of Forgery committed by the Person to whom he succeeds: But he cannot reap any benefit from the Forgery committed by the Person to whose Rights he succeeds [i]. Thus when any one has forged a Testament in their own Favour, the Legacy which he has given to himself in it ought not to be paid to his Executors, and they ought to restore it, if their Author had received it. They are likewise condemned in Costs, if they defend the Validity of the Testament, which is afterwards proved to be forged.

[i] Si quis, cum falsò sibi legatum adscribi curasset, decesserit, id hæredi quoque extorquendum est. *l.* 4. *ff. ad Legem Corneliam de falsis.*

Cum falsi reus ante crimen illatum, aut sententiam dictam, vitâ decedit, cessante Corneliâ, quod scelere quæsitum est hæredi non relinquitur. *l.* 12. *ibid.*

VIII.

8. *Prescription against the Punishment due for the Crime of Forgery.*

The Criminal acquires an Exemption from the Punishment due for Forgery, by the lapse of twenty Years from the time of the Commission of the Crime, if no Proceedings have been had against him for the same within that time [k]. But the Prescription does not commence to run, with respect to the Civil Effects of it, but from the Day that the Forgery has been discovered. And this takes Place likewise in regard to Petitions for reversing Decrees that have been pronounced on the Authority of forged Writings.

[k] Querela falsi temporalibus præscriptionibus non excluditur, nisi viginti annorum exceptione. Sicut cætera fere crimina. *l.* 12. *Cod. ad Legem Corneliam de falsis.*

IX.

9. *A Transaction grounded on forged Deeds.*

If one has concluded an Agreement on a Writing which he himself had objected against as being forged, he will not be allowed afterwards to call the said Agreement into question, and to prove the Forgery of the Writing [l]. But if on the contrary he had made an Agreement on forged Deeds, which he did not then know to be counterfeit, he might procure himself to be relieved against the said Agreement within ten Years after the Forgery had been discovered.

[l] Ipse significas, cum primum adversarii instrumenta protulerunt, fidem eorum te habuisse suspectam. Factâ igitur transactione, difficile est ut is qui provinciam regit, velut falsum cui semel acquievisti, tibi accusare permittat. *l.* 7. *Cod. ad Legem Corneliam de falsis.*

X.

10. *The assuming a false Name, or Person.*

The assuming a false Name and Person is a Forgery [m]. If it happens, for Instance, that *James* having been killed in a Fight, or having been absent for a long Time in a very remote Country, *Peter* takes the Name of *James*, and endeavours to get himself owned as such in the Family, he is to be punished with Death. It is the same Thing if one personating another signs a Promissary Note, or an Acquittance, under that borrowed Name. But he who changes his Name without any bad Design is not prosecuted as being guilty of Forgery [n].

[m] Falsi nominis vel cognominis adseveratio pœnâ falsi coercetur. *l.* 13. *ff. ad Legem Corneliam de falsis.*

[n] Sicut in initio nominis, cognominis, prænominis recognoscendi singulos impositio libera est privatis:

tis : ita eorum mutatio innocentibus periculoſa non eſt. Mutare itaque nomen vel prænomen ſine aliqua fraude licito jure, ſi liber es, ſecundum ea quæ ſæpè ſtatuta ſunt, minimè prohiberis : nullo ex hoc præjudicio futuro. *l. unicâ Cod. de mutatione nominis.*

XI.

11. *The Suborning of a Child.*

The ſuborning a Child, is a Forgery committed by a Woman who takes the Child of a Stranger and will have it to paſs for her own [o]. The Women who are convicted of this Crime deſerve to be ſeverely puniſhed, becauſe they confound the Order of Families. One is admitted to prove the Subornation of the Child, and to deprive the ſuppoſititious Child both of the Father's and Mother's Inheritance, although the Perſon who has committed the Crime be dead [p]. And this takes place even in the Caſe where the Huſband and Wife have agreed together in the Subornation of a Child which was none of theirs. A Nurſe would be condemned to Death, if after the Death of the Child which had been committed to her Care, ſhe had ſuborned another in its room, or if ſhe had given back her own Child inſtead of that which ſhe had been intruſted with.

[o] Publicè intereſt partus non ſubjici, ut ordinum dignitas, familiarumque ſalva ſit. *l.* 1. *ff. de inſpiciendo ventre.*

Cum ſuppoſiti partus crimen patris tui uxori moveas, apud rectorem Provinciæ inſtitutâ accuſatione id proba. *l.* 10. *Cod. ad Legem Corneliam de falſis.*

[p] Accuſatio ſuppoſiti partus nullâ temporis præſcriptione depellitur, nec intereſt, deceſſerit necne ea quæ partum ſubdidiſſe contenditur. *l.* 19. *ff. ad Legem Corneliam de falſis.*

XII.

12. *The Counterfeiting of the King's Coin.*

The Counterfeiting the King's Coin is one of the kinds of High Treaſon, and is puniſhed with Death [q]. The Law condemns as Counterfeiters of the Coin, not only thoſe who put off counterfeit Silver or Gold marked with the King's Stamp for true, or Pieces of Money that are altered, whether it be with reſpect to the Weight, or with reſpect to the Allay [r] ; but alſo thoſe who have by their own private Authority marked with the King's Stamp, Pieces of Gold and Silver of the ſame Fineneſs and Weight as is obſerved in the publick Coin, becauſe the Power of coining Money is a Right reſerved to the Sovereign. The Accomplices in this Crime, and even thoſe who utter and put off this counterfeited Coin, in concert with the Perſons principally concerned in the coining, are alſo puniſhed with Death.

[q] Quicunque nummos aureos partim raſerit, partim tinxerit, vel finxerit : ſi quidem liberi ſunt, ad beſtias dari : ſi ſervi, ſummo ſupplicio adfici debent. *l.* 8. *Cod. ad Legem Corneliam de falſis.*

Lege Corneliâ cavetur, ut qui in aurum vitii quid addiderit, qui argenteos nummos adulterinos flaverit, falſi crimine teneri. Eâdem pœnâ adficitur etiam is qui, cum prohibere tale quid poſſet, non prohibuit. Eâdem lege exprimitur, ne quis nummos ſtagneos, plumbeos, emere, vendere dolo malo vellet. *l.* 9. *ff. ad Legem Corneliam de falſis.*

[r] Si quis nummos falsâ fuſione formaverit, univerſas ejus facultates fiſco noſtro præcipimus addici. In monetis etenim tantum modo noſtris cudendæ pecuniæ ſtudium frequentari volumus : cujus obnoxii, majeſtatis crimen committunt. Quicunque ſolidorum adulter poterit reperiri, vel à quocunque fuerit publicatus, illicò omni dilatione ſummotâ flammarum exuſtionibus mancipetur. *l.* 2. *Cod. de falsâ monetâ.*

XIII.

13. *Of the Officers of the Mint who alter the Standard of the Coin.*

If it ſhould happen that thoſe who are imployed in the Mint by the King's Orders, ſhould alter the Coin, whether it be with regard to the Weights, or with regard to the Allay, they would be puniſhed as Counterfeiters of the Coin [s].

[s] Quoniam nonnulli monetarii adulterinam monetam clandeſtinis ſceleribus exercent, cuncti cognoſcent neceſſitatem ſibi incumbere hujuſmodi homines inquirendi : ut inveſtigati tradantur judici, facti conſcios per tormenta illicò prodituri, ac ſic dignis ſuppliciis addicendi. *l.* 1. *Cod. de falsâ monetâ.*

XIV.

14. *False Weights, false Measures.*

Nothing is more neceſſary in Trade than juſtneſs in Meaſures and Weights ; for which reaſon thoſe who wittingly and willingly ſell with falſe Weights and falſe Meaſures ought to be puniſhed corporally, or at leaſt baniſhed [t]. The Puniſhment would ſtill be more ſevere, if any one ſhould have the boldneſs to falſify the publick Weights and Meaſures.

[t] Si venditor menſuras publicè probatas, vini, frumenti, vel cujuſlibet rei, aut emptor corruperit, dolove malo fraudem fecerit : quanti ea res eſt, ejus dupli condemnatur. Decretoque divi Hadriani præceptum eſt, in inſulam eos relegari, qui pondera aut menſuras falſaſſent. *l.* 32. *ff. ad Legem Corneliam de falſis.*

XV.

15. *Of the Crime of Stellionate.*

Stellionate is a general Name that is given to all manner of Cheating and Deceit, and which is particularly applied to the Crimes of thoſe who having mortgaged a Thing to one Perſon ſell it to another, and fraudulently conceal from him the Mortgage to which it is ſubject [u]. or who grant an Annuity, and charge an Eſtate with it as being free from all manner of Debt or Incumbrance, although it be already mortgaged [x] ; or who ſell a Thing which does not belong to them. The ordinary Puniſhment of Stellionate is, that he who is found guilty of it ſhall remain in Priſon, until he has repaired the Wrong he has done, and paid the Damages. Sometimes this Crime is attended with ſuch aggravating Circumſtances, that the Judge condemns the Perſon that is guilty

ty to ſeverer Puniſhments, ſuch as thoſe of making a publick Acknowledgment of his Offence in an ignominus manner, and of Baniſhment.

[u] Stellionatus accuſatio ad Præſidis cognitionem ſpectat. Stellionatum autem objici poſſe his, qui dolo quid fecerunt ſciendum eſt —— maximè autem in his locum habet: ſi quis fortè rem alii obligatam, diſſimulatâ obligatione, per calliditatem alii diſtraxerit, vel permutaverit, vel in ſolutum dederit,—— pœna autem ſtellionatus nulla legitima eſt, cum nec legitimum crimen ſit; ſolent autem ex hoc extra ordinem plecti, dummodo non debeat opus metalli hæc pœna in plebeis egredi, in his autem qui ſunt in aliquo honore poſiti, ad tempus relegatio, vel ab ordine motio remittenda eſt. *l.* 3 *ff. ſtellionatus.*

[x] Qui duobus in ſolidum eandem rem diverſis contractibus vendidit, pœnâ falſi coercetur, & hoc divus Hadrianus conſtituit. His adjungitur & is qui judicem corrumpit, ſed remiſſius puniri ſolent ut ad tempus relegentur, nec bona illis auferantur. *l.* 21. *ff. ad Legem Corneliam de falſis.*

Improbum quidem & criminoſum fateris, eaſdem res pluribus pignoraſſe, diſſimulando in poſteriore obligatione, quod eædem aliis pignori tenerentur. Verùm ſecuritati tuæ conſules, ſi ablato omnibus debito, criminis inſtituendi cauſam peremeris. *l.* 1. *Cod. de crimine ſtellionatus.*

XVI.

16. *Of falſe Witneſſes.*

Witneſſes who are convicted of having taken a falſe Oath in a Court of Juſtice are puniſhed with Death [y]. Thoſe Perſons are proſecuted and puniſhed as falſe Witneſſes, who either retract their Depoſitions, or who change them in any material Circumſtances, after they have been repeated upon their Examination and acknowledged their Depoſition before the Judge. The Witneſs who has been ſuborned by the Party in a civil Cauſe, is alſo condemned for ſuffering himſelf to be ſuborned, and likewiſe the Party for ſuborning him. It is the ſame Thing if a Judge has ſuffered himſelf to be corrupted.

[y] Pœna legis Corneliæ irrogatur ei qui falſas teſtationes faciendas, teſtimoniave falſa dicenda dolo malo coierit. —— Sed & ſi quis ad renuntiandum, remittendumve teſtimonium, dicendum vel non dicendum, pecuniam acceperit: pœnâ legis Corneliæ afficitur, & qui judicem corruperit, corrumpendumve curaverit. *l.* 1. §. 1. 2. *ff. ad Legem Corneliam de falſis.*

XVII.

17. *Forgery, in ſuppreſſing the Truth.*

One is guilty of the Crime of Forgery not only by ſaying or doing ſomething againſt Truth, but likewiſe by doing ſomething to hinder the Truth from being known [z]. Thus he who bribes a Witneſs, that he may not give Teſtimony to the Truth in a Court of Juſtice, ought to be puniſhed as one guilty of Forgery [a]. It is the ſame Thing with reſpect to the Heir who ſuppreſſes the Teſtament of him to whom he has a right to ſucceed in right of Blood.

[z] Paulus reſpondit, Legis Corneliæ pœnâ omnes teneri, qui etiam extra teſtamenta, cætera falſa fignaſſent. Sed & cæteros qui in rationibus, tabulis, literis publicis, aliave qua re ſine conſignatione falſum fecerunt; vel, ut verum non appareat, quid celaverunt, ſubripuerunt, ſubjecerunt, reſignaverunt, eâdem pœnâ adfici ſolere dubium non eſt. *l.* 16. §. 1. 2. *ff. ad Legem Corneliam de falſis.*

[a] Eum qui celavit vel amovit, teſtamentum, committere crimen falſi publicè notum eſt. *l.* 14. *Cod. ad Legem Corneliam de falſis.*

TITLE X.

Of Offences againſt Chaſtity, and of Adultery.

The CONTENTS.

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2. *Of Fornication.*
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5. *Puniſhment of an adulterous Woman.*
6. *Puniſhment of the Man, who commits the Adultery.*
7. *Adultery with a common Whore.*
8. *Who has the Right to proſecute one for the Crime of Adultery.*
9. *If the Heirs of the Huſband may proſecute the Wife for the Crime of Adultery.*
10. *If there is a Compenſation of the Adultery on the Part of the Huſband with that committed by the Wife.*
11. *Reconciliation of the Huſband with his adulterous Wife.*
12. *Adultery committed during the firſt Marriage.*
13. *Of a Woman that has been raviſhed.*
14. *Different Kinds of Rapes, the Puniſhments inflicted on the Raviſhers.*
15. *Of the Rape of a Nun.*
16. *Of Violence offered to a Woman.*
17. *Of Inceſt.*
18. *Of Crimes againſt Nature.*
19. *Of Polygamy.*

I.

1. *Of the Crime of Luxury.*

WE comprehend under the general Name of Luxury, or Offences againſt Chaſtity, ſimple Fornication, Adultery, Rape, Violence, Inceſt, Crimes againſt Nature, and Polygamy.

II.

2. *Of Fornication.* Fornication is a criminal Converſation which two ſingle Perſons, who are free from all Engagements, have with one another; that is to ſay, Perſons who are not engaged, either by the Ties of Marriage, or by a ſolemn Vow of Religion. If a Child is born of this unlawful Commerce, and the Woman is not a common Proſtitute, the Father of the Child is condemned to maintain it, and to pay to the Mother moderate Damages, according to the Condition of the Parties, and the Circumſtances of the Offence. Both Parties are likewiſe condemned to pay a Fine, or to give ſomething to the Poor.

The Emperor Juſtinian *thought it proper to inflict a ſeverer Puniſhment on thoſe who committed ſimple Fornication with a Maiden, or a Widow, who was not a common Proſtitute. For he ordains in the Title of the Inſtitutes* de publicis judiciis, *that thoſe who are found guilty of this Crime ſhall forfeit the half of their Goods, if they are Perſons of an illuſtrious Rank, and that they ſhall be puniſhed with corporal Puniſhment, and Baniſhment, if they are Perſons of a low Condition.*

[As to the Maintenance of Baſtard Children, in *England* the reputed Father, if he is of ability, is obliged to maintain them, whether the Mother be a common Proſtitute, or a Perſon of leſs abandoned Character. And ſeveral Acts of Parliament have been made to prevent Baſtard Children being left as a Burden on the Pariſh where they happen to be born. By the Stat. 13. and 14. *Car.* 2. Chap. 12. Church-Wardens and Overſeers of the Poor, where any Baſtards are born, may ſeize ſo much of the Goods, and Profits of the Lands, of the putative Father and lewd Mother, as two Juſtices of the Peace ſhall order towards the Diſcharge of the Pariſh.]

III.

3. *Circumſtances which aggravate Fornication.* Sometimes the Circumſtances of ſimple Fornication may ſo heighten the Enormity of the Crime, as that one of the Parties may be condemned to corporal Puniſhment, even to that of Death [a]. Thus a Guardian who debauches his Ward may be puniſhed with Death. It is the ſame Thing in the Caſe of a Servant who has an unlawful Commerce with his Maſter's Daughter, or a Jayler who debauches an honeſt Woman who is confined in the Priſon of which he is the Keeper.

[a] Si tutor pupillam quondam ſuam violatâ caſtitate ſtupraverit, deportationi ſubjugetur, atque univerſæ ejus facultates fiſci juribus vindicentur, quamvis eam pœnam debuerit ſuſtinere; quam raptori leges imponunt. *l. unicâ. Cod. ſi quis eam cujus tutor fuerit corruperit.*

IV.

4. *Of common Whores, and of thoſe who make a Trade of procuring them.* When common Whores are informed againſt before the Civil Magiſtrate by the Neighbours, or by the Officers who are appointed to take care of the Civil Policy, they are ſhut up for a certain Time in a Houſe of Correction, or they are ſent into Colonies [b]. As to Perſons of both Sexes, who drive a ſcandalous Trade in proſtituting young Women, they are declared to be infamous, and they are condemned to be whipt and baniſhed. If thoſe who are guilty of this infamous Commerce are convicted of having ſeduced young Women of good Families, and of having drawn them away by Artifice from their Parents, they would be puniſhed with Death. It is even unlawful for any Perſons to let their Houſes to Women of a ſcandalous Life, and much more to thoſe who harbour them in their Houſes, in order to proſtitute them.

[b] Lenones jubemus extra hanc fieri feliciſſimam civitatem, (ſcilicet Conſtantinopolim) tanquam peſtiferas, & communes caſtitatis vaſtatores factos, & liberas ancillaſque requirentes & deducentes ad hujuſmodi neceſſitatem, & decipientes, & habentes educatas ad univerſam confuſionem. Præconizamus itaque quia ſi quis de cætero præſumpſerit invitam puellam aſſumere, & habere ad neceſſitatem nutritam, & fornicationis ſibi deſerentem quæſtum: hunc neceſſe eſt à ſpectabilibus prætoribus populi hujus feliciſſimæ civitatis comprehenſum omnia noviſſima ſuſtinere ſupplicia. Si enim pecuniarum eos furtorum & latrociniorum emendatores elegimus; quomodo non multo magis caſtitatis furtum & latrocinium eos coercere permittimus? Si quis autem patiatur in ſua domo quemquam lenonem & hujuſmodi præpoſitum operationis habere, & hæc denuntiata cognoſcens, non etiam domo ſuâ expulerit: ſciat ſe & decem librarum auri ſuſtinere pœnam, & circa ipſam periclitaturum habitationem. *Nov.* 14. *cap. unico.*

V.

5. *Puniſhment of an adulterous Woman.* When a married Woman is convicted of Adultery, ſhe is condemned to be ſhut up in a Nunnery, where ſhe continues for two Years in a Lay-habit [c]. If the Huſband does not take her out of the Nunnery in the Space of two Years, or if he happens to die, ſhe is ſhaved, and puts on the Habit of a Nun, in order to paſs the Remainder of her Days in that State. She is deprived of all the Advantages ſhe was intitled to under her Marriage Settlement, and her Marriage Portion falls to her Huſband in caſe ſhe has no Children; and if ſhe has Children the Mother's

ther's Portion is decreed to them. There is to be taken out of the ſaid Portion, whether it be decreed to the Huſband, or to the Children, ſo much as will pay the Penſion of the Adultereſs in the Nunnery.

[c] Adultera —— in monaſterium mittatur: quam intra biennium viro recipere licet. Biennio tranſacto, vel viro priuſquam reduceret ream mortuo: adultera tonſa monaſtico habitu ſuſcepto, ibi dum vivit, permaneat. —— pactis dotalibus inſtrumentorum in omni caſu viro ſervandis. *Authent. ſed hodie. Cod. ad Legem Juliam de adulteriis.*

What is ſaid in the Authentick ſed hodie, *that after two Years the Adultereſs ſhall be ſhaved, in order to ſpend the Remainder of her Days in a Monaſtery, is to be underſtood in Caſe the Huſband does not take her out from thence even after two Years. For a Huſband is always at liberty to be reconciled to his Wife. And even Adultereſſes have been ſometimes permitted to quit their Retreat in order to be married again, after the Death of the Huſband to whom they have been unfaithful. In this caſe it is neceſſary that the Widow who has been thus ſhut up in a Cloyſter, be demanded in marriage of the ſupreme Court of Judicature by the Perſon who deſigns to marry her.*

VI.

6. *Puniſhment of the Man who commits the Adultery.*

The Man who has committed Adultery with another Man's Wife may be proſecuted out of the ordinary Courſe by the Huſband of the Woman with whom he has had an unlawful Commerce; but the Puniſhment of this Crime commonly ends in ſome Alms to the Poor, and Damages to the Huſband that has been injured. Sometimes the Adultery is attended with aggravating Circumſtances which oblige the Judges to heighten the Puniſhment. Thus a Vaſſal that ſhould lie with the Wife of his Lord, would forfeit his Fee. A Servant who ſhould have a criminal Converſation with his Maſter's Wife, would be puniſhed with Death.

By the Roman *Law every Adulterer was puniſhed with corporal Puniſhments.*

VII.

7. *Adultery with a common Whore.*

If the Woman with whom the Adultery was committed, was a common Proſtitute, the Huſband could not have this Action againſt the Man who had committed this Crime with her, nor have condemned to pay any Damages [d].

[d] Si ea, quæ ſtupro tibi cognita eſt paſſim venalem formam exhibuit, ac proſtitutam meretricio more vulgo ſe præbuit: adulterii crimen in ea ceſſat. *l.* 22. *Cod. ad Legem Juliam de adulteriis.*

VIII.

8. *Who has the right to proſecute one for the Crime of Adultery.*

It is only the Huſband that can accuſe his Wife of Adultery; for it is not reaſonable that others ſhould be permitted to raiſe diſcord and diviſion between Huſband and Wife who appear to be very well ſatisfied with each other's conduct [e]. We muſt except from this Rule the caſe of a Huſband who encourages the diſorderly Life of his Wife, and who proſtitutes her himſelf, or who ſuffers her to live as a publick Whore [f]. For in that Caſe the Officers who are charged with the Care of the Civil Policy, ought to proſecute both the Huſband and the Wife with the utmoſt Rigour; in order to bring them to condign Puniſhment.

[e] Conſtante matrimonio, ab eo qui extra maritum ad accuſationem admittitur, accuſari mulier adulterii non poteſt. Probatam enim marito uxorem, & quieſcens matrimonium non debet alius turbare, atque inquietare, niſi prius lenocinii maritum accuſaveit. *l.* 26. *ff. ad Legem Juliam de adulteriis.*

[f] Qui quæſtum ex adulterio uxoris ſuæ fecerit plectitur, nec enim mediocriter delinquit, qui lenocinium in uxore exercuit. Quæſtum autem ex adulterio uxoris facere videtur, qui quid accepit: ut adulteretur uxor. Sive eniam ſæpius, ſive ſemel, accepit: non eſt eximendus. Quæſtum, enim de dulterio uxoris facere propriè ille exiſtimandus eſt, qui aliquid accepit, ut uxorem pateretur adulterari meretricio quodam genere. Quod ſi patiatur uxorem delinquere non ob quæſtum, ſed negligentiam vel culpam, vel quandam patientiam, vel nimiam credulitatem: extra legem poſitus videtur.

IX.

9. *If the Heirs of the Husband may proſecute the Wife for the Crime of Adultery.*

The Heirs of the Huſband cannot bring an Accuſation againſt the Widow for the Crime of Adultery which ſhe had committed during the Marriage; becauſe the Huſband is preſumed in his own lifetime to have forgiven the Widow for the ſaid Crime [g]. But if he dies in the time whilſt he is preparing an Accuſation againſt his Wife, his Heirs may go on in the Proſecution of that Accuſation, in order to have her condemned to the Puniſhment that the Law inflicts for Adultery, and to have her Marriage Portion declared to be forfeited for their Advantage. It is likewiſe permitted to the Heirs to object to the Widow her immodeſt Life and Converſation, when ſhe has lived a diſorderly Life in the Year of her Widow-hood, in order to ſtrip her of all the Advantages which ſhe could hope for from her firſt Marriage, whether it be in reſpect to her Dower, or the Addition to her Marriage Portion, or in reſpect to any Gifts made to her by her Huſband.

[g] Hære-

[g] Hæredi mariti licet in ſolidum condemnetur, compenſationis tamen, quæ ad pecuniariam cauſam reſpiciunt, proderunt ut minus ſit obligatus: veluti ob res donatas, & amotas & impenſas, morum vero coercitionem non habet. *l.* 15. *ff. ſoluto matrimonio.*

X.

10. *If there is a compenſation of the Adultery on the Part of the Huſband, with that committed by the Wife.*

If a Huſband who ſues his Wife in a Court of Juſtice on the Head of Adultery, is himſelf guilty of that Crime, the Court ought not to decree to him his Wife's Marriage Portion, becauſe it would be unjuſt that he ſhould reap the Advantage of Puniſhment of a Fault, of which he himſelf is guilty [h]. But there is no Compenſation of the Crime. So that the Judges may puniſh both the Huſband and the Wife that are guilty of Adultery.

[h] Judex adulterii ante oculos habere debet & inquirere maritus pudicé vivens, mulieri quoque bonos mores colendi autor fuerit. Periniquum enim videtur eſſe, ut pudicitiam vir ab uxore exigat, quam ipſe non exhibeat. Quæ res poteſt & virum damnare, non rem ob compenſationem mutui criminis inter utroſque communicare. *l.* 13. *ff. ad Legem Juliam de adulteriis.*

XI.

11. *Reconciliation of the Huſband with his adulterous Wife.*

When the Huſband is reconciled to his Wife, after he had knowledge of the Adultery ſhe had committed, he is not allowed afterwards to accuſe her [i]; whether it be that the Action was not commenced, or that the Proceedings which had been begun were ſuſpended by the Reconciliation of the Parties [k]. Becauſe the Huſband is preſumed in this Caſe to have looked upon his Wife to be innocent, or to have forgiven her the Fault which ſhe had committed.

[i] Si qua repudiata, mox reducta ſit, non quaſi eodem matrimonio durante, ſed quaſi alio interpoſito: videndum eſt an ex delicto, quod in priore matrimonio admiſit, accuſari poſſit? & puto, non poſſe abolevit enim prioris matrimonii delicta, reducendo eam. *l.* 13. § 9. *ff. ad Legem Juliam de adulteriis.*

Item quæritur, an idem maritus deſtitiſſe videatur, vel lenocinium commiſiſſe, qui eandem reduxit uxorem? Paulus reſpondit, eum, qui poſt crimen adulterii intentatum eandem uxorem reduxit, deſtitiſſe videri: & ideo ex eâdem Lege poſtea accuſandi ei jus non ſupereſſe. *l.* 40. § 1. *ad Legem Juliam de adulteriis.*

[k] Abolitionem adulterii criminis poſtulans; Præſidem in cujus officio accuſatio fuerit inſtituta, adire debes. ——— Quin hoc amplius ſcias, nullam fuiſſe tibi amplius poteſtatem inſtituendi hujuſmodi accuſationes: quia & decreto Patrum & Lege Patroniâ, ei qui jure viri delatum adulterium non peregit, nunquam poſteà hoc crimen deferre permittitur. *l.* 16. *Cod. ad Legem Juliam de adulteriis.*

It is to be obſerved with reſpect to the two laſt Proofs of this Article, that ſuch a Divorce as totally diſſolves the Marriage not being allowed in Popiſh Countries, not even for the Crime of Adultery; in ſuch Countries they are to apply to a Reconciliation, that is proved by the Parties cohabiting together again as Man and Wife, or by ſome other Means, that which is ſaid of a ſecond Marriage in the 9th §. *of the* 13th *Law quoted, as alſo in the* 40th *Law. As to the Law* Abolitionem, *it is to be obſerved, that by the* Roman *Law a Huſband was not allowed to live with his Wife whom he knew to be an Adultereſs, and he could not deſiſt from carrying on the Proſecution againſt her for the Crime of Adultery which he had commenced, without declaring to the Judge, that his Proſecution againſt her was begun upon frivolous ſuggeſtions. The Judgment which was given upon the ſaid Declaration made by the Huſband, was called* Abolition.

XII.

12. *Adultery committed during the firſt Marriage.*

The Huſband of a Widow who had committed Adultery during the Time of her firſt Marriage, cannot proſecute her as an Adultereſs, becauſe he has no controul over his Wife's Conduct, but from the Day when he married her [l].

[l] Si quis uxorem ſuam velit accuſare, dictaque eam adulterium commiſiſſe, antequam ſibi nuberet: jure viri accuſationem inſtituere non poterit: quia non, cum ei nupta eſt, adulterium commiſit. *l.* 13. §. *ad Legem Juliam de adulteriis.*

XIII.

13. *Of a Woman that has been raviſhed.*

If the Wife has been raviſhed, her Huſband cannot proſecute her as an Adultereſs, becauſe Chaſtity is a Virtue of the Mind which cannot be ſullied by any external Force [m].

[m] Si quis planè uxorem ſuam, cum apud hoſtes eſſet, adulterium commiſiſſe arguat, benignius dicetur, poſſe eum accuſare jure viri. Sed ita demum adulterium maritus vindicabit, ſi vim hoſtium paſſa non eſſet. Cæterùm quæ vim patitur non eſt in eâ causâ, ut adulterii vel ſtupri damnetur. *l.* 13. §. 7. *ad Legem Juliam de adulteriis.*

XIV.

14. *Different kinds of Rapes: the Puniſhment inflicted on the Raviſher.*

There are two Kinds of Rape, the one by Force, when one carries off ſingle Women or married Women againſt their Will from their own Houſes, in order to debauch them; the other is by Way of Seduction, when one intices a married Woman to leave the Houſe of her Huſband, in order to lead a diſorderly Life, or a young Woman to quit the Houſe of her Father, or of her Guardian, whether it be with a View to gratify an unruly Paſſion, or to marry againſt the Will of thoſe to whoſe care ſhe is committed. We ought likewiſe to look upon it as a Rape by

by Seduction, when an Infant of a good Family is drawn away to marry againſt the Will of the neareſt Relations. The Raviſhers and their Accomplices ought always to be puniſhed with Death, when the Rape is by Force, even although the Perſon raviſhed ſhould conſent to marry the Raviſher[n]. According to the Rigour of the Law it ought to be the ſame Thing with reſpect to a Rape by Seduction; but the Puniſhment is often mitigated according to the Circumſtances, which are more particularly gathered from the Age and Quality of the Parties.

[n] Raptores virginum honeſtarum vel ingenuarum, ſive jam deſponſatæ fuerint, ſive non, vel quarum libet viduarum fœminarum, licet libertinæ, vel ſervæ alienæ ſint, peſſima criminum peccantes, capitis ſupplicio plectendos decernimus ——— Pœnas autem, quas prædiximus, id eſt, mortis, & bonorum amiſſionis, non tantum adverſus raptores, ſed etiam contra eos, qui hos comitati in ipsâ invaſione, & rapina fuerint, conſtituimus. Cæteros autem omnes, qui conſcii, & miniſtri hujuſmodi criminis reperti, & convicti fuerint, vel qui eos ſuſceperint, vel quicunque opem eis tulerint, ſive maſculi, ſive fæmine ſint cujuſcunque conditionis, vel gradus, vel dignitatis, pœnæ tantummodo capitali ſubjicimus, ut huic pœnæ omnes ſubjaceant, ſive volentibus, ſive nolentibus virginibus, ſive aliis mulieribus, tale facinus fuerit perpetratum. Si enim ipſi raptores metu, vel atrocitate pœnæ ab hujuſmodi facinore ſe temperaverint, nulli mulieri ſive volenti, ſive nolenti peccandi locus relinquetur: quia hoc ipſum velle mulierum ab inſidiis nequiſſimi hominis, qui meditatur rapinam, inducitur. Niſi etenim eam ſollicitaverit, niſi odioſis artibus circumvenerit, non faciet eam velle in tantum dedecus ſeſe prodere. *l. un. Cod. de raptu virginum.*

See the Ordinance of Blois, *and that of* 1639.

[Rape is deſcribed in the Laws of *England* to be when a Man hath carnal Knowledge of a Woman by Force, and againſt her Will. The Puniſhment of it is Death. Although there be *emiſſio ſeminis*, yet if there be no penetration, that is *res in re*, it is no Rape. Before the Time of King *Edw.* I. the Puniſhment of this Crime was by Caſtration and putting out of the Eyes of the Offender; but of the ancient Time at the Common Law it was Death at the Election of the ſingle Woman raviſhed. *Coke* 3. *Inſt. pag.* 60. *and* 2. *Inſt. pag.* 181.

It having been made a Doubt in the Time of Queen *Elizabeth*, at what Age a Woman-child might be raviſhed, this gave occaſion to the making of the Act of Parliament of 18 *Eliz. cap.* 6. for the plain Declaration of the Law in this Point. And it is therein declared, that if any Perſon ſhould unlawfully know and abuſe any Woman-child under the Age of *ten years*, every ſuch unlawful and carnal knowledge ſhould be Felony, and that the Offender therein being duly convicted, ſhould ſuffer as a Felon, without Benefit of Clergy.

The Parliament of *England* has been very careful in making Proviſion againſt this Offence of carrying away Women againſt their Will, either to marry, or to defile them. For by the Act of 3 *H.* VII. *cap.* 2. it is enacted, that if any Perſon takes any Woman againſt her Will unlawfully, ſhe having Subſtance in Lands or Tenements, or moveable Goods or being Heir apparent to her Anceſtors, and ſhe be married either to the Miſdoer himſelf, or to ſome other by his conſent or be defiled, ſuch taking ſhall be Felony. And by this Act, not only the Takers but the Procurers, Abetters, and Receivers of the ſaid Women wittingly, knowing the ſame, are all adjudged as principal Felons.

There is likewiſe a very good Act made in the *4th and 5th Philip and Mary*, *cap.* 8. for the Puniſhment of ſuch as ſhall take away young Women, under the Age of ſixteen Years, altho' it be not againſt their Will, and ſhall marry them without conſent of their Parents or Guardians. The Puniſhment of the ſaid Offence is Fine or Impriſonment.]

XV.

15. *Of the Rape of a Nun.*

Thoſe who carry away a Nun out of her Monaſtery, are to be puniſhed with Death together with their Accomplices, whether it be that the Rape has been committed by force, or that the *Nun* did conſent to it [o]. As to the Nun herſelf, ſhe is ſhut up again in her Convent, where ſhe is ſeverely chaſtiſed, if it was with her own Conſent that ſhe was carried off.

[o] Si quis rapuerit, aut ſollicitaverit, aut corruperit aſcetriam, aut diaconiſſam, aut monaſtriam, aut quamlibet aliam fœminam venerabilem habitum habentem, ——— jubemus ——— eos qui talia deliquerint, & participes eorum ſceleris fuerint, capitale periculum ſuſtinere. Talem verò mulierem ubicunque eſt ——— in monaſterio recondi, in quo cautiùs cuſtodiri poſſit, ut non rurſus in eodem crimine reperiatur. *Nov.* 123. *cap.* 43.

XVI.

16. *Of Violence offered to a Woman.*

All ſorts of Violence uſed againſt a ſingle or married Woman, in order to have the carnal Knowledge of her againſt her Will, ought to be puniſhed with Death, whether it be that the Crime has been conſummated, or that there were only Endeavours uſed to conſummate the Crime.

XVII.

17. *Of Inceſt.*

Inceſt is puniſhed according to the Degree of Kindred or Affinity of the Parties who have this inceſtuous Commerce with one another. If thoſe who are guilty of this Crime, were related together in the direct Line, ſuch as the Mother and Grandmo-

ther and the Grandſon, they would be burnt. If they were related in the firſt Degree of the Collateral Line, the Manner of the Puniſhment might be mitigated, but it could not be leſs than Death, and the Body to be burnt. The Spiritual Inceſt which a Confeſſor commits with the Penitent who makes her Confeſſion to him, is alſo puniſhed with Death.

XVIII.

18. *Of Crimes againſt Nature.* The Crimes againſt Nature which cannot be ſo much as named without horrour, ſuch as Sodomy and Buggery, are to be puniſhed with Death [p].

[p] Cum vir nubit, in fæminam viris porrecturam, quid cupiatur, ubi ſexus perdidit locum, ubi ſcelus eſt quod non proficit ſcire: ubi Venus mutatur in alteram formam; ubi amor quæritur, nec videtur, jubemus inſurgere leges, armari jura gladio ultore, ut exquiſitis pœnis ſubdantur infames qui ſunt vel qui futuri ſunt rei. *l.* 32. *Cod. ad Legem Juliam de adulteriis.*

XIX.

19. *Of Polygamy.* He is called a Polygamiſt who having a lawful Wife living marries another [q]. Although the ſecond Marriage be null and void, yet he who is convicted of this Crime is condemned to ſtand in the Pillory with as many Diſtaffs as he has had Wives at the ſame Time, and is either ſent to the Gallies, or baniſhed. If it is a Woman that is guilty of Polygamy, beſides the Puniſhment of Adultery to which ſhe is condemned, ſhe is ſet in the Pillory, that ſhe may ſuffer the Infamy which ſhe has deſerved by her marrying a ſecond Huſband whilſt the firſt was living.

[q] Neminem qui ſub dictione ſit Romani nominis, binas uxores habere poſſe, vulgò patet: cum etiam in Edicto Prætoris hujuſmodi viri infamiâ notati ſint. Quam rem competens Judex inultam eſſe non patietur. *l.* 2. *de inceſtis & inutilibus nuptiis.*

[*In* England, *it is Felony to marry a ſecond Huſband or Wife, the former Huſband or Wife living. See the Statute of* 1 Ja. 1. cap. 11. *But the Offender againſt this Statute may have the Benefit of Clergy.* Coke. 3. Inſtit. cap. 27.]

TITLE XI.

Of Injuries, and Defamatory Libels.

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I.

1. *Different kinds of Injuries.* WE give the Name of Injury to every Thing that is ſaid, written, or done deſignedly with a View to offend and affront any one [a]. Thus there are verbal Injuries which are done by Words, or by Songs, Injuries by Writing, and others which are real Injuries, when they ſtrike any one, or do any Thing to inſult him [b].

[a] Ait Prætor, ne quid infamandi causâ fiat. Si quis adverſus ea fecerit, prout quæque res erit animadvertam —— Generaliter vetuit Prætor quid ad infamiam alicujus fieri. Proinde quodcunque quis fecerit vel dixerit, ut alium infamet, erit actio injuriarum. Hæc autem fere ſunt quæ ad infamiam alicujus fiunt: utputa ad invidiam alicujus veſte lugubri utitur, aut ſqualida: aut ſi barbam demittat, vel capillos ſubmittat; aut ſi carmen conſcribat, vel proponat, vel cantet aliquod, quod pudorem alicujus lædat. *l.* 15. §. 25. 27. *ff. de injuriis.*

Adverſus eos qui minuendæ opinionis tuæ cauſa aliquid confeciſſe comperientur, more ſolito injuriam judicio experiri potes. *l.* 3. *Cod. de injuriis.*

[b] Injuriam autem fieri Labeo ait aut re aut verbis; *re*, quoties manus inferuntur, *verbis* autem, quoties non manus inferuntur, ſed convicium fit. Omnemque injuriam aut in corpus inferri, aut ad dignitatem, aut

aut ad infamiam pertinere. *In corpus* fit, cum quis pulſatur. *Ad dignitatem*, cum comes matronæ abducitur. *Ad infamiam*, cum pudicitia adtemptatur. *l.* 1. §. 1. 2. *ff. de injuriis.*

Injuria autem committitur, non ſolum cum quis pugno pulſatus, aut fuſtibus cæſus, vel etiam verberatus erit: ſed & ſi cui convicium factum fuerit; ſive cujus bona quaſi debitoris, qui nihil deberet, poſſeſſa fuerint ab eo, qui intelligebat nihil eum ſibi debere; vel ſi quis ad infamiam alicujus libellum aut carmen, aut hiſtoriam, ſcripſerit, compoſuerit, ediderit, dolove malo fecerit, quò quid eorum fieret: ſive quis matrem familias, aut prætextatum, prætextatamve adſectatus fuerit; ſive cujus pudicitia attentata eſſe dicetur. Et denique aliis plurimis modis admitti injuriam, manifeſtum eſt. *Inſtit. lib.* 4. *tit.* 4. §. 1.

II.

2. Of Defamatory Libels.

One may ſue in an Action of Injury not only thoſe who have compoſed Defamatory Libels, and who have printed them [c], but likewiſe thoſe who have publiſhed and diſperſed them [d]. It is the ſame Thing with reſpect to Pictures and Prints, which have been drawn or engraven to reflect on the Honour of any one.

[c] Si quis librum ad infamiam alicujus pertinentem ſcripſerit, compoſuerit, ediderit, dolove malo fecerit, quo quid eorum fieret, etiam ſi alterius nomine ediderit, vel ſine nomine, uti de ea re agere liceret. —— Eâdem pœnâ ex Senatus conſulto tenetur etiam is qui ἐπιγεγράμματα, id eſt, *inſcriptiones*, aliudve quid ſine ſcriptura in notam aliquorum produxerit: item qui emendum vendendumve curaverit. *l.* 5. § 9. 10. *ff. de injuriis.*

[d] Si quis famoſum libellum ſive domi, ſive in publico, vel quocunque loco ignarus repererit: aut corrumpat priuſquam alter inveniat, aut nulli confiteatur inventum. Si verò non ſtatim eaſdem chartulas vel corruperit, vel igni conſumpſerit, ſed vim earum manifeſtaverit, ſciat ſe quaſi autorem hujuſmodi delicti capitali ſententiæ ſubjugandum. *l. un. Cod. de famoſis libellis.*

III.

3. Of injurious Writings exhibited in the Proceedings of a Cauſe

The Libels and other Writings which are exhibited in the Proceedings of a Cauſe are to be reckoned in the Number of Defamatory Libels, when they contain injurious Words or Facts which reflect on the Reputation of the Parties; and we are to except only the Facts which are true, and which it is neceſſary to lay open in order to the Deciſion of the Cauſe [e].

[e] Si quis libello dato vel Principi vel alicui famam alienam infectatus fuerit: injuriarum erit agendum, Papinianus ait. *l.* 15. §. 29. *ff. de injuriis.*

IV.

4. Of Injuries by Land.

It is a real Injury, to ſtrike any one, to enter one's Houſe by force [f], to turn one out of his own Houſe, to cauſe the Effects of a Merchant to be ſealed up as if he were become a Bankrupt, although he was abſent upon his lawful Occaſions, to make a Tumult or Diſorder before the Door of a Widow upon her marrying another Huſband, to place at the Door of a Man ſome Sign whereby they would inſinuate that his Wife had not been faithful to him, to attempt the taking of indecent Freedoms with a virtuous Woman, to throw any Filth or Naſtineſs into the Precincts of their Neighbours, with Deſign to affront them [g]. There are many other kinds of real Injuries, which are eaſily diſtinguiſhed, when we once know what a real Injury is.

[f] Lex Cornelia de injuriis competit ei qui injuriarum agere volet ob eam rem, quod ſe pulſatum, verberatumve, domumve ſuam introitam eſſe dicat, —— Domum accipere debemus, non proprietatem domus, ſed domicilium. Quare ſive in propriâ domu quis habitaverit, ſive in conductâ, vel gratis, ſive hoſpitio receptus, hæc lex locum habebit. *l.* 5. *ff. de injuriis.*

Si creditor meus, cui paratus ſum ſolvere, in injuriam meam fidejuſſores meos interpellaverit, injuriarum tenetur. *l.* 19. *ff. de injuriis.*

See under the firſt Article, the 1*ſt* §. *of the* 4*th tit. of the* 4*th Book of the Inſtitutes.*

[g] Si inferiorum dominus ædium, ſuperioris vicini fumigandi causâ fumum faceret, aut ſi ſuperior vicinus in inferiores ædes quid aut projecerit, aut infuderit: negat Labeo injuriarum agi poſſe; quod falſum puto, ſi tamen injuriæ faciendæ causâ immittitur.

V.

5. Of Injuries which one procures to be done by the Means of another Perſon.

One may be ſued in an Action of Injury, not only when one does the Injury himſelf, but likewiſe when he procures it to be done [h]. For Inſtance, when one commands a Perſon to beat another, to publiſh a defamatory Libel againſt him, or to do him ſome other Injury.

[h] Non ſolum is injuriarum tenetur, qui fecit injuriam, hoc eſt, qui percuſſit: verùm ille quoque continetur, qui dolo fecit, vel qui curavit, ut cui mala pugno percuteretur: —— Si mandatu meo facta ſit alicui injuria, plerique aiunt, tam me qui mandavi, quàm eum qui ſuſcepit injuriarum teneri. Proculus rectè ait, ſi in hoc te conduxerim, ut injuriam facias, cum utroque noſtrum injuriarum agi poſſe; quia meâ operâ facta ſit injuria. *l.* 11. *ff. de injuriis.*

VI.

6. Injuries done to thoſe who belong to us.

A Man may bring an Action of Injury againſt thoſe who have inſulted his Wife, or his Children who are ſubject to his Authority [i]; and even againſt thoſe who have inſulted his Servants, if the Injury has been done to the Servants on account of the Maſter [k]. But the Wife cannot ſue in a Court of Juſtice for Reparation of an Injury done to her Huſband, becauſe he is the Head of the Family, and it ought to be left to his Diſcretion either to ſue for Reparation of the Injury, or to forgive it [l].

[i] Per ipſum alicui fit injuria, aut per alias perſonas. Per ipſum, cum directo ipſi cui patriſamilias, vel matriſamilias fit injuria. Per alias, cum per conſequentias fit, ut cum fit liberis meis, vel ſervis meis, vel uxori, nuruive. *l.* 1. §. 3. *ff. de injuriis.*

[k] Si libero homini, qui tibi bonâ fide ſervit, injuria facta ſit, nulla tibi actio dabitur, ſed ſuo nomine is

is experiri poterit: niſi in contumeliam tuam pulſatus ſit: tunc enim competit & tibi injuriarum actio. *Inſtit. lib.* 4. *tit.* 4. §. 6.

[l] Quod ſi viro injuria facta ſit, uxor non agit: quia defendi uxores a viris, non viros ab uxoribus æquum eſt. *l.* 2. *ff. de injuriis.*

VII.

7. If the Heir may have an Action for the Injury done to the Perſon to whom he ſucceeds.

The Right of proſecuting one for an Injury done does not go to the Heirs of the Party injured, unleſs he who has received the Injury had began his Action in his Lifetime, becauſe he is preſumed by his ſilence to have forgiven the Injury [m]. But if the Inſult has been offered to the Corpſe, to the Memory, or to the Grave of the Deceaſed, the Heir has a Right to demand Satisfaction for it [n]; becauſe it is in ſome reſpect to attack himſelf, when an Inſult is offered to the Memory of him to whom he ſucceeds, and whom he repreſents.

[m] Injuriarum actio neque hæredi, neque in hæredem datur. *l.* 13. *ff. de injuriis.*

[n] Si ſortè cadaveri defuncti ſit injuria, cui hæredes, bonorumve poſſeſſores extitimus: injuriarum noſtro nomine habemus actionem, ſpectat enim ad exiſtimationem noſtram ſi qua ei fiat injuria. Idemque & ſi fama ejus cui hæredes extitimus laceratur. *l.* 1. §. 4. *ff. de injuriis.*

Si ſtatua patris tui in monumento poſita, ſaxis cæſa eſt: ſepulchri violati agi non poſſe, injuriarum poſſe, Labeo ſcribit, *l.* 27. *ff. de injuriis.*

VIII.

8. Injury done without a deſign to affront the Perſon injured.

There is no Injury done, when there is no Deſign to affront [o]. Thus one cannot proſecute a Mad-man, or an Infant that is not yet capable of Malice, if he wounds or inſults any one. One cannot for the ſame Reaſon ſue in an Action for Reparation of an Injury, him who has wounded one in Play.

[o] Sunt quidam qui facere (injuriam) non poſſunt; utputa furioſus & impubes, qui doli capax non eſt. Namque hi pati injuriam ſolent, non facere Cum enim injuria ex affectu facientis conſiſtat, conſequens erit dicere hos, ſive pulſent, ſive convicium dicent, injuriam feciſſe non videri. Itaque pati quis injuriam etiamſi non ſentiat; poteſt facere nemo, niſi qui ſcit ſe injuriam facere, etiamſi neſciat quid faciat. Quare ſi quis per jocum percutiat, aut dum certat, injuriarum non tenetur. *l.* 3. §. 1. 2. 3. *ff. de injuriis.*

IX.

9. Injuries done in purſuance of Orders of Courts of Juſtice.

One cannot ſue in an Action of Injury, thoſe who execute only the Orders of Judges [p]. But the Party who has obtained the Decree of the Judge, by which an Injury is done to a Perſon without cauſe ought to repair the Injury. The Judge himſelf might be made a Party, if he had made without good Ground, a Decree againſt a Perſon that was injurious to him.

[p] Is qui jure publico utitur, non videtur injuriæ faciendæ cauſâ hoc facere: juris enim executio non habet injuriam. —— Quæ jure poteſtatis a magiſtratu fiunt, ad injuriarum actionem non pertinent. *l.* 13. §. 1. 6. *ff. de injuriis.*

X.

10. The enormity of the Injury depends on the Circumſtances.

The Injury is more or leſs heinous, according to the Circumſtances of the Time and Place, the Quality of the Perſon that is inſulted, the Condition of him who has done the Injury, and the Nature of the Injury that is done [q]. Thus he who affronts a Magiſtrate, or a Prieſt in Holy Orders, deſerves to be puniſhed more ſeverely, than he who affronts any private Man. The Injury is ſtill more heinous, if it is done to a Magiſtrate whilſt he is ſitting on the Bench, and adminiſtring Juſtice, or to a Prieſt when he is at the Altar celebrating the holy Myſteries of our Religion [r]. A private Perſon that is injured in a publick Aſſembly, ought to have a more publick Satisfaction made him, than if the Injury had been done only in the Preſence of two or three Witneſſes [s]. A Box on the Ear, or Blows with a Cane, do more ſenſibly affect a Man of courage than other Acts of Violence. A Man of low eſtate who affronts a Perſon of Quality is guilty of a more heinous Offence, than if he had affronted a private Perſon of equal Condition with himſelf. It is a greater Crime to maim one, than to make any contuſion. Injurious Words are puniſhed with leſs ſeverity when they are uttered inadvertently in the heat of a Diſpute, than when they are ſpoke with premeditated deſign.

[q] Atrocem autem injuriam, aut perſona, aut tempore, aut re ipſa fieri, Labeo ait. *Perſonâ* atrocior, injuria fit, ut cum Magiſtratui, cum parenti, patrono fiat. *Tempore*, ſi ludis, & in conſpectu. Nam Prætoris in conſpectu, an in ſolitudine injuria facta ſit, multum intereſſe ait: quia atrocior eſt, cum in conſpectu fiat. *Re* atrocem injuriam haberi, Labeo ait, utputa, ſi vulnus illatum, vel os alicui percuſſum. *l.* 7. §. 8. *ff. de injuriis.*

Sed eſt quæſtionis, quod dicimus re injuriam atrocem fieri, utrum ſi corpori inferatur, atrox ſit? an & ſi non corpori, utputa veſtimentis ſciſſis, comite abducto, vel convicio dicto. Et ait Pomponius, etiam ſine pulſatione atrocem dici injuriam, perſonâ atrocitatem faciente. Sed & ſit in theatro, vel in foro cædit & vulnerat, quanquam non atrociter, atrocem injuriam facit. *l.* 9. *ff. de injuriis.*

[r] Atrocem ſine dubio injuriam eſſe factam manifeſtum, ſi tibi illata eſt cum eſſes in ſacerdotio, & dignitatis habitum & ornamenta præferres, & ideò vindictam potes eo nomine perſequi. *l.* 4. *Cod. de injuriis.*

Vulneris magnitudo atrocitatem facit, & nonnunquam locus vulneris, veluti oculo percuſſo. *l.* 8. *ff. de injuriis.*

[s] Quædam injuriæ à Liberis hominibus factæ, levis nonnullius momenti videntur: enimvero à ſervis, graves ſunt: creſcit enim contumelia ex perſona ejus, qui contumeliam fecit. *l.* 17. §. 3. *ff. de injuriis.*

XI.

11. The Puniſhment of the Injury depends on the different Circumſtances of the Parties.

The Puniſhment of the Injury depends, as well as the Enormity thereof, on the different Circumſtances [t]; a Child who is ſo unnatural as to lift up its Hand againſt its Father or Mother, is condemned

condemned to Death, although he has not wounded them; if he inſults them with Words, he is ſentenced to the Gallies, or to perpetual Baniſhment. The Gallies, or perpetual Baniſhment, or a publick ignominious Acknowledgment of the Offence, are the Puniſhments of thoſe who compoſe, who print, or who diſperſe defamatory Libels. Slight Injuries are puniſhed by obliging the offending Party to aſk Forgiveneſs of the Party injured in the Preſence of a certain Number of Perſons, and to make Reparation of the Damages according to the Quality of the Offence. If the Injuries have been inſerted in Libels, and in other Writings in the Proceedings of a Cauſe, they are to be ſtruck out.

[t] Si quis injuriam atrocem fecerit, qui contemnere judicium poſſit ob infamiam ſuam aut egeſtatem, Prætor acriter exequi hanc rem debet, & eos qui injuriam fecerunt coercere. *l.* 35. *ff. de injuriis.*

De injuriâ nunc extra ordinem ex causâ & perſonâ ſtatui ſolet. Et ſervi quidem flagellis cæſi dominis reſtituuntur. Liberi verò humilioris quidem loci, fuſtibus ſubjiciuntur. Cæteri autem vel exilio temporali, vel interdictione certæ rei coercentur. *l. ult. ff. de injuriis.*

XII.

12. *Two ways of suing for reparation of the Injury.*

One may ſue for Reparation of an Injury either in a Civil Action, or by a Criminal Proſecution [u]. But when the Judge perceives by the Charge and the Informations, that the Injury is but ſlight, and that the whole muſt terminate in a Declaration of Damages, he ought not to ſuffer the Criminal Proſecution to go on. The Informations are then converted into Articles of a Libel in order to Proof, and Sentence is given according to what comes out in the Proof that is made, either by the Depoſitions of Witneſſes, or by the Confeſſion of the Parties.

[u] Sciendum eſt, de omni injuriâ eum, qui paſſus eſt, poſſe vel criminaliter agere, vel civiliter. *Inſtit. lib.* 4. *tit.* 4. §. 10.

XIII.

13. *Injurious words which are true in fact.*

Although the approbrious Words contain nothing but what is true in Fact, and what is publickly known, yet the Perſon who utters them is not exempt from the Puniſhment due for the Injury. It is not allowed, for Example to upbraid a Perſon, becauſe one of his Family has been condemned to an ignominious Puniſhment. It is not permitted to make proof of Facts which are ſecret, and which have been the Foundation of reproachful Words.

XIV.

14. *Within what time one may demand Reparation of an Injury.*

If he who has received an Injury has forgiven him that did it, whether it be upon his receiving a Reparation which the Parties themſelves agreed on, or whether it be by a Reconciliation with the Perſon who has offended him, he cannot afterwards ſue in a Court of Juſtice for a Reparation of the Injury [x]. It is the ſame Thing if he ſuffers one Year to paſs without bringing his Action againſt the Perſon who has inſulted him; becauſe that Action laſts only for a Year [y], and becomes extinct by the Silence of the injured Party for the Space of a Year, to be computed from the Day that the Injury was done.

[x] Injuriarum actio ex æquo & bono eſt, & diſſimulatione aboletur. Si quis enim injuriam dereliquerit, hoc eſt, ſtatim paſſus ad animum ſuum non revocaverit: poſtea ex pœnitentiâ remiſſam injuriam non poterit recolere. Secundum hæc ergò æquitas actionis omnem metum ejus abolere videtur, ubicunque contra æquum quis venit. Proinde & ſi pactum de injuria interceſſit, & ſi tranſactum, & ſi jusjurandum exactum erit: actio injuriarum non tenebit. *l.* 11. §. 1. *ff. de injuriis.*

Si autem in rixam inconſulto calore prolapſus, homicidii convicium objeciſti, & ex eo die annus exceſſit: cum injuriarum actio ex eo tempore præſcripta ſit, ob injuriæ admiſſum conveniri non potes. *l.* 5. *Cod. de injuriis.*

There are ſome heinous Injuries which may be proſecuted by the Publick, in order to bring the Offenders to condign Puniſhment; although the Party that is injured keeps ſilence, or perhaps has forgiven the Offence.

TITLE XII.

Of the ſeveral Infractions of the Orders eſtabliſhed for the Civil Policy.

The CONTENTS.

1. *Of Monopolies.*
2. *Of Gaming.*
3. *Of Vagabonds.*

I.

1. *Of Monopolies.*

IT is not lawful for private Perſons, or Merchants to lay up great Stores of Corn, or other Merchandize, with a View to make themſelves Maſters of that Trade, and to ſell the ſaid Merchandizes

afterwards at what Price ſoever they ſhall think proper to fix [a]. It is likewiſe unlawful for Merchants to have any private Underſtanding with one another to the Prejudice of the publick Intereſt, and to agree among themſelves not to ſell Merchandizes but at a certain Price. Thoſe who act contrary to theſe Prohibitions ought to be ſeverely puniſhed, and more eſpecially in Times of Dearth, when Monopolies do often more hurt than the Famine it ſelf.

[a] Jubemus, nequis cujuſcunque, veſtis vel piſcis, vel pectinum forte, aut echini, vel cujuſlibet alterius ad victum, vel ad quemcunque uſum pertinentes ſpeciei, vel cujuſlibet materiæ, pro ſua autoritate, ——— monopolium audeat exercere: neve quis illicitis habitis conventionibus conjuret, aut paciſcatur, ut ſpecies diverſorum corporum negotiationis, non minoris quam inter ſe ſtatuerint venundentur. Si quis autem monopolium auſus fuerit exercere, bonis propriis expoliatus, perpetuitate damnetur exilii. *l. un. Cod. de monopoliis.*

Lege Juliâ de annonâ pœna ſtatuitur adverſus eum, qui contra annonam fecerit, ſocietatemve coierit, quo annona carior fiat. *l. 2. ff. de Lege Julia de annona.*

[*In* England, *all Grants of Monopolies have been declared by Parliament to be againſt the Ancient and Fundamental Laws of the Kingdom.* Stat. 21 Ja. 1. Cap. 3. Coke 3. Inſtit. chap. 85.]

II.

2. *Of Gaming.*

Games of meer Hazard, which may cauſe in a ſhort Time the Ruin of Families, are abſolutely prohibited by the Regulations of the Civil Policy [b]; and thoſe Perſons are ſeverely fined who are convicted of having played at ſuch Games, and of having kept Aſſemblies in their Houſes for ſuch ſort of Games. Bonds and Obligations contracted on account of Play are abſolutely Null and Void, whether the Motive of the Obligation be mentioned in the Bond, or whether the Bond be altogether ſilent as to the true Cauſe of the Obligation, or that it mentions another Cauſe inſtead of the true one. We muſt except from this Rule ſmall Debts contracted by one of full Age, at Games which are an Exerciſe of the Body, and which tend to render thoſe who play at them more nimble and dexterous.

[b] Senatus conſultum vetuit in pecuniam ludere: præterquam ſi quis certet haſtâ, vel pilo jaciendo, vel currendo, ſaliendo, luctando, pugnando; quod virtutis causâ fit. *l. 2. ff. de aleatoribus.*

Victum in aleæ luſu, non poſſe conveniri, ——— Data autem ſuper aleæ luſu cautio ſit irrita, & condici poſſit. Sed & ſi quis ſub ſpecie alearum victus ſit lupinis, vel aliâ quâvis materiâ, ceſſet etiam adverſus eum omnis exactio. ——— Duntaxat autem ludere liceat μονὸβολον, liceat item ludere κοντομονόβολον κυνηγετὸν κὸνηαχα, & item liceat ludere χωεὶς τὴς πέξης, id eſt, ludere vibratione. Quintiana, abſque ſpiculo, ſive aculeo, aut ferro, à quodam Quinto ita nominatâ hâc luſus ſpecie. Liceat item, ludere πὲυχυνὶν, id eſt, exerceri luctâ: Liceat verò etiam exerceri hippice, id eſt, equorum curſu, ſeu hippodromo, abſque dolo, & circumventione. Et liceat quidem ditioribus ad ſingulas commiſſiones, ſeu ad ſingulos congreſſus, aut vices, unum aſſem, ſeu numiſma, ſeu ſolidum deponere & ludere, cæteris autem longè minori pecunia. *l. 1. Cod. de aleatoribus.*

[*The Parliament of* England *being ſenſible of the great Miſchiefs which daily happen to Perſons of Noble Families, and great Eſtates by exceſſive and deceitful Gaming, made a prudent and laudable Act for preventing the ſame, in the 9th Year of Queen* Anne, Chap. 14. *By which it is enacted, That all Securities, where the Whole, or any Part of the Conſideration ſhall be for Money, or other valuable Thing, won at Play, or by Betting, or for repaying any Money knowingly lent for ſuch Gaming or Betting, or lent at the Time and Place of Gaming or Betting, ſhall be void. It is farther provided by the ſaid Act, that if any Perſon ſhall loſe at one Time the Sum or Value of ten Pounds, and ſhall pay it to the Winner, in ſuch Caſe the Loſer may, within three Months after, ſue the Winner for the ſame, which he ſhall recover, with Coſts. And for the more effectual Diſcouragement of all ſuch Perſons as make a Profeſſion of Gaming, it is provided by the ſaid Act, that two Juſtices of Peace may cauſe any Perſon ſuſpected by them to have no viſible Eſtate, Profeſſion or Calling to ſupport himſelf, to be brought before them; and if ſuch Perſon ſhall not make it appear, that the principal Part of his Maintenance is not by Gaming, then they may bind him to his good Behaviour with Sureties for a Year, and if he cannot find Sureties, they may commit him to Priſon till he can.*]

III.

3. *Of Vagabonds.*

It is the Intereſt of the Publick to take care that there be not in a Kingdom common Vagrants or Vagabonds, Perſons who have no fixed abode, and who, by Want, and the licentious Life which they lead, are often tempted to commit great Crimes. In order to prevent ſuch Miſchiefs, it is uſual to take up common Vagrants, and to oblige them to go to the Place of their Birth, and there to employ themſelves at Work; or they are ſhut up in Hoſpitals; or they are ſent abroad into the Colonies or Plantations.

There are other Offences againſt the Civil Policy, into the Detail of which it is not neceſſary to enter at preſent. Such are Treſpaſſes with reſpect to Woods and Foreſts,

reſts, to the Fiſhery, whether it be in the Rivers, or in the Sea; the Particulars of which may be ſeen in the Ordinances which relate to the Rivers and Forreſts, and to the Marine Affairs. Such is Uſury, which has been treated of in the 6th Title of the 1ſt Book of the Civil Law in its Natural Order. Such is Luxury, againſt which many ſumptuary Laws have been made; which the Pride and Vanity of Mankind have hindred from being put in Execution.

As to common Vagrants and Vagabonds, there are many Acts of Parliament in *England* to puniſh and reſtrain the Number of thoſe idle wandering Perſons. The Act of the 12th of Queen *Anne*, *Seſſ.* 2*d. Chap.* 23. is the fulleſt in the Directions given, and the Proviſions made for the Puniſhing all ſuch idle Perſons as ſhall be deemed Rogues and Vagabonds. For the Particulars whereof I muſt refer the Reader to the Act itſelf.

TITLE XIII.

Of the Crimes of Communities, or Corporations.

The CONTENTS.

1. *When a Crime is deemed to be committed by a Community.*
2. *Of the Puniſhments which are in this Caſe inflicted on the Community.*

I.

1. When a Crime is deemed to be committed by a Communi-ty.

A Crime is taken to be the Act of the Community, when it has been committed by the Inhabitants of Towns, of Villages, and by the Members of a Company, purſuant to a deliberate Reſolution of the Community, or in Conſequence of a tumultuary Reſolution, and popular Commotion; ſuch as ſounding an Alarm-bell, or the like.

II.

2. Of the Puniſhments which are in this Caſe inflicted on the Community.

Communities who have been guilty of Rebellion, or done ſome Act of Violence, or ſome other Crime, ought to be condemned only to make Reparation of Damages to the Party injured, to pay a Fine, to forfeit their Privileges, or to undergo ſome other Puniſhment which may ſufficiently denote the Chaſtiſement which they have deſerved by reaſon of their Crime. But thoſe who have been chiefly concerned in raiſing the Rebellion, the principal Actors in the Commiſſion of Crimes, and their Accomplices, may be puniſhed ſeparately from the Corporate Body itſelf, and that even with Death itſelf, when the Heinouſneſs of the Crime requires it.

TITLE XIV.

Of Puniſhments.

The CONTENTS.

1. *In what manner the Judge is to demean himſelf in inflicting Puniſhments.*
2. *Of the different Kinds of Puniſhments.*
3. *Of Puniſhments which are attended with Infamy.*
4. *Of Puniſhments which imply Civil Death.*
5. *Of Condemnations to Death.*
6. *Of Confiſcation.*

I.

1. In what manner the Judge is to demean himſelf in inflicting Puniſhments.

When a Judge condemns a Criminal, he ought carefully to examine the Nature of the Crime and its Circumſtances, that he may the better proportion the Puniſhment to the Crime, without affecting too great Severity, or a Lenity which may be attended with dangerous Conſequences [a].

[a] Perſpiciendum eſt judicanti, ne quid aut durius aut remiſſius conſtituatur, quàm cauſa depoſcit: nec enim aut ſeveritatis aut clementiæ gloria affectanda eſt: ſed perpenſo judicio, prout quæque res expoſtulat, ſtatuendum eſt. Plane in levioribus cauſis proniores ad lenitatem judices eſſe debent: in gravioribus pœnis ſeveritatem legum cum aliquo temperamento benignitatis ſubſequi. *l.* 11. *ff. de pœnis.*

II.

2. Of the different Kinds of Puniſhments.

The mildeſt Puniſhments are thoſe which are not attended with any bodily Correction, nor with Civil Death, nor with a Mark of Infamy. Such is a Fine or Pecuniary Mulct, when the Offender is not condemned to it for a Crime which in its own Nature renders thoſe Perſons infamous who are found guilty of it.

III.

3. Of Puniſhments which are attended

The Condemnation to Baniſhment and to the Gallies for a certain Time, as alſo the

with Infamy.

the making a publick Acknowledgment of the Offence, the Criminal being naked to his Shirt, and having a Torch in his Hand, Whipping, and other Puniſhments of the like Nature, render thoſe Perſons who are condemned to them infamous; but they do not however imply Civil Death [b].

[b] Cæteræ pœnæ ad exiſtimationem, non ad capitis periculum pertinent, veluti relegatio ad tempus vel in perpetuum, vel in inſulam: vel cum in opus quis publicum datur, vel cum fuſtium ictu ſubjicitur. *l.* 28. § 1. *ff. de pœnis.*

IV.

4. Of Puniſhments which imply Civil Death.

There are ſome Puniſhments which without taking away the Natural Life of the Criminal, deprive them of the Effects of the Civil Life, that is to ſay, of the Rights which belong to the Inhabitants of the Kingdom, to poſſeſs Goods within the Territories of the State, to make a Teſtament, and to inherit [c]. We ought to reckon in the Number of theſe Puniſhments, perpetual Baniſhment out of the Kingdom, and a Condemnation to the Gallies for ever.

[c] Quidam ἀπὸλιδες ſunt, hoc eſt, ſine civitate ut ſunt in opus publicum perpetuò dati, & in inſulam deportati: ut ea quidem quæ juris civilis ſunt non habeant, quæ verò juris gentium habeant. *l.* 17. §. 1. *ff. de pœnis.*

V.

5. Of Condemnation to Death.

The higheſt Puniſhment is that of Natural Death [d]. But the Kind of this Puniſhment is different, with reſpect to the Torments which the Criminals are made to ſuffer, according to the Nature and Circumſtances of the Crime [e].

[d] Ultimum ſupplicium eſſe mortem ſolam interpretamur. *l.* 21. *ff. de pœnis.*

[e] Summum ſupplicium eſſe videtur ad furcam damnatio, item vivi crematio. *l.* 28. *ff. de pœnis*

VI.

6. Of Confiſcation.

In all the Provinces of *France* where Confiſcation takes Place, Condemnation to a Natural Death, or to a Civil Death, implies a Confiſcation of the Goods of the condemned Perſon either to the Behoof of the King, or to the Lord of the Mannor. In the Provinces where Confiſcation has not place the Criminal is condemned to pay a Fine to the King, beſides the Charges of the Proſecution which are taken out of his Eſtate; and the Remainder goes to his preſumptive Heirs.

Here endeth the Supplement *to the Third* Book *of the* Publick Law.

THE

A

SUPPLEMENT

TO THE

CIVIL LAW

IN ITS

NATURAL ORDER.

BOOK IV.

Of the PUBLICK LAW.

TITLE I.

Of the ſeveral Sorts of Judicial Demands and Actions.

The CONTENTS.

1. *What an Action is.*
2. *Three principal kinds of Actions.*
3. *Perſonal Actions whence they ariſe.*
4. *Two kinds of Perſonal Actions.*
5. *Of Real Actions.*
6. *Actions Confeſſory, or Negatory.*
7. *Hypothecary Action.*
8. *Poſſeſſory Action.*
9. *How the Hypothecary Action becomes a mixt Action.*
10. *Of other mixt Actions.*

I.

AN Action is the Right which we have to demand in a Court of Juſtice, that which is due to us, and a Reparation of the Injury that is done to us, whether it be by Deed, or by Words [a]. 1. *What an Action is.*

[a] Actio autem nihil aliud eſt, quàm jus perſequendi in judicio, quod ſibi debetur. *Inſtit. lib.* 4. *tit.* 6. *in princ.*

Lex itaque Cornelia ex tribus cauſis dedit actionem quod quis pulſatus, verberatuſve, domuſve ejus vi introita ſit. *l.* 5. *ff. de injuriis.*

II.

2. *Three principal kinds of Actions.*

There are two principal kinds of Actions, Perſonal and Real [b]. Mixt Actions are thoſe which partake of the nature of both Perſonal and Real.

[b] Omnium autem actionum quibus inter aliquos apud judices arbitroſve de quacunque re quæritur, ſumma diviſio in duo genera deducitur; aut enim in rem ſunt aut in perſonam. *Inſtit. l.* 4. *tit.* 6. §. 1.

Quædam actiones mixtam cauſam obtinere videntur, tam in rem quam in perſonam: qualis eſt familiæ erciſcundæ actio, quæ competit cohæredibus de dividenda hæreditate. Item communi dividundo, quæ inter eos redditur, inter quos aliquid commune eſt, ut id dividatur: item finium regundorum actio, quâ inter eos agitur, qui confines agros habent. Ibid. §. 20.

III.

3. *Perſonal Actions, whence they ariſe.*

Perſonal Actions are thoſe by which we ſue thoſe Perſons who are under ſome obligation to us, or who have done us ſome wrong, in order to compel them to pay what they owe us, or to do the things which they have bound themſelves to us to do [c]. Theſe Actions are annexed to the Perſon that is bound, they follow him throughout, and they can be brought only againſt him, or againſt thoſe who repreſent him. They ariſe commonly from an Obligation, or a Contract, which ſerve as a Foundation to thoſe who bring them, or from a Treſpaſs.

[c] Agit unuſquiſque, aut cum eo, qui ei obligatus eſt, vel ex contractu, vel ex maleficio: quo caſu proditæ ſunt actiones in perſonas, per quas intendit adverſarium ei dare aut facere oportere, aut aliis quibuſdam modis. *Inſtit. lib.* 4. *tit.* 6. §. 1.

IV.

4. *Two kinds of Perſonal Actions.*

Perſonal Actions are divided into Civil Actions and Criminal Actions. The firſt ſort are thoſe which are brought for the Payment of a Debt, or for other Cauſes purely civil. The Second are thoſe by which we demand Satisfaction for a Wrong or an Injury, that has been done us, or to thoſe who belong to us. Sometimes theſe two perſonal Actions are reunited into one, and then we call them mixt perſonal Actions [d].

[d] Ex maleficiis verò proditæ actiones, aliæ tantum pœnæ perſequendæ cauſâ comparatæ ſunt: aliæ tam pœnæ, quam rei perſequendæ & ob id mixtæ ſunt. *Inſtit. lib.* 4. *tit.* 6. §. 18.

In France, *the Parties who have been injured, or who have ſuffered any Wrong, by a Crime, ſue in their own Names only for a Civil Reparation, and for Damages. So that Criminal Actions are proſecuted by the Officers of the Publick.*

V.

5. *Of Real Actions.*

As Perſonal Actions are annexed to the Perſon, ſo Real Actions follow the Thing into whoſe Hands ſoever it paſſes [e]. Under this Word *Thing* we comprehend not only Lands and Inheritances, but likewiſe all the real Rights with which Lands may be charged, ſuch as Services, Mortgages, and Ground Rents. This Action is not always founded on a Contract, or a prior Obligation, but on the Property of the Ground, or of the Right which belongs to the Demandant, who is in a Condition to claim what belongs to him.

[e] Aut cum eo agit, qui nullo jure ei obligatus eſt movet tamen alicui de aliqua re controverſiam. Quo caſu proditæ actiones in rem ſunt. Veluti ſi rem corporalem poſſideat quis, quam Titius ſuam eſſe affirmet, poſſeſſor autem dominum ejus ſe eſſe dicat. Nam ſi Titius ſuam eſſe intendat, in rem actio eſt æque ſi agat quis, jus ſibi eſſe ſundo fortè vel ædibus utendi, fruendi, vel per fundum vicini eundi, agendi, vel ex fundo vicini aquam ducendi: in rem actio eſt. Ejudem generis eſt actio de jure prædiorum urbanorum: veluti ſi quis agat, jus ſibi eſſe altius ædes ſuas tollendi, proſpiciendive, vel proſpiciendi aliquid, vel immitendi tignum in vicini ædes. *Inſtit. lib.* 4. *tit.* 6. §. 1, 2.

VI.

6. *Actions Confeſſory, or Negatory.*

When a Real Action is commenced by the Owner of a Houſe or Lands, claiming a Service due from the Houſe or Lands of another Perſon, that Action is called a *Confeſſory* Action. And the Name of *Negatory* Action is given to that which is brought by a Perſon, who inſiſts that his Houſe or Lands are not charged with the Service which is claimed to be due from them [f].

[f] In confeſſoria actione, quæ de ſervitutibus movetur, fructus etiam veniunt.—— Sed & in negatoria actione (ut Labeo ait) fructus computantur, quanti intereſt petitoris, non uti fundi ſui itinere adverſarium. *l.* 4. *ff. ſi ſervitus vindicetur.*

VII.

7. *Hypothecary Action.*

The Hypothecary Action is that which the Creditor brings againſt the Immoveables which are mortgaged to him by his Debtor, although the Creditor had not been put into poſſeſſion of them [g]. This Action takes Place, whether the Immoveable Thing be in the Hands of the Debtor, or have paſſed into the Hands of a new Purchaſer.

[g] Serviana (actio) & quaſi Serviana (quæ etiam hypothecaria vocatur) ex ipſius Prætoris juriſdictione ſubſtantiam capiunt. Serviana autem experitur quis de rebus coloni, quæ pignoris jure pro mercedibus fundi ei tenentur. Quaſi Serviana autem eſt, quâ creditores pignora, hypothecaſve perſequuntur.—— At eam, (rem) quæ ſine traditione; nudâ conventione tenetur, propriè hypothecæ appellatione contineri dicimus. *Inſtit. lib.* 4. *tit.* 6. §. 7.

VIII.

8. *Poſſeſſory Action.*

He who was in poſſeſſion of a Houſe or Lands or of ſome Right, and is moleſted therein, or turned out of his Poſſeſſion, may commence a Poſſeſſory Action in order to be quieted in his Poſſeſſion, if he

he is moleſted, or to regain it, if he has loſt it [h].

[h] Sequitur, ut diſpiciamus de interdictis, ſeu actionibus quæ pro iis exercentur. Erant autem interdicta formæ atque conceptiones verborum, quibus Prætor aut jubebat aliquid fieri, aut fieri prohibebat Quod tunc maximè fiebat, cùm de poſſeſſione aut quaſi poſſeſſione inter aliquos contendebatur. *Inſtit. lib.* 4. *tit.* 15. *in princ.*

IX.

9. How the Hypothecary Action becomes a mixt Action.

The Prayer in a Hypothecary Action is, that an Eſtate may be declared to be charged and mortgaged for the Payment of a Debt, or a Rent, that is due to us [i]. This Action is a Real Action in its own Nature, but it is often rendred a mixt Action, by concluding that the Poſſeſſor of the Eſtate may be compelled to pay a certain Sum of Money, or a Rent, or otherwiſe to relinquiſh the Eſtate. It is always a mixt Action, when the Debtor, or his Repreſentative, is in Poſſeſſion of the Eſtate.

[i] Serviana (actio) & quaſi Servians (quæ etiam hypothecaria vocatur) ——— Quaſi Serviana autem eſt, quâ creditores pignora hypothecaſve perſequuntur. *Inſtit. lib.*4. *tit.* 6. §. 7.

X.

10. Of other mixt Actions.

Mixt Actions partake of the Nature of Perſonal and Real Actions [k]. Such are all demands for Partition of an Eſtate among Coheirs, for dividing what belongs to ſeverals in Partnerſhip, or as joint Proprietors. For the Diviſion of the Eſtate is Real; but the Reſtitution of the Fruits and Revenues, the Reimburſtment of the Charges, and the Contributions that are to be made by the reſpective Parties, are Perſonal.

[k] Quædam actiones mixtam cauſam obtinere videntur, tam in rem quam in perſonam: qualis eſt familiæ erciſcundæ actio, quæ competit cohæredibus de dividenda hæreditate. Item communi dividundo, quæ inter eos redditur, inter quos aliquid commune eſt, ut id dividatur. Item finium regundorum actio, quâ inter eos agitur, qui confines agros habent. *Inſtit. lib.* 4. *tit.* 6. §. 20.

TITLE II.

Of Proceedings in Cauſes in general, either upon an Appearance of Parties, or by Default, and of Delays

The CONTENTS.

1. *What a Citation is.*
2. *The Formalities required in Citations.*
3. *Where Perſons out of the Kingdom, and thoſe who have no fixed Abode, are to be cited.*
4. *Delays which are granted to the Parties cited, for their appearance.*
5. *Days which are or are not, included in the Delays.*
6. *A Default taken againſt the Defendant who does not appear.*
7. *Oppoſition to the Default taken.*
8. *If in Proceedings by Default, they always give Judgment according to the Prayer of the Plaintiff.*
9. *Of Defences made againſt the Demand.*
10. *Reaſons for which the Defendant declines the Juriſdiction.*
11. *When declinatory Exceptions ought to be made.*
12. *In what manner the Judge is to decide the Exceptions taken to his Juriſdiction.*
13. *Of dilatory Exceptions.*
14. *All the dilatory Exceptions ought to be made at once.*
15. *Of peremptory Exceptions.*
16. *Of a Tender made, when the Defendant has no Exceptions to offer.*
17. *Default at the Hearing of the Cauſe. Oppoſition againſt that Default.*
18. *Two ways of giving Judgment, either upon a ſummary Hearing, or after Pleadings in Writing.*
19. *Judgment in ſummary Cauſes.*
20. *What is done in caſe of the Death of the Party, or of his Proctor.*

I.

1. What a Citation is.

A Citation, which we are to look upon as the Foundation of all Judicial Proceeding, is a Proceſs, or Warrant, by virtue of which an Officer ſummons one or more Perſons to appear before a certain Judge, and on a certain Day, to ſee himſelf or themſelves condemned to perform what is demanded by the Plaintiff [a].

[a] In jus vocare, eſt juris experiundi cauſâ vocare. *l.* 1. *ff. de in jus vocando.*

Omnium autem actionum inſtituendarum principium, ab ea parte Edicti proficiſcitur, quâ prætor edicit de in jus vocando. Utique enim imprimis adverſarius in jus vocandus eſt: id eſt, ad eum vocandus qui jus dicturus ſit. *Inſtit. lib.* 4. *tit.* 16. §. *ult.*

II.

2. The formalities required in Citations.

The Citation ought to be by way of Libel, that is, it ought to contain ſummarily the Demand of the Plaintiff, and the Title upon which it is founded [b]. The Officer ought to declare to what Court he belongs, the Place of his own Abode, and alſo that of the Party at whoſe inſtance he ſerves the Citations, the Name of the Plaintiff's Proctor, when it is neceſſary to imploy a Proctor in the Cauſe. The Citation

tation muſt be ſerved upon the Defendant perſonally at his Dwelling-houſe. And the Names of the Perſons with whom the Summons was left ought to be ſet down both in the Orignal Proceſs, and in the Copy. The Proceſs ought to have a Date, and to be regiſtred.

[b] Quâ quiſque actione agere volet, eam edere debet, nam æquiſſimum videtur, eum, qui acturus eſt, edere actionem, ut proinde ſciat reus, utrum cedere an contendere ultra debeat. Et ſi contendendum putat, veniat inſtructus ad agendum, cognitâ actione, quâ conveniatur. *l.* 1. *ff. de edendo.*

III.

3. Where Perſons out of the Kingdom, and thoſe who have no fixed Abode, are to be cited

Thoſe who have no known Domicil are cited by one ſingle Publick Outcry, in the chief Market-place of the Town, where the Court is held which iſſues the Proceſs. Strangers who are out of the Kingdom are cited at the Houſe of the Procurators General of the Parliaments in *France*, to which there lies an Appeal from the Judges, who are to take cognizance of the Matter in diſpute in the firſt Inſtance. And Subjects that are out of the Kingdom, or thoſe who are condemned to Baniſhment and the Gallies for a certain Time, are cited at the Place of their laſt abode.

See in relation to Citations, the 2d. Title of the Ordinance of 1667, *and the Edicts and Declarations of the* French *King touching the regiſtring of Proceſſes.*

IV.

4. Delays which are granted to the Parties cited, for their appearance.

In ſummoning a Party, it is neceſſary to grant him a Delay, not only that he may prepare himſelf for making his Appearance before the Judge; but likewiſe that he may conſider, whether he ſhould acquieſce to the Plaintiff's Demand, or that he may look out the Deeds and Writings that are neceſſary for the Defence of his Cauſe. This Delay is different according to the Diſtance of the Defendant's Domicil, from the Place where the Court is held, where the Affair is to be decided, and according to the Quality of the Court. The Judge ſhortens the Delays, when he ſees that the Affair requires Diſpatch, and that there would be Danger in adhering to the uſual Terms of Delay.

See the third Title of Delays in appearing to Citations, in the Ordinance of 1667.

V.

5. Days which are, or are not, included in the Delays.

The Day on which the Citation is ſerved, and that on which it is returnable, are not included in the Delays; but all the intermediate Days are to be reckoned, even Sundays and Holidays.

VI.

6. A Default taken againſt the Defendant who does not appear.

If the Defendant does not conſtitute a Proctor, and does not make any Defence, within eight Days after the Return of the Proceſs, the Plaintiff may take a Default in the Regiſtry; but he cannot have Judgment upon it till after another Delay of a Week or a Fortnight, if it is aſſigned for one of thoſe Terms, or for half the Time allowed for appearing to the Proceſs, in caſe he paſſes the Week, or the Fortnight.

VII.

7. Oppoſition to the Default taken.

The Defendant takes his Exceptions to the Judgments that have been given in default of his appearing, or making his Defence, within a Week from the Day that intimation has been given him of the ſaid Judgments, either perſonally, or by notice left at his Houſe, when he has not appointed a Proctor in Court; and within eight Days after Notice given to his Proctor, when he has a Proctor in Court.

VIII.

8. If in Proceedings by Default, they always give Judgment according to the Prayer of the Plaintiff.

In Judgments given by Default, the Judge ought not to decree according to the Prayer of the Plaintiff, unleſs it appears to be juſt and well founded [c]. Thus it may ſo fall out, that the Plaintiff may loſe his Cauſe, even when there is no Body to oppoſe him.

[c] Poſt Edictum peremptorium impetratum, cum dies ejus ſupervenerit, tunc abſens citari debet: &, ſive reſponderit, ſive non reſponderit, agetur cauſa, & pronunciabitur: non utique ſecundum præſentem, ſed interdum vel abſens, ſi bonam cauſam habuit, vincet. *l.* 73. *ff. de judiciis.*

Cum autem eremodicium ventilatur, ſive pro actore, ſive pro reo; examinatio cauſæ ſine ullo obſtaculo celebretur. Cum enim terribiles in medio proponuntur ſcripturæ, litigatoris abſentia Dei præſentiâ repleatur. *l.* 13. §. 4. *Cod. de judiciis.*

IX.

9. Of Defences made againſt the Demand.

The firſt Thing which the Defendant ought to do after his Appearance, is to propoſe the Defences which he has to make againſt the Plaintiff's Demand, and to give Copies of the Deeds, or Writings, which he intends to make uſe of, in order to hinder the Plaintiff from obtaining his Demand [d]. The Defences which he makes, contain Exceptions, which are either declinatory, dilatory, or peremptory [e].

[d] Sequitur, ut de exceptionibus diſpiciamus. Comparatæ autem ſunt exceptiones defendendorum eorum gratiâ, cum quibus agitur. *Inſtit. lib.* 4. *tit.* 13. *de exceptionibus in princ.*

[e] Ap-

e Appellantur autem exceptiones aliæ perpetuæ & peremptoriæ, aliæ temporales & dilatoriæ. Perpetuæ & peremptoriæ ſunt, quæ ſemper agentibus obſtant, & ſemper rem de quâ agitur, perimunt: qualis eſt exceptio doli mali, & quod metus cauſa factum eſt, & pacti conventi, cum ita convenerit, ne omnino pecunia peteretur. Temporales atque dilatoriæ ſunt, quæ ad tempus nocent, & temporis dilationem tribuunt: qualis eſt pacti conventi: cum ita convenerit, ne intra certum tempus ageretur, veluti intra quinquennium: nam finito eo tempore non impeditur actor rem exequi. *Inſtit. lib.* 4. *tit.* 13. §. 8, 9, 10.

X.

10. *Reaſons for which the Defendant declines the Juriſdiction.*

The Defendant declines the Juriſdiction, and demands that he may be ſent to another Court, when the Matter in diſpute does not belong to the Cognizance of the Judge before whom he is cited, when the ſaid Judge has not a Juriſdiction in the Place where the Defendant lives, in the Caſe of perſonal Actions, or in the Place where the Thing is ſituated, in the Caſe of real Actions; when the ſame Matter is conteſted in another Court; or when the Defendant has the Privilege of having the Cauſes he is concerned in, tried before another Judge, than that of his Domicil. One demands likewiſe to have the Cauſe tried before another Court, when either of the Parties is an Officer of the Court where it is begun, or when many of their Kindred or Allies are Officers in it. And this in the Terms of the *French* Law, is called *Evocation* of a Cauſe, from the *Latin* Word *evocare*.

See touching Evocations of Cauſes, the Ordinance of the Month of Auguſt, 1669.

XI.

11. *When declinatory Exceptions ought to be made*

The declinatory Exceptions muſt be offered before all others, becauſe one is not ſuffered to decline the Juriſdiction of the Court, after they have owned the Authority of the Judge, by a voluntary Proceeding in the Cauſe before him f.

f Præſcriptiones fori in principio litis, à litigatoribus opponendas eſſe, legum decrevit autoritas. *l. ult. Cod. de exceptionibus.*

XII.

12. *In what manner the Judge is to decide the Exceptions taken to his Juriſdiction.*

The Judge ought to decide ſummarily at a Hearing the Exceptions taken againſt the Juriſdiction of the Court; and if he finds that the Cognizance of the Matter does not belong to him, he ought to ſend the Parties before the proper Judge, or he ought to direct them to apply to the proper Judge; on pain of his Decree being Null and Void, and himſelf being made a Party g.

g Si militaris judex ſuper ea cauſa, de quâ civilibus actionibus diſceptandum fuit, non datus à quo dari poterat, cognovit, etiam remotâ appellatione, id quod ab eo ſtatutum eſt, firmitatem judicati non habet. *l.* 2. *Cod. ſi a non competente judice judicatum eſſe dicatur.*

Et in privatorum cauſis hujuſmodi forma ſervetur, ne quenquam litigatorum ſententia non à ſuo Judice dicta conſtringat. *l.* 4. *Cod. ibid.*

[*What is ſaid in this Article of the Judge's being obliged, in caſe he finds the Matter in diſpute not to belong to his Juriſdiction, to ſend the Parties before the proper Judge, on pain of his Decree being null, and himſelf being made a Party, is no where directed by the* Roman *Law, neither does it obtain in practice with us in* England. *For all that the Judge is obliged to do in that Caſe, when the Matter does appear not to belong to his Cognizance, is to diſmiſs the Defendant with Coſts, and leave it to the Plaintiff to bring his Action before the proper Court.*]

XIII.

13. *Of dilatory Exceptions.*

Dilatory Exceptions are thoſe which tend to delay the giving Judgment on the Merits of the Cauſe, and to hinder the Judge from proceeding, until he has determined the Matter of the ſaid Exceptions. They ariſe, either from the Nature of the Action that is commenced, as if a Creditor who has allowed his Debtor a Time for Payment, ſues him before the Time is expired, or from the Quality of the Plaintiff, as in the Caſe of a Minor, who commences an Action, without the Aſſiſtance of a Guardian.

See the Proof of the 9th Article.

XIV.

14. *All the dilatory Exceptions ought to be made at once.*

In order to hinder the Parties from protracting the Cauſe, it is required that thoſe who have many dilatory Exceptions to offer, ſhall propound them all in one ſingle Act. Here we muſt except Widows and Heirs, who are not obliged to propound their other dilatory Exceptions, till the Time which is allowed them for deliberating is expired.

XV.

15. *Of peremptory Exceptions.*

The Defences, or peremptory Exceptions, tend to deſtroy or extinguiſh the Action brought by the Plaintiff, and to have the Defendant diſmiſſed and acquitted from the Plaintiff's Demand. Of this Kind are Preſcription, Compenſation and Payment.

See the Proof of the 9th Article.

XVI.

16. *Of a Tender made, when the*

In caſe the Defendant have no Exceptions to offer that may hinder the Plaintiff

Defendant has no Exceptions to offer.

Plaintiff from obtaining a Decree for what he demands, he ought to make a Tender, in order to ſtop any further Proceedings. If the Tender is judged to be ſufficient, and the Plaintiff refuſes it without juſt cauſe, he ought to be condemned in the Expences incurred after the Time of making the Tender.

XVII.

17. *Default at the Hearing of the Cauſe. Oppoſition againſt that Default.*

Three Days after the Defendant has given in his Defences, the Cauſe is appointed for Hearing upon a bare Act ſigned by the Proctor. If one of the Parties, or rather he who is the Defendant, his Advocate or Proctor, does not appear, a Default is taken againſt him, and a diffinitive Sentence given in the Cauſe, to which Oppoſition may be made within a Week after Notice of the Sentence, unleſs the Cauſe has been called in the ordinary Courſe, as it ſtood in the Paper of Cauſes; for in that Caſe the Party is not admitted to make any Oppoſition againſt the Sentence.

XVIII.

18. *Two ways of giving Judgment either upon a ſummary Hearing, or after Pleadings in writing.*

If the Cauſe having been argued on both Sides, it appears to be ſufficiently cleared up, Judgment is given at the ſaid Hearing. But if in the Argument there ariſe Points of great moment and difficulty, Facts that are obſcure, and there be many Writings to be examined into, the Parties are directed to clear up the ſaid Difficulties in Writing, and a diffinitive Sentence is given upon the Writings exhibited by the Parties. And the Party who refuſes to produce his Writings after the uſual Delays is forejudged.

XIX.

19 *Judgment in ſummary Cauſes.*

Matters of a ſummary Nature, ſuch as in the inferior Courts Cauſes meerly Perſonal, where the Matter in diſpute does not exceed the Value of two hundred Livres, the Affairs which relate to the Civil Policy, and others of the like Nature, ought always to be judged at the firſt Hearing, without any further appointment by the Judges for a fuller Diſcuſſion of the Cauſe in Writing [h].

[h] Sit tibi quoque tertium ſtudium, lites cum omni æquitate audire, & omnes quidem breviores, & quæcunque maximè vilium ſunt, ex non ſcripto decidere, & judicare, & liberare omnes alternâ contentione. *Nov.* 73. *cap.* 3.

XX.

20. *What is done in caſe of the Death of the Party,*

When one of the Parties dies, while the Cauſe is depending, it is neceſſary that the other Party cauſe the Executor or Adminiſtrator of the Deceaſed to be cited, in order to carry on the Cauſe, if he has not already undertaken it of his own accord. It is the Method likewiſe when the Proctor of a Party dies, to cauſe him to be cited in order to conſtitute a new Proctor; and after that is done, the Proceedings in the Cauſe are carried on in the ſame State they were in at the Time of the Death of the Proctor, or of the Party. *or of his Proctor.*

TITLE III.

Of Interventions.

The CONTENTS.

1. *Of Petitions of Intervention.*
2. *Proceedings upon the Petition of Intervention.*
3. *In what Court the Party intervening is to proceed.*

I.

1. *Of Petitions of Intervention.*

WHEN a Perſon has Intereſt in a Cauſe that is depending before a Court, whether it be in the firſt Inſtance, or upon an Appeal, the ſaid Perſon may preſent a Petition at any Time whilſt the Cauſe is depending, praying to be admitted to intervene, in order to take care of his Right [a].

[a] Principaliter cauſam ejus de quo ſupplicas, eſſe, quam tuam perſpicimus: nam cum te eum ad libertatem perduxiſſe profitearis, illius intereſt magis ſolemniter ſuum tueri ſtatum, & conſequenter tua etiam agetur cauſa. Nam ſi ab eo contra quem fundis preces, ſervus dicatur, eique libertas ex manumiſſione tuâ vindicetur: probatio ſervitutis originis, & beneficium manumiſſionis libertatem illi aſſignans, tuum etiam jus patronatus tuetur. Si vero conſentiat ſervituti; tunc jure conceſſo, adito Præſide Provinciæ, eum invitum defendere poteris. *L.* 19. *Cod. de liberali cauſa.*

II.

2. *Proceedings upon the Petition of Intervention.*

The Petition of Intervention ought to ſet forth the particular intereſt of the Party who prays to be admitted to intervene, to which ought to be annexed the Vouchers to prove the ſaid Intereſt, a Copy of which ought to be communicated to the other Parties, that they may ſee whether the Perſon who prays to intervene, has a real Intereſt in the Cauſe, or whether he pretends only an Intereſt to intervene, that he may protract the Cauſe. Upon the preſenting of this Petition, the Parties are called to declare what they have to ſay againſt it, and if the Intereſt of the Party inter-

intervening is either confeſt, or ſufficiently proved, he is admitted to intervene, and the Cauſe of Intervention goes on in the ſame ſteps with the principal Cauſe, if that is appointed to be heard in a full Court, ſaving always a Liberty to ſever them if it ſhall be found neceſſary ſo to do. But if the principal Cauſe is of ſuch a Nature as to be decided on a Summary Hearing, the principal Cauſe, and the Cauſe of Intervention, are both of them decided at one and the ſame Time.

III.

3. In what Court the Party intervening is to proceed.

The Plaintiff, in the Cauſe of Intervention, ought to proceed in the ſame Court where the principal Cauſe was begun; becauſe the Party intervening being conſidered as Plaintiff, ought to follow the Juriſdiction of the Defendants. He may nevertheleſs offer reaſons of Recuſation againſt the Judges, if he has any that are lawful [b].

[b] Actor rei forum, ſive in rem, ſive in perſonam ſit actio, ſequitur. *l.* 3. *Cod. ubi in rem actio exerceri debeat.*

TITLE IV.

Of the Recuſation of Judges.

The CONTENTS.

1. *When a Party may recuſe a Judge.*
2. *Kindred, a Cauſe of Recuſation.*
3. *Affinity by the Wives of Judges.*
4. *Other grounds of Recuſation.*
5. *The ſame.*
6. *The ſame.*
7. *When the Recuſation ought to be offered.*
8. *Proceedings in Order to come at the Recuſation.*
9. *Judgment on the Matter of Recuſation.*
10. *Declaration of the Judge againſt whom there are grounds of Recuſation.*

I.

1. When a Party may recuſe a Judge.

THE Party who ſuſpects a Judge upon good Grounds, which are well proved may recuſe or challenge him; that is, may hinder him from taking cognizance of the Matter in diſpute.

II.

2. Kindred, a cauſe of Recuſation.

The Judge may be challenged in a Civil Cauſe, if he is related by Kindred or Affinity to the Parties, even to the fourth Degree inclusive, according to the Manner of computing Degrees by the Canon Law [a]. In a Criminal Cauſe, the Judge may be challenged even to the fifth Degree of Kindred or Affinity inclusive; and even in the remoteſt Degree, when the Judge bears the Name and Arms of the Criminal, or of the Proſecutor. Which is to take place, even when the Judge is related or allied to both the Parties. However, the Judge who is related or allied to one or both the Parties, may hear and determine a Civil Cauſe, if all the Parties give their conſent in writing. But it is not the ſame Thing in a Criminal Cauſe, in which Relations cannot be Judges, altho' the Parties, and likewiſe the King's Counſel, ſhould agree to it.

[a] Qua Lege (Cornelià) cavetur, ut non judicet qui ei qui agit, gener, ſocer, vitricus, privignus, ſobrinuſve eſt, propiuſve eorum quemquam eâ cognatione, affinitateve attinget. *l.* 5. *ff. de injuriis.*

[*By the Common Law of* England, *the Judges, or Juſtices, cannot be challenged.* Coke 1. Inſt. fol. 294. [a] *But in the Courts of* England, *where the Proceedings are according to the Civil and Canon Law, the Judges may be challenged. And they commonly of their own accord decline ſitting as Judges in a Cauſe, where they may be ſuppoſed to be under any the leaſt ſort of Bias of Partiality to the one ſide or the other.*]

III.

3. Affinity by the Wives of Judges.

This Ground of Recuſation which proceeds from the Kindred and Affinity of the Judge, takes place likewiſe in the Caſe of the Kindred and Affinity of the Wife of the Judge, ſhe being ſtill living, or, in caſe of her deceaſe, if ſhe has left behind her Children who are ſtill alive. It is the ſame Thing when the Wife of one of the Parties is related or allied to the Judge. But the Father-in-Law, the Son-in-Law, and the Brothers-in-Law, are not to be Judges, although the Wife be deceaſed, and has left no Children.

IV.

4. Other grounds of Recuſation.

One may challenge a Judge who is a capital Enemy to the Party, who has threatned him either by Word of Mouth, or in Writing, ſince the Commencement of the Cauſe, or within ſix Months before; who has a Law-Suit againſt the Judge, provided the ſaid Suit be not in relation to any Title or Right which the Party has acquired by Aſſignment, ſince the beginning of the Cauſe, and with a View to challenge a Judge, who himſelf is Party in a Suit of the like Nature with that on which

which he is to give Judgment, or who has a Suit depending before a Court of which one of the Parties is a Judge.

V.

5. The same. A Judge may be challenged, if he lives too familiarly with one of the Parties, as if he eats frequently with him, if he has been his Advocate in the ſame Cauſe [b], if he has ſollicited for him, if he has told him his Opinion of the Cauſe before Judgment given, if he has given him ſome Advice in relation to the ſame Affair, if the Cauſe has already been before him as Judge in another Court, or as Arbitrator.

[b] Quiſquis vult eſſe cauſidicus, non idem in eodem negotio ſit advocatus & judex: quoniam aliquem inter arbitros & patronos oportet eſſe delectum. *l.* 6. *Cod. de poſtulando.*

VI.

6. The same. One cannot be Judge in an Affair wherein an Eccleſiaſtical Community is concerned, of which he himſelf is a Syndick, nor one who is Tutor, whether it be honourary or acting Tutor, ſubſtituted Tutor or Curator, preſumptive Heir, Maſter or Servant, to one of the Parties. Neither ought one to ſit as Judge in the Cauſe of a Patron of Benefices, who has either given or procured him a Benefice, or who has given one to any one of his Family, to the ſecond Degree in the Collateral Line of Kindred or Affinity incluſive, and for all the Degrees in the direct Line. A Bailiff of a Lordſhip cannot be Judge in a Cauſe wherein his Lord is a Party, unleſs it be in Affairs which relate to the Demeſnes, the Rights, the Rents, and the Leaſes of the Land.

VII.

7. When the Recuſation ought to be offered. The Challenging of the Judges is an Exception which ought to be taken at the Beginning of the Cauſe. But this Rule admits of two Exceptions; one is, when the Ground of the Challenge has happened ſince the Commencement of the Suit; and the other is, when the Party did not know of the Ground of the Challenge until after the Cauſe was begun. When Notice has been given of the Day that a Commiſſioner appointed by the Court is to ſet out, he cannot be challenged, unleſs a Petition to that Effect is preſented three Days before his Departure.

VIII.

8. Proceedings in order to come at the Recuſation. In order to have a Judge debarred from giving Judgment in a Cauſe, the Reaſons for which he is challenged, are ſet forth in a Petition which ought to be ſigned by the Party himſelf, or by his Proctor, authorized by a ſpecial Proxy from the Party [c]. Nevertheleſs the Proctor, in the Abſence of his Client, may demand that the Judge may forbear proceeding in the Cauſe, upon which Application a Delay will be granted him that he may hear from his Client. And during the ſaid Delay, the Judge cannot proceed any further in the Cauſe.

[c] Non facile per procuratorem quis recuſabitur, quoniam famæ cauſa eſt: niſi conſtet ei à tutore mandatum nominatim. *l.* 39. *ff. de procuratoribus & defenſoribus.*

IX.

9. Judgment on the Matter of Recuſation. The Petition which contains the Grounds of the Recuſation is communicated to the Judge, that he may declare whether the Facts mentioned in it be true or not, after which they proceed to give Judgment on the Point of Recuſation, and the Judge, who is excepted againſt, is not ſuffered to be preſent at the Debates. If the Reaſons for challenging the Judge are not relevant, or that the Party who offers them hath failed in the Proof of them, he ought to be condemned to pay a Fine. And the Judge who is challenged, may likewiſe demand a Reparation proportionable to the Injury that has been done him. But if he inſiſts upon this Reparation, he cannot in that caſe act as a Judge in the Cauſe.

X.

10. Declaration of the Judge againſt whom there are grounds of Recuſation. Every Judge who knows of any juſt Cauſe of Challenge againſt him, ought to declare it. The Party ought to preſent his Petition of Recuſation, within eight Days after the ſaid Declaration has been intimated to him; otherwiſe he will not be admitted to give any Challenge, unleſs the Proctor of the Party who is abſent, has deſired time to acquaint his Client, and to receive a ſpecial Proxy from him.

See touching the Recuſation of Judges the 24th Title of the Ordinance of 1667, *and the Declaration of the 25th of* May 1705. *in relation to Conveyances and Aſſignments of Rights, which Perſons engaged in Law-Suits procure, that they may have a Foundation to challenge the Judges.*

ADVERTISEMENT.

We have explained in the ſixth Title of the third Book of this Work, that which relates to the different Kinds of Proofs, by Writing, or by Witneſſes; thoſe which are drawn from the Anſwer of a Party to certain Facts and Articles, and that which concerns the different Sorts of Preſumptions. We muſt now take Notice of what relates

to

to the Proceeding that is to be obſerved with reſpect to theſe different Kinds of Proofs.

TITLE V.

Of ſeveral Sorts of Proofs of Facts that are controverted.

The CONTENTS.

1. *Verification of private Writings.*
2. *In what manner Writings are verified.*
3. *The Advantage of a Default, in caſe the Defendant does not appear.*
4. *Of comparing Writings together.*
5. *In what manner ſuch Compariſon is made.*
6. *Of the Charge of Forgery.*
7. *The Proceedings in a Charge of Forgery.*
8. *In what caſe a Criminal Proſecution is carried on againſt him who has exhibited a forged Deed or Inſtrument.*
9. *The Effect of a Declaration of the Party that he will not make any uſe of a Deed or Inſtrument.*
10. *The Charge of Forgery does not exclude other Objections that may be offered againſt the ſaid Writing.*
11. *A Tranſaction founded on a counterfeit Deed.*
12. *Of Examination of Witneſſes.*
13. *Proceedings after the Examination of Witneſſes is finiſhed.*
14. *The Report made by ſkilful Perſons.*
15. *A View taken by the Judges themſelves.*
16. *Anſwers of the Party to certain Facts and Articles.*
17. *Proceedings in order to have the ſaid Anſwers.*
18. *If the Party can retract his Anſwers.*
19. *In what manner Communities are to give in their Anſwers.*

I.

1. *Verification of private Writings.*

WHEN a Writing that is exhibited by one of the Parties, in order to ſerve as a Proof of his Demand, or of his Defence, is only a private Writing, and is denied by the adverſe Party; it muſt be verified, in order to make it appear that it was ſigned by the Party whoſe Name it bears.

II.

2. *In what manner Writings are verified.*

This Verification is to be made in preſence of one of the Judges who are named Commiſſioners for the Cauſe, or of the Judge who is Reporter of the Cauſe, if it is appointed to be heard in a full Aſſembly. And in order to come at it, the Writing in queſtion is preſented to the Judge on the Day, and at the Hour, mentioned in the Notice given to the adverſe Party; the Judge marks it, and communicates it to the Party [a]. The Parties agree together in naming ſkilful Perſons for Comparators, or if they cannot agree, the Judge by virtue of his Office names for that Party who refuſes to name on his Side. They give to the Comparators the Writings which are to be the Foundation of the Compariſon, and which ought to be publick and authentick Writings, or private Writings which are not conteſted. And it is by theſe Writings that the Comparators examine the Subſcription that is denied, and that they make their Report. When there are no authentick Writings, nor private Note which the Parties are agreed on, that may ſerve as a Foundation for the Compariſon, they make the Perſon whoſe Handwriting is denied write ſomething; or if he is dead, they examine Witneſſes who were well acquainted with his Handwriting, and ſhew to every one of them the Writing which is the ſubject Matter in diſpute.

[a] Sancimus, ſi quando tale aliquid contigerit, & quiſpiam voluerit ſecundum eas quæ ab adverſario prolatæ ſunt literas, fieri examinationem; non accuſetur hoc tanquam non rectè ſit factum. Cui enim ipſe credidit, & quod protulit is contra quem, & ex quo ſuas affirmat allegationes, hoc non accuſet, neque prohibeat accuſationem literarum ad eum fieri: licet contingat eſſe documentum manu cujuſcunque conſcriptum. Neque enim ipſe ſibi reſiſtit: & quæ affirmavit, hæc accuſavit. Si vero etiam ex publicis archivis proferatur charta, velut de ſuſcepto deſcriptio, menſæ glorioſiſſimorum Præfectorum: — & quod ex publicis archivis profertur, & publicum habet teſtimonium, etiam ſuſceptible hoc eſſe ad collationem manuum ponimus. *Nov.* 49. *cap.* 2.

III.

3. *The Benefit of a Default, when the Defendant does not appear.*

When the Defendant againſt whom the Writings are to be verified, does not appear in obedience to the Summons, a Default is granted againſt him. The Benefit of which Default is, to have the Writing in queſtion declared to be ſuch as is alledged, in caſe it is pretended to be writ and ſubſcribed by and with the proper Handwriting of the Defendant, or if it is ſaid to be writ by another Hand, to proceed to the Proof of it by having it compared with other Writings by Perſons ſkilled in that Art, whereof one is to be named by

the Defendant, and the other by the Judge.

See touching the Declaration and Verification of private Writings, the 22d *Title of the Ordinance of* 1667, *and the Edict of the Month* December 1684.

IV.

4. *Of the collating of Writings.*

In Law Suits there is frequent occaſion to make uſe of Writings, the Originals whereof either cannot or may not conveniently be produced; in which caſe Copies are procured to be collated by a publick Officer, who atteſts the Copies to agree with the Originals. If a collated Copy is to be made uſe of againſt any one, it is neceſſary that it ſhould be collated in his Preſence, or that he be duly cited to be preſent at the collating, that he may be able himſelf to judge of the Condition of the Writing, and of its being faithfully collated.

[*It it not neceſſary with us, that the Party concerned be cited to be preſent at the Collating of a Copy with an Original; becauſe if it is duly atteſted by the proper Officer to be a true Copy, that is thought to be ſufficient, when nothing appears to the contrary.*]

V.

5. *In what manner Writings are collated.*

This Collation is made by virtue of a Compulſory, that is, a Writ out of the Chancery, or an Order of the Judge, which permits the Compulſion. The Party is cited to appear at the Hour and Place where the Collation is to be made; and he who has the Writing in his cuſtody is likewiſe cited to produce it. The Proceedings, as to the Compulſory, and the Collation of the Writings, cannot be begun by the Officer till an Hour after the Time appointed, when one of the Parties does not appear. One may procure to be collated in the Preſence of the Judge who is appointed Reporter of the Cauſe, the Writings which are in his own poſſeſſion, and of which he does not care to produce the Originals, or Writings which have been exhibited by the adverſe Party, and from whence one hopes to draw ſome advantage, either in the Affair in diſpute, or otherwiſe.

Touching the Verification and Collation of Writings, ſee the Ordinance of 1667. *tit.* 12.

VI.

6. *Of the Charge of Forgery.*

The Party againſt whom a forged Writing is produced, ought, with the Leave of the Judge, to offer himſelf ready to prove the Forgery of the ſaid Writing. The Requeſt which he gives in to that effect ought to be ſigned by the Party himſelf, or by his Proctor impowered by a ſpecial Proxy for that purpoſe. He muſt alſo depoſit the Fine which he is to pay, in caſe he does not prove the Forgery, which differs according to the Quality of the Courts of Juſtice where the Matter is tried.

VII.

7. *Proceedings in the Charge of Forgery.*

Upon the Preſenting of ſuch Requeſt, the Judge decrees that the Defendant ſhall declare within a certain Time, whether he intends to make uſe of the ſaid Writing or no. If he declares that he will not make uſe of it, the ſaid Writing is thrown out of the Cauſe. If on the contrary he purpoſes to make uſe of it, he muſt leave it in the Regiſtry, and give notice to the adverſe Party within the Space of twenty four Hours after ſuch his Declaration of his Intention; the Plaintiff ought then to draw up his Charge of Forgery, and leave it in the Regiſtry, and to procure an Order that in caſe there be any Minute taken of the Writing, the ſame be brought into the Rigiſtry, by the Perſon who has it in his cuſtody. After which the Plaintiff gives in his Reaſons to make good the Charge of Forgery. If the Judge does not think them to be admiſſible, he orders that, without having any regard to them, they proceed on to the Hearing of the Cauſe. If on the contrary they are admiſſible, he ſuffers them to be proved both by Deeds, and by Witneſſes, and by a Compariſon made by ſkilful Perſons.

The Conſent which the Party gives, that the Writing exhibited by him may be left out of the Cauſe, does not hinder the Attorney or Sollicitor Generals, or their Subſtitutes, from proſecuting the Perſon that has forged the Writing which is ſaid to be forged.

VIII.

8. *A Caſe where a Criminal Proſecution is carried on againſt him who has exhibited a forged Writing.*

If he who has exhibited the forged Writing, is convicted to be the Author of the Forgery, the Criminal Proſecution is judged ſeparately from the Civil Cauſe, and he is condemned to undergo a Puniſhment ſuitable to the Nature and Circumſtances of the Crime. But if the Perſon who has exhibited the forged Writing is not the Author of the Forgery, the Incident of the Forgery is connected with the Civil Cauſe, in order to give Judgment on the Forgery when Sentence is given upon the Merits of the Cauſe. When the Plaintiff in the Charge of Forgery fails in his Proof, he is condemned to pay a Fine, to which the Judge may add other Puniſhments, according to the Na-

ture of the Calumny, and the Quality of the Perſon to whom the Injury is done.

As to the Proceedings in the Charge of Forgery, ſee the 9th *Title of the Ordinance of* 1670.

IX.

9. *Effect of the Declaration that one will not make uſe of the Writing.*

He who has declared in a Cauſe that he will not make uſe of a Writing, cannot alter his Mind, becauſe he is deemed in his Declaration to have owned the Forgery of the Writing, or at leaſt to have looked upon it as uſeleſs [b]. But the Declarations made by a Party, and even Judgments that may be given againſt him in relation to the Forgery of a Writing, do not any ways prejudice a third Perſon who was not a Party in the Suit.

[b] Si adverſarius tuus apud acta Præſidis Provinciæ, cum fides inſtrumenti quod proferebat in dubium revocaretur, non uſurum ſe conteſtatus eſt: vereri non debes ne ea ſcriptura, quam non eſſe veram, etiam profeſſione ejus conſtitit, negotium denuò repetatur. *l.* 3. *Cod. de fide inſtrumentorum.*

Si uteris inſtrumento, de quo alius accuſatus falſi victus eſt, & paratus eſt (ſi ita viſum fuerit) à quo pecuniam petis, ejuſdem criminis te reum facere, & diſcrimen periculi pœnæ Legis Corneliæ ſubire, non oberit ſententia, à qua nec is contra quem data eſt, appellavit, nec tu qui tunc crimini non eras ſubjectus appellare debuiſti. *l.* 2. *Cod. ibid.*

X.

10. *The Charge of Forgery does not exclude other Objections that may be made againſt the Writing.*

Although one has uſed ſeveral Arguments to deſtroy the Inferences that are drawn from a Writing, yet one may in any Part of the Cauſe object againſt it that it is forged [c]. In the ſame Manner as he who has undertaken to prove that a Writing is forged, and who has not ſucceeded in that Charge, may nevertheleſs attack the ſaid Writing by other means, and ſhew it to be of no force or validity [d].

[c] Cum quidem inſtrumentum protulerit, vel aliam chartulam, eique fidem impoſuerit, poſtea autem perſona contra quam iſta chartula vel inſtrumentum prolatum eſt, quaſi falſum hoc conſtitutum redarguere nitatur, ne diutius dubitetur, utrum neceſſitatem ei qui protulit, imponi oporteat repetita vice hoc proferre, an ſufficiat fides jam approbata, ſancimus, ſi quid tale eveniat, eum qui petit iterum eam chartam proferri, prius ſacramentum præſtare, *Quod exiſtimans ſe poſſe falſum redarguere quod prolatum eſt, ad hujuſmodi veniat petitionem.* ——— Eandem autem copiam ei præſtamus, donec cauſa apud judicem ventilatur. Si enim jam pleniſſimum finem accepit & neque per appellationem ſuſpenſa eſt, neque per ſolitam retractationem adhuc lis vivere ſperatur, tunc ſatis datum eſt hujuſmodi querelæ indulgeri: ne in infinitum cauſæ tractentur, & ſopita jam negotia per hujuſmodi viam aperiantur, & contarium aliquid noſtro evenire propoſito. *l.* 21. *Cod. de fide inſtrum.*

[d] Eum qui inofficioſi querelam non tenuit, a falſi accuſatione non ſubmoveri placuit. Idem obſervatur, & ſi è contrario, falſi crimine inſtituto victus, poſtea de inofficioſo actionem exercere maluerit. *l.* 14. *Cod. de inofficioſo teſtamento.*

XI.

11. *An Agreement founded on a forged Deed.*

One may take out a Writ for the annulling of an Agreement that is founded on a forged Deed; but ſuch Writ is not allowed, when previous to the Agreement Exception has been taken to the Deed as being forged, or when the Tranſaction has been in relation to the Forgery [e].

[e] Ipſe ſignificas, cum primum adverſarii inſtrumenta protulerant, fidem eorum te habuiſſe ſuſpectam. Factâ igitur tranſactione, difficile eſt ut is qui provinciam regit, velut falſum, cui ſemel acquieviſti, tibi accuſare permittat. *l.* 7. *Cod. ad Leg. Cornel de falſis.*

XII.

12. *Of the Proof by Witneſſes.*

It is often neceſſary, when the Parties diſagree about the Facts, to have recourſe to the Proof by Witneſſes. In which caſe the Judge permits the reſpective Parties to examine Witneſſes on the Facts that are deduced in an Allegation which is approved of by the Court. The Party which is moſt diligent obtains an Order of Court for the ſummoning of Witneſſes, and of the adverſe Party, to ſee them ſworn. The Depoſition of the Witneſſes ought to be reduced into writing in Preſence of the Judge, after the Witneſſes have been firſt ſworn, and have declared their Age, and their Quality. The Judge who takes the Depoſition ought to examine the Witneſſes apart, without the Preſence of any Perſon beſides the Regiſter, unleſs the Examination be in open Court in a ſummary Way.

XIII.

13. *The Proceedings after the Witneſſes have been examined.*

When the Examination of the Witneſſes is finiſhed, the Party on whoſe behalf they have been examined, procures an Act to be made thereof, which is intimated to the adverſe Party, or the ſaid adverſe Party (in caſe they do not give him a Copy of the ſaid Act after he has demanded it) gets an Act thereof to be drawn up himſelf. Afterwards the ſaid adverſe Party gives in his Exceptions to the Witneſſes, or declares that he has none to give. In the next Place he demands a Copy of the Depoſitions of the Witneſſes. The Exceptions againſt the Witneſſes are to be decided before the Merits of the Cauſe. Such of the Parties as does not take care to have Witneſſes examined within the Time preſcribed by Law, are debarred from doing it afterwards.

See touching the Proceedings in the Examination of Witneſſes the 22*d Title of the Ordinance of* 1667. *And as to the Grounds of Exceptions to Witneſſes, ſee the* 6*th Title of the* 3*d Book of the Civil Law in its Natural Order.* §. 3.

XIV.

XIV.

14. *Report made by skilful Perſons.*

In ſuch Suits where the Matter in queſtion is about the Proof of a Thing which cannot be perfectly known, but by thoſe who are well verſed in the Practice of ſome Art, the Court directs a Report to be made by ſkilful Perſons, on the Facts mentioned in the Order of Court which directs the ſaid Report to be made [f]. Each of the Parties ought to name one ſkilful Perſon on their Part, and if one of them refuſes to name any Perſon, the Judge ought to name one himſelf. He ought likewiſe, in virtue of his Office, to name a third ſkilful Perſon, when the two that are firſt named diſagree.

[f] Mobilium vero rerum juſtis pretiis, æſtimatione habitâ per eos quos utraque pars elegerit arbitros judicaturos, interpoſito juramento, ſimili modo uſum fructum habeat. *l.* 6. *Cod. de ſecundis nuptiis.*

Æſtimationem autem holerum, non ſolum ab hortulanis fieri, ſed & à vocatis ſummariis, & ipſis horum peritiam habentibus, divinis nimirum propoſitis Evangeliis. *Nov.* 16. *cap.* 1.

There are at preſent in France, *ſome who have the Title of ſkilful Perſons in ſome Arts as an Office, and none elſe but thoſe who hold the ſaid Office can be named as ſkilful Perſons, either by the Parties, or by the Judge, in ſuch Matters as depend on the ſaid Arts. The Act or Certificate of their Report is drawn up by Officers who are called Actuaries.*

XV.

15. *A View taken by the Judge.*

Sometimes it is neceſſary that one of the Judges view upon the Spot the Condition of the Places, in order to make his Report thereof to the reſt of the Judges. In which caſe a View is ordered to be made upon the Place, and in the ſame Order of Court the Commiſſary is named who is to go to take the View. The Commiſſary goes to the Place at the Time that has been intimated to the Parties, that they may be preſent when the View is taken.

See the Ordinance of 1667. *tit.* 2.

XVI.

16. *The Parties may be examined upon Interrogatories touching Facts that are pertinent.*

It is lawful for the Parties in any Part of the Cauſe to have one another examined upon Interrogatories touching Matters and Facts that are pertinent, and have relation to the Matter in diſpute, either before the Judge himſelf, or in caſe the Party is abſent, before the Judge who is ſubſtituted for that Purpoſe [g].

[g] Ubicunque æquitas Judicem moverit, æquè oportere fieri interrogationem, dubium non eſt. *l.* 21. *ff. de interrogat. in jure faciendis.*

XVII.

17. *The Proceedings in examining the Parties on Interrogatories.*

The Party who is to be interrogated, is cited either perſonally, or at his Dwelling Houſe, by virtue of the Decree of the Judge [h]. If he appears in obedience to the Summons, he ought, after being ſworn, to anſwer by Word of Mouth, and not in Writing, in a clear and diſtinct Manner, to the Facts propoſed to him by the adverſe Party, and likewiſe to ſuch Facts as the Judge himſelf ſhall think fit to interrogate him upon. If the Party does not appear at the Time and Place appointed, or if he refuſes to anſwer, the Facts are taken as confeſt and acknowledged for the Benefit of the Party who demanded his Adverſary to be examined on Interrogatories. Nevertheleſs, the Party who has made Default may afterwards offer himſelf to undergo the Examination upon the Inrerrogatories, he paying the Charges of the Act made upon his Default, and alſo the Charges of the Examination upon the Interrogatories, without any hopes of recovering them back.

[h] Qui tacuit quoque apud Prætorem, in ea cauſa eſt, ut inſtitutâ actione in ſolidum conveniatur, quaſi negavit ſe hæredem eſſe: nam qui omnino non reſpondit, contumax eſt: contumaciæ autem pœnam hanc ferre debet, ut in ſolidum conveniatur, quemadodum ſi negaſſet: quia Prætorem contemnere videtur. *l.* 11. §. 4. *de interrogat. in jure faciendis.*

Nihil intereſt neget, quis, an taceat interrogatus, an obſcure reſpondeat, ut incertum dimittat interrogantem. *ibid.* §. 7.

XVIII.

18. *If one may retract his Anſwer.*

He who in his Examination upon Interrogatories has averred a Fact, which he afterwards diſcovers to be falſe, may retract what he has ſet forth in his Anſwers: and regard ought to be had to his Retraction, when he proves that he was really miſtaken, and eſpecially when he accounts for the Manner how he came to diſcover his Miſtake [i].

[i] Celſus ſcribit licere reſponſi pœnitere, ſi nulla captio ex ejus pœnitentia ſit actoris. Quod veriſſimum mihi videtur. Maximè ſi quis poſteà pleniùs inſtructus quid faciat, inſtrumentis vel epiſtolis amicorum juris ſui edoctus. *l.* 11. §. *ult. ff. de interrogat. in jure faciendis.*

XIX.

19. *In what manner Corporations are to anſwer to Interrogatories.*

Corporations ought to appoint a Syndick, and to give him a ſpecial Proxy, impowering him to anſwer to the Matters and Facts that have been intimated to them. One may likewiſe have thoſe Perſons examined upon Interrogatories who have acted by Order of the Corporation,

in relation to the Facts which concern the Corporation.

See touching Examinations upon Interrogatories the Ordinance of 1667. *tit.* 10.

We have explained in the 3d *Book, Title* 6, *and Section* 6, *of the Civil Law in its Natural Order, what relates to an Oath, which makes ſometimes a new kind of Proof.*

TITLE VI.

Of PEREMPTIONS.

The CONTENTS.

1. *What is the Peremption of an Inſtance.*
2. *The Inſtance being loſt, is no interruption of the Preſcription.*
3. *The Peremption of the Appeal implies a Confirmation of the Sentence.*
4. *In what Caſes the Peremption is ſaved.*
5. *What hinders the Courſe of the Peremption.*
6. *When Peremption does not take place in the ſupreme Courts of Juſtice.*
7. *If Peremption takes place in the Inſtance of publick Sales.*
8. *What Affairs are not ſubject to Peremption.*

I.

1 *What is the Peremption of an Inſtance.*

PEREMPTION is a kind of Preſcription, by which the Proceedings in a Cauſe, in an Inſtance, and in a Law-Suit, having been diſcontinued for the Space of three Years, are totally loſt, annulled, and conſidered as if they had never been had at all [a].

[a] *A Suit begun although it be conteſted, yet if by the Lapſe of three Years, it is diſcontinued, the ſame will have no effect to perpetuate or propagate the Action. But the Preſcription ſhall have its courſe, as if the ſaid Suit had never been begun or commenced, and the Party ſhall not be at liberty to alledge that the ſaid Preſcription hath been interrupted.* Ordinance of *Rouſſillon* of 1563. Art. 15.

II.

2 *The Inſtance being loſt is no interruption of the Preſcription.*

When the Inſtance is loſt for want of proceeding in the Cauſe for the Space of three Years, it does not interrupt the Preſcription; ſo that if in an Action Perſonal, which preſcribes in the Space of thirty Years, one had commenced an Action in the nine and twentieth Year, and diſcontinued the Proceedings for three Years, the Action would be barred by Preſcription, and the Party would not be at liberty to commence a new one. But when the Action is not barred by Preſcription, although the Inſtance be loſt, yet the Party may begin a new Proceeding.

See the Ordinance of Rouſſillon *quoted on the foregoing Article.*

III.

3. *The Peremption of the Appeal implies a Confirmation of the Sentence.*

Appeals are liable to be perempted, and in that Caſe the Peremption is in the Eye of the Law a Confirmation of the Sentences; becauſe the Appeal, which is a legal Proceeding, and which is to be conſidered as the principal Proceeding, is loſt.

See the 2d *Article of the Regulation made in the Parliament of* Paris *the* 23d *of* March, 1692.

IV.

4. *In what Caſes the Peremption is ſaved.*

The Peremption of the Inſtance is ſaved, when the Party who has acquired it, or his Proctor, by his Order, renews the Inſtance, gives in a Plea, and does any other Act in the Cauſe, or if any Decree or Order of Court is made, when it is oppoſed by the adverſe Party. It is not reaſonable that a Proctor ſhould, thro' his inadvertency deprive his Client of a Right which has accrued to him.

See the 4th *Article of the ſame Regulation.*

V.

5. *What hinders the Courſe of the Peremption.*

The Death of either of the Parties, of the Proctors, or of the Judge who is appointed Reporter of the Cauſe, the Marriage of a ſingle Woman or Widow, who by her Intermarriage comes under the Power of a Huſband, hinders the Courſe of the Peremption, and the Action is prorogued to thirty Years.

VI.

6. *When Peremption does not take place in the ſupreme Courts of Juſtice.*

In the Supreme Courts of Juſtice, when a Cauſe has been ſet down in the Liſt of Cauſes aſſigned for hearing, or when the Cauſe has been concluded and put into a ſtate of being finally determined, there is no further room for Peremption to take Place, by any diſcontinuance of the Proceedings, becauſe it does not then depend on the Party himſelf to have his Cauſe heard. It is not the ſame Thing with reſpect to the inferior Courts of Juſtice, where the Parties may require the Judges to give their Sentence, and after ſuch Requeſt made in due form, may interpoſe an Appeal, as from the Denial of Juſtice.

See the 2d *Article of the Regulation of* 1692.

VII.

7. If Peremption takes place in the Inſtance of publick Sales.

Peremption does not take Place in Seizures and publick Sales of Immoveables, when Commiſſioners have been once named for that purpoſe, and Leaſes granted under the Authority of the Court purſuant to the ſaid Nomination.

See the 3d *Article of the Regulation of* 1692.

VIII.

8. What Affairs are not ſubject to Peremption.

The Affairs which concern the Demeſnes of the Crown, and the Proceedings in Criminal Proſecutions, where the King and the Publick have the principal Intereſt, are not ſubject to Peremption; becauſe it is not reaſonable that the Negligence of thoſe who are charged with the Conduct of theſe Affairs ſhould be prejudicial to the King, or to the Publick.

The Reader may perhaps wonder that he does not find here, the Law properandum 13. Cod. de judiciis, *which the Authors who have treated of the Practical Part of the Law, and who have compared the Practice of the Courts in* France *with the Civil Law, have all of them quoted on the Subject of Peremption of Inſtances. But there is a great Difference between the Tenor of the Law* properandum, *and that of the 5th Article of the Ordinance of* Rouſſillon. *For the Civil Law, in order to ſhorten Law-Suits, directs that the Judge ſhall pronounce Sentence whether the Parties be abſent or preſent, whether the Proceedings have been continued, or diſcontinued; whereas according to the Ordinance of* Rouſſillon, *the Peremption of an Inſtance takes Place only in caſe the Proceedings have been diſcontinued for three Years together, and that the Party has acquired a Right thereby, although the Judge give no Sentence touching the Merits of the principal Cauſe.*

There are ſome of the Parliaments in France *where the Ordinance of* Rouſſillon *has not been regiſtred and approved, and where Peremption of Inſtances does not take Place, and where likewiſe they do not follow the Diſpoſition of the Law* properandum.

TITLE VII.

Of Sentences, their Execution, and of Coſts.

The CONTENTS.

1. *Of the different Kinds of Sentences.*
2. *What Sentences are Legal.*
3. *In what manner the Sentences are drawn up.*
4. *Which of the Parties ought to be condemned in the Coſts of Suit.*
5. *How the Fruits are to be liquidated in the Execution of Sentences.*
6. *If Interlocutory Decrees are executed proviſionally.*
7. *What definitive Sentences are executed proviſionally.*
8. *Of the Seizure of Moveables in Execution.*
9. *Of the Seizure of Immoveables.*
10. *Perſonal Arreſts.*

I.

1. Of the different Kinds of Sentences.

WE give the Name of Sentence to whatever the Judge decrees, when he gives his Opinion in relation to the Matter in diſpute before him. If that which the Judge decrees regards only the Matters which inſtruct the Cauſe, or tends only to introduce into the Cauſe things without which the Merits of the principal Cauſe cannot well be decided, the Sentence in ſuch caſes is called an Interlocutory Decree. If the Decree of the Judge orders one of the Parties to remain or to be put into Poſſeſſion during the Law-Suit, the Sentence is Proviſional. When the Judge pronounces a Decree touching the Merits of the Cauſe it is a Definitive Sentence.

II.

2. What Sentences are legal.

In order to make a Sentence a legal Sentence, it is neceſſary that it ſhould be pronounced by a competent Judge, in the Form preſcribed by Law, and that it be conformable to the Laws and Cuſtoms of the Country [a]. Thus a Sentence is null, when it has been pronounced by a Court that has not the proper Juriſdiction of the Cauſe, or on a feſtival Day, or without obſerving the Delays preſcribed by Law.

[a] In

[a] In eadem obſervatione numeramus & dies ſolis, quas dominicos rité dixere majores, qui repetito in ſeſe calculo revolvuntur in quibus parem neceſſe eſt habere reverentiam: ut nec apud ipſos arbitros, vel a judicibus flagitatos, vel ſponte electos, ulla ſit cognitio jurgiorum. *l.* 7. *Cod. de feriis.*

Sive pars, ſive integra dilatio fuerit data: eò uſque judicis officium conquieſcat donec petiti temporis defluxerint curricula Feriæ autem ſive repentinæ ſive ſolemnes ſint, dilationem temporibus non excipiantur, ſed his connumerentur. *l.* 7. *Cod. de dilationibus.*

III.

3. In what manner the Sentences are drawn up.

The Preſident of the Court ought at the breaking up of the Court, or ſome time the ſame Day, to ſee what the Regiſter has taken down in Writing, ſign the Minutes thereof, and ſet his Hand to every Judgment that is given. As to the Law-Suits where the Proceedings are in Writing, the Judgments bear Date from the Day that the Cauſe is concluded. It is the Reporter of the Cauſe who inſerts the Date in the Proceſs, before he delivers it into the Regiſtry.

IV.

4. Which of the Parties ought to be condemned in the Coſts of Suit.

Every Party that is caſt in a Suit, whether it be before Judges, or before Arbitrators, ought to be condemned in Coſts [b]. Nevertheleſs if there be many Points in a Cauſe, and one of the Parties prevails in ſome of the Points, and fails in others, the Judge may decree that the Coſts of Suit be compenſated, or he may condemn one of the Parties in ſome part of the Coſts, and compenſate the Overplus.

[b] Sive autem alterutrâ parte abſente, ſive utrâque præſente lis fuerit deciſa: omnes judices, qui ſub imperio noſtro conſtituti ſunt, ſciant victum in expenſarum causâ victori eſſe condemnandum. *l.* 13. §. 6. *Cod. de judiciis.*

See in the Ordinance of 1667, *Art.* 31. *the Proceeding that is to be obſerved in the Taxation of Coſts.*

V.

5. How the Fruits are to be liquidated in the Execution of Sentences.

When a Party is condemned to make reſtitution of the Fruits, he muſt bring in kind thoſe of the laſt Year. With reſpect to the Fruits of the foregoing Years, the Reſtitution that is to be made of them is to be regulated according to the Market Price of the four Seaſons of each Year, taken from the Regiſter that is kept of the Price of all Sorts of Grain each Market Day.

See the 30th *Title of the Ordinance of* 1667.

IV.

6. If Interlocutory Decrees are executed provisionally.

Interlocutory Decrees ought to be executed, notwithſtanding any Appeal from them, when the Grievances which they do to the Party Appellant, are capable of being redreſſed when the Definitive Sentence is given. But when the Injury that the Party would ſuffer by the Execution of the Interlocutory Decree, cannot be afterwards repaired, the Appeal from the Interlocutory Decree ſuſpends the Effect of it. If it happens, for Inſtance, that the Judge admits a Fact to be proved by Witneſſes, and the adverſe Party who inſiſts that ſuch Proof is not admiſſible, interpoſes an Appeal from the ſaid Decree, one cannot proceed to the Examination of the Witneſſes, before the Appeal has been determined.

VII.

7. What definitive Sentences are executed provisionally.

Judges may order their Sentences to be executed proviſionally, when the Demand is founded upon Contracts, Obligations, and Promiſes, that are owned and acknowledged to be genuine; or when the Sum does not amount to one thouſand Livres *French*, in Cauſes that are of a ſummary Diſcuſſion. And ſuch are Servants Wages, the Hire of Day Labourers, the Fees of Phyſicians, *&c.* The Party in whoſe favour the Sentence is ordered to be executed proviſionally, ought to give ſufficient Security, by ſuch Perſons as are eaſy to be come at, and whoſe Ability is duly atteſted, before the Sentence is put in Execution.

VIII.

8. Of the Seizure of Moveables in Execution.

When a Party refuſes to pay the Sum in which he is condemned, an Officer is ordered to ſeize his Moveables, and a Commiſſary is appointed to ſell them in a publick Market-place to the higheſt and laſt Bidder, in order to pay with the Monies ariſing by the ſaid Sale, the Creditors, and the Coſts.

See touching Seizures and the taking of Moveables in Execution, the Ordinance of 1667, *Title* 33.

IX.

9. Of the Seizure of Immoveables.

The Immoveables belonging to the Debtor, are likewiſe taken in Execution, and ſold by a Decree of the Court, to the higheſt Bidder, after due Publication, and obſerving the other Formalities preſcribed by the Laws and Cuſtoms.

X.

10. Perſonal Arreſts.

The perſonal Arreſt of the Debtor is the harſheſt Way of obtaining the Execution of a Judgment, and it is not allowed to be made uſe of in all Sorts of Civil Debts, but only in certain Debts that are privileged, or in which the Debtor has been guilty of ſome Offence; or of an Act

Act that carries ſomething of a criminal Imputation with it. There are likewiſe ſome Perſons who are privileged in this reſpect, ſuch as Clergymen, who are not liable to be arreſted for any Civil Debt of what Nature ſoever.

TITLE VIII.

Of the Ways of obtaining a Redreſs againſt Sentences, and of the Proceedings on Appeals.

The CONTENTS.

1. *What an Appeal is.*
2. *When it is too late to interpoſe an Appeal from a Sentence.*
3. *When the Appeal ſuſpends the Execution of the Sentence.*
4. *Of the Deſertion of the Appeal.*
5. *The Party may demand the principal Cauſe to be determined by the Judge of the Appeal, at the ſame Time that he determines the Grievance.*
6. *What one may do upon an Appeal for the better Defence of their Right.*
7. *Penalties againſt the Appellant who is caſt.*
8. *The Judge made a Party to the Appeal.*
9. *Other Caſes where the Judge may be made a Party to the Appeal.*
10. *The Judge who is properly made a Party to the Appeal, is liable to Coſts and Damages.*

I.

1. What an Appeal is.

AN Appeal is a legal Remedy which the Law gives to Suitors, whereby they may have a Sentence which they conceive to be unjuſt reheard by a ſuperior Court.

II.

2. When it is too late to interpoſe an Appeal from a Sentence.

A Party cannot interpoſe an Appeal from a Sentence which has been given by his own Conſent, nor from a Judgment which he has willingly executed in whole or in part, nor from Judgments which have been intimated to him perſonally, whereof Notice has been left at his Dwelling-Houſe, when he has been ſummoned three Years after ſuch Notice to enter his Appeal, and when he has ſuffered ſix Months to paſs after the ſaid Summons, without entring his Appeal. When the Sentence has been intimated to the Party, and he has not been afterwards ſummoned to enter his Appeal, he may enter it within ten Years from the Time that the Sentence was intimated to him. In the firſt Caſe the Church and Hoſpitals have for entring their Appeals ſix Years inſtead of three, and in the ſecond Caſe they have twenty Years inſtead of ten. Theſe Delays do not begin to run againſt Minors, nor againſt thoſe who are abſent out of the Kingdom on the King's Service, but from the Day that the firſt are of Age, and the others return into the Kingdom. If the Perſon to whom the Sentence has been intimated, dies within the three Years, his Heir or Executor ought to have a new Delay of one whole Year, over and above what remains to run of the three Years, before he is ſummoned to interpoſe his Appeal from the Sentence.

See the Ordinance of 1667. *title* 27.

[What is ſaid in this Article touching the Time of entring Appeals, is peculiar to the Laws of *France*. For by the Civil Law, the Party who complained of the Injuſtice of a Sentence, was obliged to enter his Appeal from it within the Space of ten Days after the Date of the Sentence. *Cod. de appellat. l.* 6. *Auth. hodie.* And in *England* the Space of fifteen Days after Sentence is limited by Act of Parliament for entring Appeals. *Stat.* 24. *H.* 8. *cap.* 12.]

III.

3. When the Appeal ſuſpends the Execution of the Sentence.

The Effect of the Appeal is to ſuſpend the Execution of Sentences, except in certain Caſes, where the publick Intereſt has made it neceſſary that Sentences ſhould be executed proviſionally [a].

[a] Appellatione interpoſitâ, licet à judice repudiata ſit, in præjudicium deliberationis nihil fieri debere, & in eo ſtatu omnia eſſe, quo tempore pronunciationis fuerunt, ſæpiſſimè conſtitutum eſt, *l.* 3. *Cod. de appellat.*

IV.

4. Of the Deſertion of the Appeal.

If the Appellant does not renounce his Appeal within eight Days after it has been intimated, the Party appellate may take out what they call Letters of Anticipation, in order to proceed upon the Appeal [b]; or if the Party appellate has not taken out Letters of Anticipation, nor the Appellant proſecuted his Appeal, within the Time

Time limited for each of them, according to the Uſage of the reſpective Courts, the Party appellate takes out Letters of Deſertion, by virtue whereof he demands of the Judge from whoſe Sentence the Appeal is interpoſed that the Sentence be put in execution; and of the Judge before whom the Appeal is lodged that the ſame may be declared deſerted. The Deſertion of the Appeal is no Obſtacle why the Party may not appeal anew upon his refunding the Expences of the Deſertion, provided he be ſtill within the Time of appealing.

[b] Si quis libellos appellatorios ingeſſerit, ſciat ſe habere licentiam arbitrium commutandi, & ſuos libellos recuperandi, ne juſtæ pœnitudinis humanitas amputetur. *l.* 28. *Cod. de appellat.*

V.

5. The Party may demand the principal Cauſe to be determined by the Judge of the Appeal, at the ſame Time that he determines the Grievance.

In hearing the Merits of an Appeal from a Grievance upon an Incident, one may demand that the principal Cauſe be brought before the ſame Judge who is to determine the Appeal; and he has a Right to determine the principal Cauſe alſo, provided he gives Sentence on the principal Cauſe and the Grievance at one and the ſame Time.

[According to the Practice of the Courts in *England*, which are guided by the Rules of the Civil and Canon Law, when the Judge of the Appeal pronounces for the Grievance, he retains the principal Cauſe of courſe; becauſe the inferior Judge who has done a Grievance in an Incident of the Cauſe, is not to be truſted with the principal Cauſe. But if the Judge of the Appeal from a Grievance, pronounces againſt the Appeal, and in conſequence of his Sentence that the inferior Judge has done no Grievance remits the Cauſe back to him, yet the Party appellate may nevertheleſs retain the principal Cauſe before the Judge of the Appeal, and the Appellant cannot decline it, becauſe he has already voluntarily ſubmited himſelf to the Juriſdiction of the ſaid Judge, by bringing his Appeal before him. *Clarke's Praxis in Curiis Eccleſiaſticis. tit.* 253.]

VI.

6. What one may do upon an Appeal for the better Defence of their Right.

In an Appeal one may plead new matter [c], have his adverſe Party examined on Interrogatories, produce Witneſſes [d], make new Demands which have a connection with the principal matter in diſpute, ſo as to have them all decided together; and in general he may do every Thing that may tend to inform the Judge more fully, touching the merits of the principal Cauſe that has been decided in the firſt Inſtance.

[c] Si quid autem in agendo negotio minus ſe allegaſſe litigator crediderit, quod in judicio acto fuerit omiſſum: apud eum qui de appellatione cognoſcit perſequatur: cum votum gerentibus nobis nihil aliud in judiciis, quam juſtitiam, locum habere debere, neceſſaria res fortè tranſmiſſa, non excludenda videatur. Si quis autem poſt interpoſitam appellationem neceſſarias ſibi putaverit eſſe perſonas, per quas apud judicem, qui ſuper appellatione cognoſcet, veritatem poſſit oſtendere, quam exiſtimavit occultam, hocque fieri judex perſpexerit: ſumptus iiſdem ad faciendi itineris expeditionem præbere debebit. *l.* 6. §. 1. & 2. *Cod. de appellat.*

[d] Per hanc divinam ſanctionem decernimus ut licentia quidem pateat in exercendis conſultationibus, tam appellatori quam adverſæ parti, novis etiam adſertionibus utendi, vel exceptionibus, quæ non ad novum capitulum pertinent, ſed ex illis oriuntur, & illis conjunctæ ſunt quæ apud anteriorem judicem noſcuntur propoſitæ. Sed & ſi qua dicta quidem allegatio monſtrabitur, vel inſtrumentum aliquod prolatum, probationes tamen illo quidem defuerint tempore, verum apud ſacros cognitores ſine procraſtinatione præberi poterunt: id quoque eos admittere, quo exercitatis jam negotiis pleniore ſubveniatur veritatis lumine. *l.* 4. *Cod. de temp. & reparat. appellat.*

[*What is ſaid in this Article of pleading new matter in an Appeal, is to be underſtood of Appeals from Definitive Sentences. For that is not allowed in Appeals from a Grievance done in an Interlocutory Decree, unleſs the Grievance be ſuch as cannot be redreſſed in the Appeal from the Definitive Sentence. The Rule in Appeals from Grievances is, that they are to be heard* ex iiſdem actis, *that is, that no more is to be brought before the Judge of the Appeal than what was before the Judge below.* Clement. lib. 2. tit. 12. de appellat. cap. 5.]

VII.

7. Penalties againſt the Appellant who is caſt.

The Appellant who loſes his Appeal ought to pay a Fine, and to be condemned in the Coſts of the firſt Inſtance, as well as in thoſe of the Appeal.

VIII.

8. The Judge made a Party to the Appeal.

One may appeal as from a Denial of Juſtice, and make the Judge a Party, when the Cauſe being ripe for hearing, he delays or refuſes abſolutely to decide it, provided the Party who calls on the Cauſe has made two formal Demands of Juſtice from the Judge, by leaving Notice of his Prayer either in the Regiſtry of the Court, or at the Judge's Houſe, or acquainting himſelf perſonally with it.

See the Ordinance of 1667. *tit.* 25.

IX.

9. Other caſes where the Judge may be made a Party to the Appeal.

There are many other Caſes in which the Judge may be made a Party to the Appeal from his Sentence, with the Permiſſion of the Judge before whom the Appeal is brought [e]. As if he has given Sentence either out of Hatred, or Fa-

vour to any of the Parties, if he has been bribed, if he has given Sentence contrary to the plain known Law, or if he has assumed the Cognizance of Causes which no ways belonged to his Jurisdiction.

[e] Omnes cognitores & judices a pecuniis & patrimoniis abstineant, neque alienum jurgium putent suam prædam. Etenim privatarum quoque litium cognitor, idemque mercator, statutam legibus cogetur subire jacturam. *l.* 3. *Cod. ad Leg. Jul. repetund.*

Si quis scit venalem fuisse de jure sententiam, si quis pœnam vel pretio remissam, vel vitio cupiditatis ingestam, si quis postremò quâcunque de causâ improbum judicem potuerit approbare, is vel administrante eo, vel post administrationem depositam in publicum prodeat, crimen deferat, delatum approbet, cum probaverit & victoriam reportaturus & gloriam. *l.* 4. *ibid.*

X.

10. The Judge who is properly made a Party to the Appeal is liable to Costs and Damages.

The Judge who is declared to have been properly made a Party to the Appeal, ought to be condemned in Costs and Damages to the Party who has made him a Defendant in the Appeal.

TITLE IX.

Of the Decrees of Supreme Courts of Justice, and the Means of getting them revoked, or annulled.

The CONTENTS.

1. *Of petitioning the Court it self against the Decree, or applying to the King in Council to have it reversed.*
2. *In what stile the Writ for petitioning runs.*
3. *The Heads of Complaint to be suggested in a Petition for Redress against Decrees pronounced against Persons of full Age.*
4. *Reasons to be suggested in a Petition for Minors, and for the King.*
5. *Within what time the Petition ought to be lodged.*
6. *Proceedings upon the Petition.*
7. *If two Petitions may be preferred touching the same Affair.*
8. *Decrees pronounced by Sovereign Courts.*
9. *Of a third Sort of Opposition.*
10. *Of the Interpretations of a Decree.*

1. Of petitioning the Court it self against the Decree, or applying to the King in Council to have it reversed.

THERE lies no Appeal from Judgments given by Courts which the Sovereign has impowered to administer Justice in the last Resort [a]. But one may in certain Cases be relieved by the extraordinary Ways of obtaining leave from the King to present a Petition to the Court, setting forth the particular Errors and Defects of the Judgment complained of, or applying to the King's Council, in order to have the Judgment reversed as being directly contrary to the known and received Law of the Kingdom [b].

[a] Appellandi facultas (a sententiis Præfecti Prætorio) interdicta est. Credidit enim Princeps, eos qui ob singularem industriam, exploratâ eorum fide & gravitate, ad hujus officii magnitudinem adhibentur, non aliter judicaturos esse pro sapientiâ ac luce dignitatis suæ, quam ipse foret judicaturus. *l. unicâ* §. 2. *ff. de Officio Præfecti Prætorio.*

[b] Litigantibus in amplissimo prætorianæ præfecturæ judicio, si contra jus se læsos affirment, non provocandi, sed supplicandi licentiam ministramus: licet pro curiâ, vel qualibet publicâ utilitate, seu aliâ causâ dicatur prolata sententia. *l. unicâ. Cod. de sententiis præfectorum prætorio.*

in Council to have it reversed.

[*In* England *there lies no Appeal from a Court of Delegates, which is impowered to judge finally of all Causes that are to be decided by the Civil or Canon Law. And the only Way of being relieved against a Sentence of a Court of Delegates, is by petitioning the King for a Commission of Review, appointing other Judges to review the Sentence complained of. But as this is not a Matter of Right which the Subject can claim, and is only pray'd as a meer Grace and Favour, the same is not readily granted unless upon extraordinary Occasions, when the Circumstances of the Case appear plainly to be such as deserve it.* Cok. 4. Inst. pag. 3. 41.]

II.

2. In what stile the Writ for petitioning runs.

The Writ in Form of a Petition runs in the Name of the King, who requires the Judges who have pronounced the Decree, that if what has been suggested in order to obtain the said Writ be duly verified, they put the Parties in the same State and Condition they were in before the Decree.

The Writ against Sentence given by the Presidial Courts, mentioned in the first Article of the Edict, is not taken out of the Chancery; it being sufficient to apply to the same Presidial by a bare Petition.

III.

3. The Heads of Complaint to be suggested in a Petition for Redress against Decrees pronounced against Persons of full Age.

The Heads of Complaint suggested in a Petition for Redress against Decrees pronounced against Persons of full Age, are eleven in number [c]. If there is any personal Deceit or Cousenage on the Part of any one of the Parties; if the Manner of proceeding prescribed by Law has not been observed; if Judgment has been given touching Things that were not demanded, or not disputed; if more has been

4. Reasons to be suggested in a Petition for Minors, and for the King.

5. Within what time the Petition ought to be lodged.

been pronounced for than has been demanded; or if the Judge has omitted to give Sentence on any Point contained in the Demand; if there is a Contrariety of Decrees or Judgments in the laſt Reſort, between the ſame Parties, on the ſame Heads, and in one and the ſame Juriſdiction; if there are Diſpoſitions that are inconſiſtent with one another in the ſame Decree; if the Affairs wherein the King, the Church, or the Civil Government are concerned have not been communicated to the Advocates or Sollicitors General; if the Judgment has been founded on forged Deeds, or upon Offers which have been juſtly diſallowed; or if the Party has newly recovered Writings of Importance to decide the Matter in diſpute, which had been ſecreted by the Means of his Adverſary.

[c] Præfecti etiam prætorio ex ſuâ ſententiâ poſſunt in integrum reſtituere, quamvis appellari ab his non poſſit. Hæc idcirco tam varie; quia appellatio quidem iniquitatis ſententiæ querelam: in integrum verò reſtitutio erroris proprii veniæ petitionem, vel adverſarii circumventionis allegationem continet. *l.* 17. *ff. de minoribus* 25. *annis*.

Si quando de aliquâ causâ proceſſerit definitiva ſententia, & provocatio fuerit ſubſecuta: appellationis examinatores ſecundum leges quæ tempore definitivæ ſententiæ obtinebant, terminum dare negotio: hoc eodem videlicet obſervando, & in retractandis ampliſſimæ Prætorianœ ſententiis. *Nov.* 115. *tit.* 16. *cap.* 1.

Ultra id, quod in judicium deductum eſt, excedere poteſtas judicis non poteſt. *l.* 18. *ff. de communi dividundo.*

Falſam quidem teſtationem qua diverſa pars in judicio adverſus te uſa eſt, ut proponis, ſolito more arguere non prohiberis: ſed cauſa judicati in irritum non devocatur, niſi probare poteris, eum, qui judicaverit, ſecutum ejus inſtrumenti fidem, quod falſum eſſe conſtiterit, adverſus te pronuntiaſſe. *l.* 3. *Cod. ſi ex falſis inſtrumentis vel teſtimoniis judicatum ſit.*

IV.

4. Reaſons to be ſuggeſted in a Petition for Minors, and for the King.

Minors, Clergymen, and Communities may apply for Redreſs againſt Decrees by Way of Petition, when they have not been defended, or when they have not been repreſented by Perſons duly appointed. There is likewiſe room for preſenting a Petition, in relation to Judgments which concern the Rights of the Crown and of the Demeſnes, when the King's Council have not been called before the Concluſion of the Cauſe, to know whether they have any more Writings to produce, or any new Matter to alledge; of which mention ought to be made in the Decree.

V.

5. Within what time the Petition ought to be lodged.

The Writ for Leave to petition againſt a Decree muſt be taken out, intimated, and ſerved on the adverſe Party within ſix Months, to be computed, with regard to Majors, from the Day that they were ſerved with a Copy of the Decree, or Judgment in the laſt Reſort, either Perſonally, or by proper Notice left at the Dwelling-houſe; and with reſpect to Minors, to be computed from the Day that they arrive at the Age of their Majority. There is a whole Year's Delay from the Day of the Service of the Decree that is granted to Churches, Hoſpitals, Communities, and to thoſe who are abſent out of the Kingdom on Account of the Publick. The Heirs of him who dies within ſix Months from the Time of the Service of the Decree, have ſtill a further Delay of ſix Months more from the Time that the Decree has been ſerved on him anew. It is the ſame Thing in the Caſe of Incumbents of Church Benefices, who have a new Delay of one Year granted them for petitioning, after they have been ſerved with a Copy of the Decree, when they have ſucceeded within the Year after the Service of the Decree on the former Incumbents, who did not reſign in their Favour. When the Grounds of Complaint ſuggeſted in the Petition are, that the Sentence was founded on Deeds that are counterfeit, or that Writings, which are of importance to decide the Merits of the Cauſe, are newly found, which were kept up by the adverſe Party; in that caſe the Delay runs only from the Day that the Forgery, or the Writings that were wanted are diſcovered, provided they have Proof thereof in writing. If the Petition is againſt a Sentence that has been given by a Preſidial Court of the firſt Sort mentioned in the Edict, the Intimation and Service thereof muſt be within half the Time that is allowed either to Majors, or Minors, to Churches, to Communities, and to thoſe who are abſent out of the Kingdom on a publick Account, for obtaining Redreſs againſt Decrees that are final.

VI.

6. Proceeding upon the Petition.

The Petition muſt be argued in the ſame Court where the Decree complained of was pronounced, unleſs it be in ſuch Courts where there is a particular ſeparate Court appointed for the Hearing of Petitions, in which the Merits of the Petition muſt be argued, ſaving always the Liberty of remitting it to the whole Court, if the Parties are ordered to argue the Merits of it in full Aſſembly. In the Argument on theſe Petitions, the Counſel are to inſiſt only on the Exceptions to the Manner and Form of the Proceedings, without entring into the Merits of the Cauſe. When the Suggeſtions in the Petition are declared to be ſufficient, the Parties are reſtored to the ſame Condition they were in before the Decree, and then Sentence is afterwards given upon the Merits of the Cauſe.

VII.

7. If two Petitions may be preferred touching the ſame Affair.

The Party whoſe Petition has been rejected, is not to be allowed to preſent another Petition, whether it be againſt the former Decree, or againſt that which has rejected his Petition, nor even againſt the Decree that has been made touching the Reſcinding of the former Decree, when the Writ relating thereto has been duly entred [d].

[d] Si quis adverſus præfectorum prætorio ſententias duxerit ſupplicandum, victuſque defuerit, nullam habebit licentiam iterum ſuper eâdem causâ ſupplicandi. *l.* 5. *Cod. de precibus Imperatori offerendis.*

See in relation to Petitions of this nature, the 35th *Title of the Ordinance of* 1667.

VIII.

8. Decrees pronounced by Sovereign Courts.

When the Decrees pronounced by Sovereign Courts are directly contrary to Statutes and Ordinances, or to the known Cuſtoms, in that caſe the Application muſt be to the King's Council, in order to have them reverſed. Thus the Suggeſtions in Petitions of the firſt Sort are drawn from the Quality and Act of the Party, but in this laſt Caſe the Suggeſtions muſt be taken from the Act of the Judge.

See in relation to the reverſing of final Decrees, the Regulations touching Proceedings before the Council Board.

IX.

9. Of a third Sort of Oppoſition.

When any one finds himſelf aggrieved by a Decree to which he was not a Party, neither by a proper Appearance, nor by Default; he is always at liberty to make uſe of a third Sort of Oppoſition againſt the ſaid Decree, whenever it is made uſe of againſt him [e]. And the Affair is decided in the ſame Manner as if the firſt Decree, to which no Regard is had, had it never been made.

[e] De unoquoque negotio præſentibus omnibus quos cauſa contingit, judicari oportet: aliter enim judicatum tantum inter præſentes tenet. *l.* 47. *ff. de re judicata.*

X.

10. Of the interpretation of a Decree.

When there is any Clauſe in a Decree, about the true Meaning whereof the Parties have juſt Cauſe to be divided, they apply to the Judges who pronounced the Decree for the Interpretation thereof. They ought to be very attentive to hinder the Parties, under the Pretext of aſking for an Explanation of the Decree, from praying a Review of the whole Decree.

PART II.

Of the Order of Judicial Proceedings.

TITLE I.

Of Accuſations, Complaints and Denunciations.

The CONTENTS.

1. *Different ways of accuſing a Criminal.*
2. *Of Complainants, and of the Form of the Complaint.*
3. *Of the Accuſer, and the Prayer which he makes.*
4. *When the Accuſer may retract his Accuſation.*
5. *In what manner the Information of a bare Informer is taken.*
6. *Who are the proper Parties in Criminal Proſecutions.*
7. *Penalties to which the Accuſer is liable when the Accuſation is malicious.*
8. *In what caſe the King's Proctor may be liable to Damages.*

I.

1. Different ways of accuſing a Criminal.

THERE is a Diſtinction to be made in Matters criminal, between a Complaint, an Accuſation and Denunciation.

II.

2. Of Complaints, and of the Form of the Complaint.

The Complainant is he who preſents a Petition to the Judge, in which he complains of a Crime that has been committed, and therein ſets forth the principal Circumſtances of the Fact, and avers the Truth of them, without demanding any Reparation, without making himſelf a Party, and conſequently without being obliged to advance any Thing for carrying on the Proſecution, or being intitled either to Damages or Coſts, in caſe the Party accuſed be found guilty of the Crime laid to his Charge [a]. All the Sheets of the Petition of Complaint ought to be ſigned by the Party, or by his Proctor impowered by a ſpecial Proxy for that Purpoſe. And mention is made in the Minutes, and on the engroſſed Peti-

tion, of its being ſigned by the Party, or of his Refuſal to do it.

[a] Libellorum inſcriptionis conceptio talis eſt, Conſul & dies. Apud illum prætorem vel proconſulem Lucius Titius profeſſus eſt, ſe Mæviam Lege Julia de adulteriis ream deferre : quod dicat eam cum Caio Seio, in civitate illâ, domo illius, menſe illo, conſulibus illis, adulterium commiſiſſe. Utique enim & locus deſignandus eſt, in quo adulterium commiſſum eſt : & perſona cum quâ admiſſum dicitur, & menſis ; hoc enim Lege Juliâ publicorum cavetur. Et generaliter, præcipitur omnibus qui reum aliquem deferunt. ——— Item ſubſcribere debebit is, qui dat libellos, ſe profeſſum eſſe, vel alius pro eo, ſi literas neſciat *l.* 3. *ff. de accuſat. & inſcriptionibus.*

See the Ordinance of 1670, *Title* 3.

III.

3. Of the Accuſer, and the Prayer which he makes.

The Accuſer is he who makes himſelf a Party to the Suit, either by his Complaint, or by a ſubſequent Act, who procures Informations to be taken, who carries on the Accuſation in his own Name, and at his own Expences, and who concludes with a Prayer for Satisfaction of his Damages. In *France*, the Accuſer never prays that any corporal Puniſhment be inflicted on the Party offending ; becauſe ſuch Concluſions, or Prayers, are to be made by the King's Proctors, by the Proctors Fiſcal of ſuch Lords as have Juriſdiction within their Manors, or by Promoters of the Office in Eccleſiaſtical Courts, who are always the Parties principal in Criminal Proſecutions. Becauſe thoſe Perſons who are intruſted with the Care of the Publick are more nearly concerned in the Puniſhment of Crimes, than the particular Perſons who have been injured.

IV.

4. When the Accuſer may retract his Accuſation.

When the Complainant has made himſelf a Party to the Suit, whether it be by his Complaint, or by an Act which he may interpoſe in any Part of the Cauſe, provided it be before Judgment given, he may retract the ſame within twenty four Hours after the Time of his giving notice that he had made himſelf a Party. But ſuch Declaration does not excuſe him from paying the Coſts which were incurred before his Retractation.

See the Ordinance of 1670, *Title* 3.

V.

5. In what manner the Information of a bare Informer is taken.

He who is only a bare Informer goes and declares to the King's Proctor, that ſuch a Perſon, whom he names, has committed a Crime, and he relates the particular Circumſtances of it. That Declaration is entred in the Regiſter Book of the King's Proctor, or of the Proctor Fiſcal of the Lordſhip, and the Informer ſets his Hand to it. If the Informer cannot write, the Regiſter of the Office takes it down in writing in the Preſence of the Informer, and mentions the Reaſon why the Information is not ſigned.

See the Ordinance of 1670, *Title* 3.

VI.

6. Who are the proper Parties in Criminal Proſecutions.

The King's Attorney and Sollicitor General, and the Proctors Fiſcal of Lords who have a Juriſdiction, being charged by virtue of their Office with the publick Revenge, ought to carry on the Proſecution againſt Criminals, although there be no Accuſer, nor even Informer. In which caſe the Proſecution is at the Charge of the King, or of the Lord who has a Sovereign Juriſdiction for the Tryal of ſuch Crimes.

VII.

7. Penalties to which the Accuſer is liable, when the Accuſation is malicious.

When the Accuſation is judged to be malicious, the Accuſers and the Informers are condemned to pay the Expences and Damages of the Party accuſed, and ſometimes to ſuffer bodily Puniſhments, according to the Nature and Circumſtances of the Calumny [b]. But the Accuſer is excuſed, if he has not out of ill will preferred an Accuſation which he knew to be ill grounded ; if he had reaſon to believe that the Perſon whom he accuſed was really guilty, and if he was bound in Honour and in Point of Intereſt to proſecute the Criminal.

[b] Quiſquis crimen intendit, non impunitam fore noverit licentiam mentiendi. *l.* 10. *Cod. ad calumniatoribus.*

Sed non utique, qui non probat quod intendit, protinus calumniari videtur ; nam ejus rei inquiſitio arbitrio cognoſcentis committitur ; quia reo abſoluto, de accuſatoris incipit conſilio quærere, qua mente ductus ad accuſationem proceſſit, & ſi quidem juſtum ejus errorem repererit, abſolvit eum : ſi vero in evidenti calumniâ eum deprehenderit, legitimam pœnam ei irrogat. *L. unicâ* §. 3. *ff. ad Senat. Turpilianum.*

Qui non probaſſe crimen quod intendit, pronuntiatur : ſi culumniæ non damnetur, detrimentum exiſtimationis non patitur. Non enim ſi reus abſolutus eſt, ex eo ſolo etiam accuſator qui poteſt juſtam habuiſſe veniendi ad crimen rationem, calumniator credendus eſt. *l.* 3. *Cod de calumniatoribus.*

The Ordinance of King Philip *the Fourth, in the Year* 1303, *is conformable to theſe two laſt Laws, and it requires nothing more to exempt any one from falling under the Penalty of Calumny, than barely that the Party accuſed be charged with the Crime by the Teſtimony of one Witneſs without Reproach, or that there be ſtrong Preſumptions againſt him.*

VIII.

8. In what Caſe the King's

The King's Proctor, or the Proctor Fiſcal of the Lord within whoſe Juriſdiction

Proctor may be liable to Damages.

tion the Proſecution has been carried on, ought to name the Informer, after the Criminal has been acquitted; that he who has been raſhly accuſed may have his recourſe for Recovery of Damages [c]. If the King's Proctor, or the Proctor Fiſcal of the Lord, have carried on the Proſecution without a previous Information, they themſelves ought to be condemned to pay Damages to the Party accuſed; which ought not to take Place, except in the Caſe where the Accuſation appears to be a manifeſt Calumny.

[c] Advocatum fiſci, qui intentionem delatoris exequitur, in omnibus officii neceſſitas ſatis excuſat. *l.* 5. §. 13. *de his quæ ut indignis auferuntur.*

TITLE II.

Of Informations, and Decrees.

The CONTENTS.

1. *A Relation of the whole Fact to be drawn up in Writing, after the Complaint is lodged.*
2. *The Inſpection of wounded Perſons by Surgeons.*
3. *When the Crime is eſtabliſhed, the next Step is, to take the Information.*
4. *How Witneſſes are compelled to give their Teſtimony.*
5. *Of the Circumſtances which the Witneſs ought to explain before he depoſes.*
6. *What he is to obſerve in giving his Depoſition.*
7. *Publications of Monitions, to oblige Perſons to diſcover what they know.*
8. *Different kinds of Decrees.*
9. *Rules that are obſerved in granting Decrees.*
10. *When to Arreſt or Impriſon a Perſon in a previous Information.*
11. *The gradual Converſion of Decrees from one to another.*
12. *Of the Excuſes made by the Criminal.*

I.

1. A Relation of the whole Fact to be drawn up in writing after the Complaint is lodged.

THE firſt Thing that the Judge ought to do upon the Complaint made, either by a private Party, or by the publick Officers, is to examine whether any Crime has been really committed or not, to inform himſelf of all the Circumſtances of the Time and Place where the Fact was done, and to draw up a Relation thereof in Writing; which he ought to lodge in the Regiſtry within four and twenty Hours, together with the Cloaths, Moveables, and Arms which may be of ſervice to convict the Criminal. And this is more eſpecially to be obſerved, when any one has been killed or wounded [a].

[a] Item illud ſciendum eſt, niſi conſtet aliquem eſſe occiſum, non haberi de familiâ quæſtionem. Liquere igitur debet, ſcelere interemptum, ut Senatuſconſulto locus ſit. *l.* 1. §. 24. *ff. de Senatuſcon. Silaniano.*

II.

2. The Inſpection of wounded Perſons by Surgeons.

Thoſe who are wounded may get their Wounds to be inſpected by ſworn Surgeons, who draw up a Relation thereof in Writing, in which they ought to ſet down diſtinctly the Condition of the Wound, of the Inſtrument with which it was given, of the Place where the Wound is, and of the Condition of the ſick Perſon; that in caſe any Thing is to be decreed for Alimony, or for Medicines, the Allowance may be proportioned to the Condition in which the wounded Perſon appears to be, and to the Damage which his Family ſuſtains by his Wound [b]. The Perſons who proſecute others for Murder, may likewiſe procure the dead Corpſe to be inſpected, that it may appear from thence whether the Deceaſed died of his Wounds.

[b]. Ratio habeatur. —— impenſarum in curationem factarum, & operarum amiſſarum, quaſque amiſſurus quis eſſet inutilis factus. *l.* 3. *ff. ſi quadrupes pauperiem feciſſe dicatur.*

Si vulneratus fuerit ſervus non mortiferè, negligentiâ autem perierit, de vulnerato actio erit, non de occiſo. *l.* 30. §. 4. *ad Legem Aquiliam.*

Si ex plagis ſervus mortuus eſſet, neque id medici inſcitiâ aut domini negligentiâ accidiſſet, rectè de injuriâ, occiſo eo agitur. *l.* 52. *ibid.*

See the Ordinance of 1670, *Title* 5.

III.

4. How Witneſſes are compelled to give their Teſtimony.

When the Fact of the Crime is well eſtabliſhed, the next Step is, to take the Information, that is, to examine the Witneſſes in order to find out the true Author of the Crime. The Witneſſes are procured by the Accuſer, or by the publick Officer who carries on the Proſecution [c]. For it is the Part of the Accuſers to bring Proof of what they alledge; and the Party accuſed is acquitted, if there is no Proof againſt him.

[c] Qui accuſare volunt, probationes habere debent. —— Actore enim non probante, qui convenitur, & ſi nihil ipſe præſtat, obtinebit. *l.* 4. *Cod. de edendo.*

IV.

5. Of the Circumſtance which the

It being for the Intereſt of the Publick that Crimes do not go unpuniſhed, Witneſſes

neſſes may be compelled to give their Teſtimony, either by condemning them to pay a Fine in caſe of Refuſal, or by Impriſonment, if they are Lay-Perſons; and by a Fine, if they are Clergymen; and by ſeizing the Temporal Revenues of the Monaſtery, if the Witneſſes are Monks. We muſt except from this Rule the Relations of the Party accuſed, who cannot be compelled to give their Teſtimony, no more than the Advocate or Proctor whom they have conſulted in relation to the Accuſation. For their Office obliges them to Secrecy as much as Confeſſors. Witneſſes of both Sexes are examined, although they be under the Age of Puberty. It is the Judge's Buſineſs to examine in the Courſe of the Proceeding what Regard ought to be had to their Teſtimony.

See the 3d *Section of the* 6th *Title of the* 3d *Book of the Civil Law in its Natural Order, where the Proofs of this Article are to be met with. The Reader may likewiſe conſult the Ordinance of* 1670, *Title* 6. *It is this Ordinance which directs, contrary to the* Roman *Law, that Witneſſes ſhall be examined although they be under the Age of Puberty.*

V.

5. Of the Circumſtances which the Witneſs ought to explain before he depoſes.

The Witneſs when he appears before the Judge, ought in the firſt Place to produce the Summons with which he was ſerved to oblige him to come and give his Teſtimony; in the next Place he is to be ſworn; and then he declares every Thing that may ſerve to ſhew what Regard ought to be had to his Depoſition, his Name, his Surname, his Age, his Quality, the Place of his Abode, if he is a Servant or Domeſtick to any of the Parties, if he is related to them by Blood or Affinity, and in what Degree.

See the Section of the Civil Law in its Natural Order quoted on the foregoing Article; as alſo the 6th *Title of the Ordinance of* 1670.

VI.

6. What he is to obſerve in giving his Depoſition.

After this Declaration made by the Witneſs, which the Regiſter is to ſet down in his Depoſition on pain of Nullity of his Examination, he is to acquaint the Judge in a clear, diſtinct, and impartial Manner, with every Thing that he knows, which makes either for or againſt the Party accuſed [d]. His Depoſition is taken down in Writing by the Regiſter in preſence of the Judge, after which it is read over to him, and he declares whether it be agreeable to his Mind, and whether he perſiſts in it; then he ſigns it, or a Reaſon is ſet down why he does not ſign it. Both the Judge and Regiſter do alſo ſign the Depoſition, and the Judge ſigns each Page of it. It is the Judge that taxes the Charges and Allowance that is given to Witneſſes.

[d] In criminalibus. —— in quibus de magnis eſt periculum, omnibus modis apud judices præſentari teſtes: & quæ ſunt eis cognita edocere: ubi. —— erit opus omnibus obſervationibus, *Nov.* 90. *cap.* 5.

See the laſt quoted Section of the Civil Law in its Natural Order, and the Ordinance of 1670.

VII.

7. Publication of Monitions, to oblige Perſons to diſcover what they know.

One may obtain permiſſion from the Judge to have Monitions publiſhed, in order to oblige Witneſſes by Eccleſiaſtical Cenſures to diſcover Facts within their Knowledge. One ought not to name, nor deſcribe the Perſons in the Monitions, unleſs it be impoſſible to avoid it, as in the Caſe of a Monition publiſhed in relation to a Fact of Adultery.

See the Ordinance of 1670, *Title* 17.

VIII.

8. Different kinds of Decrees.

When the Party accuſed is charged by Information, or other Proof, a Decree iſſues out againſt him. There are three kinds of Decrees; the Firſt is to call him to anſwer to the Charge; the Second is to oblige him to appear in Perſon; and the Third is a Decree to take him into Cuſtody. The only Difference between the two firſt Decrees is, that the Decree to anſwer does not imply, as the Decree for a Perſonal Appearance does, a Prohibition to a Judge, or other publick Officer, to act in his publick Capacity until he obeys the Order of Court; and that the firſt Decree ſuppoſes a leſs Degree of Proof, or a leſs Offence than the Second.

IX.

9. Rules that are obſerved in granting Decrees.

The Judge having ſeen the Concluſions of the King's Counſel upon the Informations, pronounces one of theſe three Decrees againſt the Party accuſed; according to the Quality of the Crimes, the Proofs, the Preſumptions, and the Perſonal Arreſt is more readily granted againſt a Vagabond, or one that is not known, than againſt a Perſon that has a fixed Abode; againſt one of a mean Condition, than againſt a Magiſtrate, or a Gentleman [e].

[e] De cuſtodiâ reorum Proconſul æſtimare ſolet, utrum in carcerem recipienda ſit perſona, an militi tradenda, vel fidejuſſoribus committenda, vel etiam ſibi. Hoc autem vel pro criminis quod objicitur qualitate, vel propter honorem, aut propter ampliſſimas facultates, vel pro innocentiâ perſonæ, vel pro dignitate ejus, qui accuſatur, facere ſolet. *l.* 1. *ff. de cuſtodia & exhibitione reorum.*

See the Ordinance of 1670, *Title* 10.

X.

X.

10. *When to Arreſt or Impriſon a Perſon in a previous Information.*

One may decree a Perſonal Arreſt without a previous Information, when the Crime is notorious, that is to ſay, when it has been committed in the Preſence of a great many People, when the Charge is for fighting a Duel, when the Perſons accuſed are Vagabonds, and have no fixed Place of Abode, or for Crimes committed by Servants in the Houſe of their Maſter. One may likewiſe impriſon, without any previous Information, him who has been conducted to Priſon with the publick Voice and Acclamation of the People, or who has been taken in the Fact, ſuch as a Thief who has been ſurprized whilſt he was committing the Theft, or on whom the Thing ſtolen has been found, the Murderer who has been ſeen with his Sword naked and bloody in the Place where the Murder was committed, the Adulterer who has been taken in the Act[f].

[f] Fur eſt manifeſtus, quem Græci ἐπ' αὐτοφώρῳ appellant, hoc eſt, eum qui deprehenditur cum furto. Et parvi refert, à quo deprehendatur, utrum ab eo cujus res fuit, vel ab alio. Sed utrum ita demum fur ſit manifeſtus, ſi in faciendo deprehendatur, an vero & ſi alicubi fuerit deprehenſus? Et magis eſt, ut & Julianus ſcripſit, & ſi non ibi deprehendatur ubi furtum fecit, attamen eſſe furem manifeſtum, ſi cum re furtivâ fuerit apprehenſus priuſquam eo loci rem pertulerit, quo deſtinaverat. *l.* 3. *ff. de furtis.*

See the Ordinance of 1670, *Title* 10.

XI.

11. *The gradual Converſion of Decrees from one to another.*

If he who has been ordered to anſwer to the Charge, does not appear within the Time that is fixed by the Order of Court, according to the Diſtance of the Place where he lives, the ſaid Decree is converted into an Order for his perſonal Appearance; and if that Order is not complied with within the Time prefixed, then an Order iſſues for the Arreſting of his Perſon.

See the Ordinance of 1670, *Title* 10.

XII.

12. *Of the Excuſes made by the Criminal.*

If the Criminal who is under an Order of Court to anſwer to the Charge, or who is cited to appear in Perſon, or againſt whom a Perſonal Arreſt has been awarded, is not able to appear by reaſon of Sickneſs, or of a Wound, or Hurt, which does not allow him to go out of his Houſe, without expoſing himſelf to viſible Danger, he gets his Excuſe to be made by a Proctor impowered by a ſpecial Proxy for that purpoſe, ſigned before a Notary Publick [g]. He annexes to the Proxy the Report of an approved Phyſician, who has made Oath of the Truth of his Report before the Judge of the Place. A Copy of the Excuſe is delivered to the King's Proctor, and to the adverſe Party, and if the Reaſon alledged appear to be ſufficient, Informations are had thereupon reciprocally; and in caſe the Facts are juſtified, a Superſedeas is granted, during which Delay the Criminal remains under Confinement in his own Houſe, as in a Jail, and the Landlord of the Houſe, or ſome other Perſon, becomes bound for his Appearance.

[g] Si quis judicio ſe ſiſti promiſerit, & valetudine vel tempeſtate, vel vi fluminis prohibitus ſe ſiſtere non poſſit: exceptione adjuvatur, nec immerito, cum enim in tali promiſſione præſentiâ opus ſit: quemadmodum potuit ſe ſiſtere, qui adversâ valetudine impeditus eſt. *l.* 2. §. 3. *ff. ſi quis cautionibus in judicio ſiſtendi causâ factis non obtemperaverit.*

Pœnam contumacis non patitur, quem adverſa valetudo, vel majoris cauſæ occupatio defendit. *l.* 53. §. 2. *ff. de re judicatâ.*

TITLE III.

Of Criminals that are in Contempt.

The CONTENTS.

1. *Enquiry after the Perſon that is in Contempt.*
2. *The Seizure of the Moveables, and Inventorying of the Immoveables, belonging to the Criminal.*
3. *Citation of the Criminal by publick Outcry.*
4. *Sentence againſt Criminals who do not appear, and the Manner of putting them in execution.*
5. *What is the Effect of Judgments pronounced againſt Perſons in their Abſence, when they do afterwards appear.*
6. *What Proceeding is had when the Perſon that is in Contempt ſurrenders himſelf.*

I.

1. *Enquiry after the Perſon that is in Contempt.*

WHEN the Decree for taking into cuſtody the Party accuſed cannot be put in execution, diligent Search is made after him, and his Goods are ſeized and inventoried [a]. The Enquiry after him ought to be made at the Place of his ſettled Abode, or at the Place

2. *The Seizure of the Moveables, and Inventorying of the Immoveables, belonging to the Criminal.*

3. *Citation of the Criminal by publick Outcry.*

Place of his Reſidence, if he had any ſuch within the Juriſdiction where the Crime was committed, provided the Enquiry be made within three Months after the Commiſſion of the Crime, for which the Proſecution is carried on. When the Party accuſed has neither Domicil nor Reſidence within the Bounds of the Juriſdiction, the Decree is hung up at the Door of the Hall where the Court is kept. And Mention is made of the Hanging up the Decree in this Manner in the Citation againſt the Criminal; which ſerves inſtead of a Copy of the Act relating to the Enquiry and Search that is made after him, and which is left at his Manſion-houſe, or the Place of his Reſidence.

[a] Abſens requirendus annotatus eſt, ut copiam ſui præſtet. Præſides autem provinciaraum circa requirendos annotatos hoc debent facere, ut eos quos adnotaverint edictis adeſſe jubeant: ut poſſit innoteſcere eis qui adnotati ſunt. Sed & literas ad Magiſtratus ubi conſiſtunt, mittere ut per eos poſſit innoteſcere, requirendos eſſe annotatos. *l.* 1. *ff. de requirendis reis, vel abſentibus damnandis.*

Cum abſenti reo gravia crimina intentantur, ſententia feſtinari non ſolet, ſed adnotari, ut requiratur: non utique ad pœnam, ſed ut poteſtas ei ſit purgandi ſe, ſi potuerit. *l.* 1. *Cod. de requirendis reis.*

II.

2. The Seizure of the Moveables, and Inventorying of the Immoveables, belonging to the Criminal.

After Enquiry has been made after the Perſon of the Criminal, they ſeize his Moveables, and the Fruits of his Real Eſtate, and Commiſſioners are appointed to take care of them, according to the Method obſerved in Seizures of Goods in Civil Cauſes. If among the Things that are ſeized there be any which cannot be kept, without Danger, or without too great an Expence, the Officer of the Court ought to cauſe them to be ſold in the next Market Town, on the uſual Market Day, and to depoſit the Monies ariſing from the Sale in the Hands of a Perſon that is reſponſible.

See the Ordinance of 1670, *Title* 17.

III.

3. Citation of the Criminal by publick Outcry.

Enquiry having been made after the Perſon of the Criminal, and his Moveables being ſeized, he is cited to appear within fifteen Days; after the Expiration of which Time, and of a Day which is allowed him over and above for every ten Leagues Diſtance between the Place of his Abode, and the Court where he is cited to appear, he is again once more cited by publick Outcry to appear within a Week. The firſt of theſe two Citations is ſerved at his Manſion-houſe, or the Place of his Reſidence, where he was ſought for. The publick Outcry is made with the Sound of Trumpet before the Criminal's Manſion-houſe, or Place of Reſidence, if he has any, in the publick Market Place, and at the Door of the Hall where the Court is held, where a Copy of the Act narrating the ſaid Proceeding ought to be affixed.

See the ſame Ordinance, and the ſame Title.

IV.

4. Sentence againſt Criminals who do not appear, and the Manner of putting them in execution.

When the Contempt has been ſufficiently proved, the Judge orders the Witneſſes to be repeated to their Depoſitions, that is, to declare whether they perſiſt in what they have depoſed, and decrees that ſuch Repetition of the Witneſſes ſhall have the ſame Effect, as if they had been confronted with the Party accuſed [b]. After the Witneſſes have been repeated, the Judge declares the Contumacy to be well proved, and by the Judgment the Criminal is condemned, if there is ſufficient Proof againſt him ariſing from the Informations that have been taken againſt him. For his Contumacy alone, without a Proof of the Crime, is not ſufficient Ground for his Condemnation. When the Sentence imports Death, it is Executed by hanging up his Effigie in the Market Place. And the Sentences which condemn the Criminals to other Corporal Puniſhments, to publick Penance, or to perpetual Baniſhment, are executed againſt thoſe that are abſent by writing them on a Board, which is likewiſe hung up in ſome publick Place. The Sentences which inflict other Sorts of Puniſhments, are notified at the Dwelling-houſe of the abſent Criminal, or the Place of his Reſidence, or poſted up at the Door of the Hall where the Court is held. The Act reciting the Execution of the Criminal in Effigie is inſerted at the bottom of the Judgment. The Effect of this execution is, to prorogue the Time of Preſcription, ſo that the Criminal who would have preſcribed againſt the Puniſhment due for the Crime by the Space of twenty Years, does not acquire the ſaid Preſcription till after the Expiration of thirty Years from the Day of the Execution.

[b] Non ſemper compelleris ut adverſus abſentem pronunties, propter ſubſcriptionem patris mei, quâ ſignificavit etiam contra abſentes ſententiam dari ſolere. Id enim eo pertinet, ue etiam abſentem damnare poſſis, non ut omnimo de neceſſe habeas. *l.* 1. *Cod. quomodo & quando judex ſententiam proferre debeat.*

See the Ordinance of 1670, *Title* 17.

V.

5. What is the Effect of Judgments pronounced againſt Per-

So ſoon as the Perſons who are condemned for their Contempt in not appearing are taken Priſoners, or ſurrender themſelves; all the Proceedings againſt them are

ſons in their Abſence, when they do afterwards appear.

are annulled with reſpect to the Puniſhment, that is, they ſerve to no other purpoſe but as Citations, and a new Proceeding is commenced againſt the Criminals [c]. But with regard to Fines, to the Contumacy Fees, to Money Concerns, and to Confiſcations, it is neceſſary to diſtinguiſh three different Times [d]. If the Criminal ſurrenders himſelf, or is taken within a Year after the Execution of the Judgment pronounced againſt him for his Contempt, he recovers his Moveables and Immoveables that were diſtrained, as alſo the Monies ariſing from the Sale of his Moveables that have been diſpoſed of, deducting the Charges, and he paying the Fine to which he was condemned. If the Contempt is purged after the Year from the Execution of the Judgment, but within five Years after the ſaid Execution, the Criminal does not recover his Moveables and Immoveables that have been ſeized, and the Party who proſecutes ought to be paid his Charges of the Proſecution, but the Nonpayment thereof will not ſtop the further Proceedings in the Proſecution, and the giving of Judgment. If the Criminal ſurrenders himſelf after the five Years, the Pecuniary Mulcts, the Fines and Confiſcations, are put in Execution, as if they had been pronounced by Decrees, made in preſence of the Parties. We muſt except the Caſe, where the King grants to the Criminal Letters for purging his Contempt. For if the Judgment that has been given in this Caſe does not carry with it a Confiſcation of the Criminal's Eſtate, they reſtore to him all his Moveables and Immoveables, but make no Reſtitution of the Fines, of the Sums of Money decreed to be paid to the Proſecutor, or of the Fruits and Profits that have been made of his Lands and Tenements while under Seizure.

As to the Queſtion, whether he that is condemned by Default, and dies within the five Years from the Time that the Judgment was put in execution, is reckoned to be civilly dead from the Day of the Execution. See the Remark on the 36th *Article of the* 3d *Section of the* 1ſt *Title of the* 2d *Part of the Civil Law in its Natural Order.*

VI.

6. What Proceeding is had when the Perſon that is in Contempt ſurrenders himſelf.

When the Criminal that has been condemned by Default is brought into Priſon the Judge examines him upon Interrogatories, and then they proceed to confront him with the Witneſſes. However, if the Witneſs who has been repeated is dead either a Natural or Civil Death, or if he has been abſent a long Time, there is no other Confrontation of the ſaid Witneſs with the Criminal but by his Depoſition; and in that Caſe no Regard is had to any Objections made againſt the Witneſs but what are juſtified by Writing.

TITLE IV.

Of the arreſting, impriſoning, and interrogating of Criminals.

The CONTENTS.

1. *What is to be done after the Criminal is carried to Priſon.*
2. *How the Priſoner is to be treated in Priſon.*
3. *Women and Men ought to be kept apart.*
4. *How the Priſoner is provided with Neceſſaries.*
5. *Of the Examination of the Criminal.*
6. *The Manner of examining the Criminal.*
7. *What Method is obſerved with reſpect to thoſe who do not underſtand the Language, or thoſe who are deaf and dumb.*
8. *Of one that ſtands mute.*
9. *Although the Criminal confeſſes the Fact upon his Examination, yet the Proſecution is carried on againſt him as if he had denied it.*
10. *Criminal*

[c] Quod juſſit vetuitve Prætor, contrario imperio tollere & repetere licet, de ſententia contra. *l.* 14. *ff. de re judicatâ.*

[d] Mandatis cavetur, intra annum requirendorum bona obſignari, ut ſi redierint, & ſe purgaverint, integram rem ſuam habeant. Si neque reſponderint, neque qui ſe defendant, habebunt: tunc poſt annum bona in fiſcum coguntur. *l. ult ff. de requirendis vel abſentibus damnandis.*

By the Civil Law the Criminal had not his Goods delivered back to him, if he did not ſurrender himſelf within a Year after he was pronounced to be in Contempt, even although he had been acquitted from the Crime laid to his Charge.

In ſumma ſciendum eſt, nulla temporis præſcriptione, cauſæ defenſione ſummoveri eum, qui requirendus annotatus eſt. *l.* 4. *ff. de requirendis vel abſentibus damnandis.*

See the Ordinance of 1670, *Title* 17.

10. *Criminal Cauſes decided without repeating the Witneſſes, and without Confrontation.*

I.

1. *What is to be done after the Criminal is carried to Priſon.*

ASSOON as a Criminal is taken up by virtue of an Order or Decree for arreſting him, or by Hue and Cry, or being taken in the Fact, he is carried to Priſon. And ſo ſoon as he is brought into Priſon, he is to be regiſtred, that is, the Jailer, or he who keeps the Regiſter of the Jail, ought to write down in his Book, all the Leaves whereof are ſigned and marked by the Judge, the Name, the Surname, the Quality of the Priſoner, and of the Party at whoſe Inſtance he is arreſted, the Judgment by virtue whereof he was arreſted, and the Domicil which he has made choice of in the Place where the Priſon is ſituated. If the Priſoner had Papers, Cloaths, and Moveables in his Poſſeſſion at the Time when he was taken up, the Officer, or Bailiff who carried him to Priſon, draws up an Inventory or Account of them, which he ſigns himſelf, and gets two Witneſſes to atteſt it. They depoſit in the Regiſtry ſuch Part thereof as will ſerve to defray the Charges of the Proceeding, and the Surplus is delivered to the Priſoner who ſigns the Inventory; if he refuſes to ſign it, particular Mention is made of ſuch his Refuſal.

See the Ordinance of 1670, *Title* 13.

II.

2. *How the Priſoner is to be treated in Priſon.*

Priſons were not eſtabliſhed as a Puniſhment of the Guilty, but only as a Means to ſecure their Perſons until they are brought to a Tryal [a]. For which Reaſon it is that they ought to be ſecure, and yet built in ſuch a Manner as not to endanger the Health of the Priſoners [b]. However for the greater Security of the Priſoners it is neceſſary to take greater or leſſer Precautions, according to the Condition of the Perſons, and the Nature of the Crimes for which they ſtand committed. The Jailer cannot ſhut the Priſoners up in Dungeons, nor put them in Irons, nor releaſe them from thence, when they are in that condition, without an expreſs Order ſigned by the Judge. He is obliged to viſit, at leaſt once a Day, the Criminals who are ſhut up in Dungeons, and if he finds any of them to be ſick, to give advice thereof to the King's Proctors, or thoſe of the Lords within whoſe Priſons they are confined, that they may cauſe them to be viſited by Phyſicians and Surgeons, and to be removed into more airy Rooms, if it be found neceſſary for reſtoring them to their former Health.

[a] Carcer enim ad continendos homines, non ad puniendos haberi debet. *l.* 8. §. 9. *ff. de pœnis.*

[b] In quacunque cauſa reo exhibito, ſive accuſator exiſtat, ſive eum publicæ ſollicitudinis cura produxerit, ſtatim debet quæſtio fieri, ut noxius puniatur, innocens abſolvatur. ——Intereà verò reum exhibitum non per ferreas manicas, & inhærentes oſſibus mitti oportet, ſed prolixiores catenas, ſi criminis qualitas etiam catenarum acerbitatem poſtulaverit, ut & cruciatio deſit, & permaneat ſub fidâ cuſtodiâ. *l.* 1. *Cod. de cuſtodia reorum.*

III.

3. *Women and Men ought to be kept apart.*

Women and Men who are Priſoners ought to be confined in ſeparate Apartments, in order to prevent all occaſions of Scandal or Debauchery [c].

[c] Quoniam unum carceris conclave permixtos ſecum criminoſos includit; hac lege ſancimus, ut etiamſi pœnæ qualitas permixtione jungenda eſt, ſexu tamen diſpares diverſa clauſtrorum habere tutamina jubeantur. *l.* 3. *Cod. de cuſtodiâ reorum.*

IV.

4. *How the Priſoner is provided with Neceſſaries.*

Criminals who are committed to Priſon, are ſupplied with Bread, Water, and Straw, at the Expences of the King, or of the Lords of Manors in whoſe Priſons they are confined. But if they are not ſhut up in the Dungeons, they may procure Victuals and other Neceſſaries to be ſent to them into Priſon, or they may buy them of the Jail-Keeper. The Jailer is to give an Acquittance for whatever he receives, and he is ſtrictly enjoined not to take any Thing from the Priſoners by Way of Advance, either for their Diet, their Lodging, or the Fees of the Priſon. He is likewiſe prohibited to take Money or Proviſions from Priſoners newly brought into Jail under pretext of freſh Fees, even although they ſhould offer them freely and of their own accord. The ſenior Priſoners are likewiſe forbidden to inſiſt on any ſuch Cuſtom or Uſage.

See the Ordinance of 1670, *Title* 13. *The ſame Ordinance enjoins the King's Proctors, and alſo thoſe of Lords of Manors who have Priſons, to viſit the Priſons once every Week, and there to hear the Complaints of the Priſoners, that they may ſee that they be not inhumanely treated by the Jail-Keepers.*

V.

6. *Of the Examination of the Criminal.*

The Jailer ought not to ſuffer any Perſon to have acceſs to the Priſoners who are committed for Crimes, until they have been examined [d]. Their Examination ought to be begun by the Judge, at fartheſt within four and twenty Hours after their Commitment. The Judge is required to examine them himſelf. The Criminal, who is ſworn to declare the Truth,

is obliged to anſwer to the Queſtions himſelf, without the Aſſiſtance of any Adviſer [c]. They ſhew him the Moveables, the Cloaths, and the Writings which may ſerve to prove the Charge againſt him. The Judge is at liberty to re-examine him as often as he ſhall think fit. It is the Duty of the Judge to act on theſe Occaſions with the utmoſt Prudence, ſo as to take all poſſible Ways for diſcovering the Truth, without perplexing the Criminal with ſubtle Queſtions, and without laying a Trap to enſnare him.

[d] Sed & caput mandatorum extat, quo divus Pius, cum provinciæ Aſiæ præerit, ſub edicto propoſuit, ut Irenarchæ, cum apprehenderint latrones, interrogent eos de ſociis & receptatoribus. *l.* 6. *ff. de cuſtodiâ & exhibitione reorum.*

[c] Ad crimen judicii publici perſequendum fruſtra procurator intervenit, multoque magis ad defendendum. *l.* 13. *ff. de publicis judiciis.*

VI.

6. The Manner of examining the Criminal.

While the Judge is examining the Criminal, either on ſuch Queſtions as he himſelf thinks fit to propoſe, or upon Inſtructions given him either by the Party who proſecutes for his civil Intereſt, or by him who proſecutes on account of the Publick, the Regiſter takes down in writing the Queſtions propoſed by the Judge, and the Anſwers made by the Criminal, without making any Interlineation. At the End of each Sitting the Queſtions and Anſwers are read over to the Criminal. Each Page is marked, and ought to be ſigned by the Judge, and alſo by the Criminal, if he can, and is willing to ſign his Name, or Mention is made that he refuſes to ſign it. When there are ſeveral Criminals, they are examined ſeparately. The Examinations are communicated to the Party who proſecutes for his civil Intereſt, and alſo to him who carries on the Proſecution for the publick Account.

See the Ordinance of 1670, *Title* 4.

VII.

7. What Method is obſerved with reſpect to thoſe who do not underſtand the Language, or thoſe who are deaf and dumb.

When a Criminal does not underſtand the Native Language of the Country in which he is examined, he has an Interpreter given him, who after being duly ſworn, explains to the Criminal the Queſtions, and to the Judge, the Anſwers made thereto by the Criminal. The Examination is ſigned by the Judge, by the Interpreter, and by the Criminal, or Mention is made of his Refuſal to ſign it. If the Criminal is deaf or dumb, or both deaf and dumb, ſo that he cannot hear the Judge, or is not able to make him any Anſwer, he has a Curator aſſigned him, who receives private Inſtructions from him, and who after having taken an Oath truly and faithfully to defend the Criminal, anſwers to the Queſtions propoſed by the Judge, and gives in Exceptions to the Witneſſes. The Deaf and Dumb Perſon who can write, may write down his Anſwers and ſign them, as alſo the Exceptions againſt the Witneſſes, which ought likewiſe to be ſigned by the Curator.

See the Ordinance of 1670, *Title* 14, *and Title* 18.

VIII.

8. Of one that ſtands mute.

With regard to the Criminal who ſtands mute, and refuſes to anſwer when he is able, the Judge admoniſhes him three ſeveral Times to anſwer, at each of which Times he declares to him if he does not anſwer, he ſhall be proceeded againſt as a Perſon ſtanding mute, and that he ſhall not afterwards be admitted to anſwer to the Queſtions to which he refuſes to anſwer.

[*The Manner of proceeding againſt a Criminal who ſtands mute, and refuſes to anſwer, is different by the Law of* England *according to the Nature of the Crime with which he ſtands charged. For if a Man be arraigned upon an Indictment of High-Treaſon, and ſtand mute, he ſhall have ſuch Judgment, and incur ſuch Forfeiture, as if he had been convicted by Verdict, or had confeſſed it. But it is otherwiſe in the Caſe of Petit Treaſon, Murder, or other Felony. In which Caſes, the Perſon ſtanding obſtinately mute, forfeits his Goods, and is remanded back to Priſon, where he is laid naked on his Back in ſome dark Room, with Hands and Legs extended, and Weights put on his Breaſt, which are increaſed, until he agrees to plead to the Indictment, or expires under the Torture.* Coke 3. Inſt. Pag. 14. Hales's Pleas of the Crown, Pag. 227.

IX.

9. Although the Criminal confeſſes the Fact upon his Examination, yet the Proſecution is carried on againſt him, as if he had denied it.

Although the Criminal upon his Examination has acknowledged himſelf to be guilty of the Crimes laid to his Charge, yet nevertheleſs they proceed to repeat and confront the Witneſſes, and go on with the Criminal Proſecution in the ſame Manner, as if he had denied the Facts of which he is accuſed; becauſe it may ſo happen that Fear, Trouble, or Weakneſs of Mind, may make the Criminal confeſs Crimes which he has not committed [f]. It is neceſſary that the Priſoner's Confeſſion be ſupported by other Proofs, in order to his being condemned to corporal Puniſhment.

[f] Divus ſeverus reſcripſit, confeſſiones reorum pro exploratis facinoribus haberi non oportere, ſi nul-

la probatio religionem cognoſcentis inſtruat. *l.* 1. §. 17. *ff. de quæſtionibus.*

X.

10. *Criminal Cauſes decided without repeating the Witneſſes, and without Confrontation.*

If the Crime which has given occaſion to the Criminal Proſecution, is not of the Number of thoſe which are to have corporal Puniſhments, the Perſon accuſed, the Party who proſecutes in the Name of the Publick, and the Party who has a Civil Intereſt in the Proſecution, may agree to have the Matter determined barely upon the Information, and the Examination of the Party accuſed upon Interrogatories. In which caſe the Court proceeds to give Judgment in the Cauſe, after having examined the Petitions, and the Anſwers, if the Parties have thought fit to give in any in the Delays which have been granted to them. There are ſome Matters of ſo ſlight a Concern, that the Judge ought not to ſuffer the Cauſe to be carried on by repeating of Witneſſes, and Confrontations; he orders in that Caſe that the Parties proceed as in ordinary Cauſes, and that the Informations be turned into a ſummary Examination of Witneſſes, allowing the Party accuſed to examine Witneſſes alſo on his Part. However the Judge may direct the ordinary Proceeding in Criminal Cauſes to be reſumed, in caſe he diſcovers afterwards that the Matter requires it.

See the Ordinance of 1670, *Title* 14, *and Title* 20.

TITLE V.

Of Repeating the Witneſſes, Confrontations, the Rack and Torture.

The CONTENTS.

1. *Repeating of Witneſſes.*
2. *The Manner of Confrontation.*
3. *Effects of the Depoſitions of the Witneſſes who have not been repeated.*
4. *In what Caſes the Criminal is condemned to the Torture.*
5. *Execution of the Sentences which condemn one to the Torture.*
6. *What is obſerved in putting the Criminal to the Torture.*
7. *Precautions touching the Declarations.*
8. *One is not put twice to the Torture.*

9. *The Torture given for the Diſcovery of the Accomplices.*

I.

1. *Repeating of Witneſſes.*

THE Witneſs who has been examined ought to be repeated, that it may appear, whether he perſeveres in his Depoſition. The Witneſſes are ſummoned in order to their being repeated, as well as to their being firſt examined. They are firſt ſworn, then their Depoſition is read over to them, and they are aſked if they will add any Thing to it, or take any Thing from it, or if they will have it to ſtand as it is. The Regiſter writes down the whole Proceeding in a Paper ſeparate and diſtinct from the other Proceedings, and reads it over to the Witneſs who is repeated. The Judge marks and ſigns all the Pages of the Act of repeating the Witneſs, and the Witneſs himſelf ſets his Hand to it, or if he does not, mention is made of his Refuſal. The Witneſs is not to be repeated any more, altho' the Party accuſed was not preſent when he was repeated.

See the Ordinance of 1670, *Title* 15.

II.

2. *The Manner of Confrontation.*

In order to proceed to the Confrontation which ought to follow the Repeating of the Witneſs, the Party accuſed is brought Face to Face with the Witneſs; they are both ſworn, and the Judge requires them to declare whether they know one another. Then they read the firſt Articles of the Depoſition of the Witneſs, which mention his Name, his Age, his Quality, *&c.* After which the Party accuſed is required by the Judge to declare what Objections he has to offer againſt the Witneſs, if he has any, and he is told that he will not be allowed to make any Objection after he has heard the Depoſition read. The Criminal having made his Objections, or declared that he has none to make, the Depoſition of the Witneſs is read; and when the Criminal obſerves any Contrariety in it, or any Circumſtance that may tend to juſtify him, he may deſire the Judge to require the Witneſs to acknowledge that Part of the Depoſition. The Act of Confrontation of the Witneſs with the Criminal, which contains all that has been ſaid by the one or the other, is writ in a ſeparate Paper. The Judge marks and ſigns all the Pages of it, and he cauſes it to be ſigned by the Criminal, and by the Witneſs, and if it is not ſigned by them, mention is made of their Refuſal. The ſame Formalities are to be obſerved in confronting Criminals with one another.

See the Ordinance of 1670, *Title* 15.

The Criminal may at any Time whilſt the Cauſe is depending offer Objections againſt the Witneſſes, provided he verify them by ſome Proof in Writing.

III.

3. *Effects of the Depoſitions of the Witneſſes who have not been repeated.*

When the Proceedings in the Cauſe are looked into and examined, they read the Depoſitions of the Witneſſes who have neither been repeated, nor confronted, when they tend to acquit the Criminal, and the Judge ought to have regard to them. For the Rule in all Criminal Proſecutions is, to be more inclinable to acquit the Criminal than to condemn him. When the Proſecution has been carried on by Default, through the Contumacy of the Criminal in not appearing, the repeating of the Witneſs to his Depoſition, is equivalent to Confrontation, in caſe the Witneſs dies before he can be confronted with the Party accuſed.

See the ſame Ordinance.

IV.

4. *In what Caſes the Criminal is condemned to the Torture.*

In order to lead a Condemnation of the Criminal to the Torture, it is neceſſary that the Crime with which he is charged be ſuch as deſerves the Puniſhment of Death [a], that it appear that there are ſtrong Proofs againſt the Criminal, and that nevertheleſs the ſaid Proofs are not ſufficient to condemn him to Death thereupon [b]. The Judges who condemn the Criminal to undergo the Torture, may decree by the ſame Order, that the Proofs ſhall remain whole and intire. In this Caſe they may condemn the Party accuſed to all Sorts of corporal Puniſhments, excepting the Puniſhment of Death, which they are not to pronounce againſt the Party accuſed, unleſs there appear afterwards new Proofs.

[a] In criminibus eruendis, quæſtio adhiberi ſolet. Sed quando, vel quatenus id faciendum ſit videamus, & non eſſe à tormentis incipiendum, & divus Auguſtus conſtituit, neque adeo fidem quæſtioni adhibendam. Sed & epiſtola divi Hadriani ad Sennium Sabinum continetur. Verba reſcripti ita ſe habent: ad tormenta ſervorum ita demum veniri oportet, cum ſuſpectus eſt reus, & aliis argumentis ita probationi admovetur, ut ſola confeſſio ſervorum deeſſe videatur. *l.* 1. *in princ.* & §. 1. *ff. de quæſtionibus.*

[b] Edictum divi Auguſti, quod propoſuit Vivio Avito & Lucio Approniano Conſulibus, in hunc modum extat: Quæſtiones neque ſemper in omni causâ & perſonâ deſiderari debere arbitror, & cum capitalia & atrociora maleficia non aliter explorari & inveſtigari poſſunt, quam per ſervorum quæſtiones, efficaciſſimas eas eſſe ad requirendam veritatem exiſtimo, & habendas cenſeo. *l.* 8. *ibid.*

Oportet autem judices nec in his criminibus, quæ publicorum judiciorum ſunt ad inveſtigationem veritatis, à tormentis initium ſumere, ſed argumentis primum veriſimilibus probabilibuſque uti. Et ſi veluti certis indiciis ducti, inveſtigandæ veritatis gratiâ ad tormenta putaverint eſſe veniendum. *l.* 8. *Cod. de quæſtionibus.*

V.

5. *Execution of the Sentence which condemns one to the Torture.*

The Sentences which condemn Criminals to the Torture, ought to be drawn up and ſigned immediately after they are pronounced, and the Judge who is the Reporter of the Cauſe, together with another of the Judges, go and intimate the Sentence to the Criminal. But thoſe Sentences cannot be put in execution, when they are not pronounced by a Court from which there lies no Appeal, until they have been affirmed by a Decree of the Supreme Court to which the Appeal lies; becauſe that the Damage which the Party ſuffers by thoſe Interlocutory Sentences, cannot be repaired in an Appeal from the Definitive Sentence.

See the Ordinance of 1670, *Title* 19.

VI.

6. *What is obſerved in putting the Criminal to the Torture.*

Before the Criminal is put to the Torture, the Judge interrogates him, and he is afterwards tortured in Preſence of the Judge [c]. An Act is drawn up of all that paſſes at the Torture, of the Confeſſions, and the Denials made by the Criminal, that one may be able to judge by what has paſſed at the Torture, what Credit is to be given to the Declarations of the Criminal. The Judge may remit a Part of the Rigours of the Torture, if the Criminal confeſſes the Fact; but if he prevaricates, the Rigours of the Torture are increaſed, however with ſuch Precautions that the Criminal may ſuffer pain, without being expoſed to die under the Torture, or to be diſabled for the remainder of his Days [d], when there is not a ſufficient Proof of the Crime, to condemn him to Death.

[c] Tormenta autem adhibenda ſunt, non quanta accuſator poſtulat; ſed ut moderatæ rationis temperamenta deſiderant. —— Plurimum quoque in excutienda veritate etiam vox ipſa, & cognitionis ſubtilis diligentia adfert. Nam & ex ſermone, & ex eo, quâ quis conſtantiâ, quâ trepidatione quid diceret, vel cujus exiſtimationis quiſque in civitate ſuâ eſt, quædam ad illuminandam veritatem in lucem emergunt. *l.* 10. §. 3, & 5. *ff. de quæſtion.*

[d] Quæſtionis modum magis eſt judices arbitrari oportere. Itaque quæſtionem habere oportet, ut ſervus ſalvus ſit, vel innocentiæ vel ſupplicio. *l.* 7. *ff. de quæſtionibus.*

VII.

7. *Precautions touching the Declarations made under Torture.*

Aſſoon as the Criminal is taken from the Rack, the Judge ought to interrogate him anew touching the Facts which he has confeſſed or denied [e]. It is neceſſary to act with a great deal of Precaution, when Judgment is to be given upon the Declarations

made by a Criminal whilſt he is under the Torture, becauſe it often happens that a guilty Perſon that is robuſt and reſolute reſiſts the Pains of the Torture, and that an innocent Perſon, who is of a weak and fearful Conſtitution, owns himſelf to be guilty of a Crime which he has not committed.

[e] Quæſtioni fidem non ſemper, nec tamen numquam habendam Conſtitutionibus declaratur: etenim res eſt fragilis, & periculoſa, & quæ veritatem fallat. Nam plerique patientiâ, ſive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo poſſit. Alii tantâ ſunt impatientiâ, ut in quovis mentiri, quam pati tormenta velint. Ita fit, ut etiam vario modo fateantur, ut non, tantum ſe, verum etiam alios comminentur. *l.* 1. §. 23. *ff. de quæſtionibus.*

Divus Severus reſcripſit, confeſſiones reorum pro exploratis facinoribus haberi non oportere, ſi nulla probatio religionem cognoſcentis inſtruat. *l.* 1. §. 17. *ff. de quæſtionibus.*

Si quis ultro de maleficio fateatur, non ſemper ei fides adhibenda, nonnunquam enim aut metu, aut quâ aliâ de causâ in ſe confitetur. *ibid.* §. 27.

VIII.

8. One is not put twice to the Torture.

Although new Proofs are afterwards diſcovered, yet the Criminal cannot be put to the Torture twice for the ſame Fact.

IX.

9. The Torture given for the Diſcovery of the Accomplices.

Sometimes it is ordered by the Sentence of Death, the condemned Perſon ſhall be put to the Torture, in order to make him diſcover his Accomplices.

See the Ordinance of 1670, *Title* 19.

TITLE VI.

Of Sentences of Condemnation, or Acquittal, and of Enlargements for a Time.

The CONTENTS.

1. *When is the Criminal admitted to the Proof of the Facts which ſerve for his Defence.*
2. *The Manner of making the ſaid Proof.*
3. *The Examination of the Criminal on the Stool.*
4. *Rules to be obſerved in the Tryal of Criminals.*
5. *When Sentence is pronounced againſt the Perſons that are condemned.*
6. *The Criminal is allowed to make Confeſſion of his Sins.*
7. *When one is condemned to make a publick Acknowledgment of his Offence, and refuſes to do it.*
8. *Criminals ought to be brought ſpeedily to their Tryal.*
9. *When a more ample Information is neceſſary.*
10. *The Criminal acquitted.*

I.

1. When is the Criminal admitted to the Proof of the Facts which ſerve for his Defence.

AFTER the Judges have examined the Proceedings in the Cauſe that is carried on againſt the Party accuſed, they direct him to make Proof of the Facts which he has alledged for his Defence in his Examination upon Interrogatories, and at his Confrontation with the Witneſſes, if the ſaid Facts be of ſuch a Nature as that they may ſerve for his Juſtification in caſe the Truth of them be made to appear [a]. The ſaid Facts are particularly mentioned in the Order which directs the Proof of them.

[a] Cogniturum de criminibus Præſidem oportet ante diem palam facere, cuſtodias ſe auditurum: ne hi, qui defendendi ſunt, ſubitis accuſatorum criminibus opprimantur, quamvis defenſionem quocunque tempore poſtulante reo, negari non oportet: adeo ut propterea, & differantur, & proferantur cuſtodiæ. *l.* 18. §. 8. *ff. de quæſtionibus.*

II.

2. The Manner of making the ſaid Proof.

Aſſoon as they have read to the Criminal the Decree which admits him to the Proof of Facts which he alledges for his Defence, he is required to name his Witneſſes, which he ought to do off Hand. The ſame Witneſſes are ſummoned at the Inſtance of the publick Proſecutor, and are examined by the Judge. The Party accuſed depoſites the Charges of this Examination, if he is able to do it, if not, they are advanced by the Party who carries on the Proſecution for his Civil Intereſt, and when there is no ſuch Party, they are paid either out of the King's Exchequer, or by the Lords of the Manor who have the Criminal Juriſdiction within their own Limits. The Examination of the Witneſſes being finiſhed, their Depoſitions are communicated to the Party who has the Civil Intereſt, and to the Publick Proſecutor. After which the Parties give, if they think fit, Petitions, to which they may annex ſuch Writings as they conceive may be of Service in the Deciſion of the Cauſe.

See the Ordinance of 1670, *Title* 28.

III.

III.

3. *The Examination of the Criminal on the Stool.*

The laſt Expedient which the Judges are to make uſe of, for diſcovering the Truth of the Facts, is to interrrogate the Criminal on the Stool, when the Prayer made by the publick Proſecutor, or the Sentence which is appealed from, tends to inflict Corporal Puniſhment; or behind the Bar, when the Sentence, or the Prayer of the publick Proſecutor does not extend to Corporal Puniſhment.

See the Ordinance of 1670, *Title* 14. *and the Declaration of the* 18th *of* September 1682.

IV.

4. *Rules to be obſerved in the Tryal of Criminals.*

One ought not to proceed to the Tryal of a Criminal in the Afternoon, when the Crime of which he is accuſed is of ſo high a Nature that it may deſerve the Puniſhment of Death, either Natural or Civil, of the Gallies, or a Temporary Baniſhment. When the Prayer of the publick Proſecutor, is to have Corporal Puniſhment inflicted on the Party accuſed, there ought to be at leaſt three graduate Judges to aſſiſt at the final Examination, and the giving of Judgment, and even in ſuch Judgments from which there lies no Appeal. The Judgments which are given in the final Deciſion of the Cauſe, or in Incidents, which ariſe in the Proceedings, are according to the mildeſt Opinion, unleſs it be carried for the ſevereſt Puniſhment by a Majority of one Voice, in ſuch Judgments from which there lies an Appeal, or by a Majority of two Voices when the Judgment is final without any Appeal from it.

V.

5. *When Sentence is pronounced againſt the Perſons that are condemned.*

The Certainty of Death being more harſh than Death itſelf, it would be barbarous to acquaint the Criminal with the Puniſhment to which he is condemned, a long Time before he is to undergo it [b]. And it is for this Reaſon that the Sentences are put in Execution the ſame Day that they are pronounced; unleſs there be ſome Reaſon for deferring the Execution of it, as in the Caſe of an Appeal, which would ſuſpend the Effect of the Sentence, or in the Caſe of a Woman who ſeeing herſelf condemned to Death, ſhould declare that ſhe was with Child [c]. For the Judge ought, upon ſuch Declarations, to direct her to be viſited by a Jury of Matrons, and if ſhe is found to be with Child, to put off the Execution of the Judgment, until after ſhe is brought to Bed.

[b] Cum reis manifeſtâ probatione convictis ſpatium temporis ante ſententiam datur, facultas ſupplicandi, vel quibuſdam malignis artibus tam Præſidum quam Officialium, pœnas evitandi criminoſis patet, cum & in homicidii crimine, & in aliis detectis gravioribus cauſis ultio differenda non ſit. *l.* 18. *Cod. de pœnis.*

[*In* England *the Practice is different from that of ſome other Countries, where condemned Criminals are conveyed to the Place of Execution immediatly after they have received Sentence of Death. Whereas in* England *it is thought to be more humane to ſuch unfortunate Perſons, to allow them ſome few Days to compoſe their Thoughts, and to prepare themſelves for ſuch a great Change, rather than to hurry them out of this World before they have had any ſerious Thoughts of making their Peace with God.*]

[c] Prægnantis mulieris conſumendæ damnatæ pœna differtur, quoad pariat. Ego quidem & ne quæſtio de ea habeatur, ſcio obſervari, quamdiu pregnans eſt. *l.* 3, *ff. de pœnis.*

[*This Practice of reſpiting the Execution of Women big with Child, is reſtrained in* England *to ſuch only as are found to be quick with Child. Altho' it ſeems to be reaſonable to extend this Indulgence more generally in favour of the innocent Fruit of the Womb, whether it be advanced to that Maturity as to be quick or not. Becauſe that the Woman is certainly found to be with Child, nothing ought to be done to prevent that Child which is formed in the Womb from having its natural Birth. It is in a Manner making the innocent Babe to ſuffer for the Guilt of the Mother.*]

VI.

6. *The Criminal is allowed to make Confeſſion of his Sins.*

Before the Criminal is put to Death, he is allowed to make Confeſſion of his Sins, and to receive Abſolution if he is penitent, and he is attended by a Miniſter in Holy Orders even to the Place of Execution.

See the Ordinance of Charles *the* 6*th of the* 11*th of* February 1396. *and the Ordinance of* 1670, *Title* 25.

[In *England* condemned Perſons are admitted to partake of the Sacrament of the Lord's Supper, if they deſire it, and expreſs a ſincere and hearty Contrition for their Sins in general, and more particularly for the Facts which have brought them to that unhappy End.]

VII

7. *When one is condemned to make a publick Acknowledgment of his Offence and refuſes to do it.*

When the Perſon who is condemned to make a publick Acknowledgment of his Offence, refuſes to obey the Order; after three Admonitions, he is condemned to undergo a ſevere Puniſhment.

See the Ordinance of 1670, *Title* 25.

VIII.

VIII.

8. *Criminals ought to be brought ſpeedily to their Tryal.*

The greateſt Diſpatch that is poſſible ought to be given in bringing Criminals to their Tryal, and ſuch Cauſes ought to have the Preference before all others, that the Criminal may not languiſh too long Time under the dreadful Horrors of a Priſon, if he is innocent, and that he may undergo the Puniſhment due to his Crime, if he is guilty [d].

[d] De his quos tenet carcer incluſos, id apertâ definitione ſancimus, ut aut convictos velox pœna ſubducat, aut liberandos diuturna cuſtodia non maceret. *l.* 5. *Cod. de cuſtodia reorum.*

IX.

9. *When a more ample Information is neceſſary.*

When the Facts are not ſufficiently cleared up, ſo as to acquit or condemn the Party accuſed, the Judges order a fuller Information to be taken within a certain Time, and that in the mean while the Priſoner ſhall be ſet at liberty, upon his giving his Juratory Caution to appear again whenever he is required, upon pain of Conviction; or that he ſhall remain in Priſon until a more ample Information is taken of the Caſe.

X.

10. *The Criminal acquitted.*

When the Accuſation is declared to be groundleſs, there being no Proof againſt the Party accuſed, he is acquitted, and is left at liberty to ſue for his Damages.

TITLE VII.

Of Appeals.

The CONTENTS.

1. *Difference between an Appeal from the intermediate Proceedings in the ſame Cauſe, and an Appeal from a Definitive Judgment.*
2. *If the condemned Perſon does not appeal himſelf, an Appeal ought to be entred in his behalf by another.*
3. *If there are ſeveral Perſons accuſed, they are all ſent to the ſuperior Judge.*
4. *The Perſon who is condemned upon the Appeal, is ſent back to the Place from whence he was brought, there to have the Judgment put in Execution.*
5. *When the condemned Perſon dies before Judgment is given upon the Merits of the Appeal.*
6. *The Manner of Proceeding in order to purge the Memory of a Deceaſed Perſon who has been condemned by Default.*

I.

1. *Difference between an Appeal from the intermediate Proceedings in the Cauſe, and an Appeal from a Definitive Judgment.*

IN Criminal Cauſes we muſt diſtinguiſh between an Appeal from the intermediate Proceedings in the Cauſe, and an Appeal from the Definitive Judgment. The firſt Appeal does not ſuſpend the Effect of the Order or Decree, and does not ſtop the further Proceedings in the Cauſe, unleſs the ſuperior Judge has inhibited any further Proceeding upon view of the Charge and Informations. It is for the Intereſt of the Publick, that Criminals ſhould not too eaſily eſcape the Puniſhment which they have merited by their Crimes [a]. With Reſpect to the Appeal from Definitive Judgments, or an Interlocutory Decree, which cannot be afterwards repaired, ſuch as a Decree condemning one to the Torture, the Appeal in that Caſe vacates the Judgment; ſo that if the Judge, notwithſtanding the Appeal, ſhould cauſe his Sentence, which inflicts Corporal Puniſhment, to be put in Execution, he would be ſeverely puniſhed by the ſuperior Judge.

[a] Reus condemnatus provocavit. ——— provocationis remedio condemnationis extinguitur pronunciatio. *l.* 1. §. *ad Senatuſconſultum Turpilianum.*

Lege Juliâ de vi publicâ tenetur, qui cum imperium poteſtatemve haberet, civem Romanum adverſus provocationem necaverit, verberaverit, juſſeritve quid fieri, aut quid in collum injecerit, ut torqueatur. *l.* 7. *ff. ad Legem Juliam de vi publicâ.*

II.

2. *If the condemned Perſon does not appeal himſelf, an Appeal ought to be entred in his behalf by another.*

If the Party accuſed who has been condemned to Corporal Puniſhment, by the Sentence of a Court from which there lies an Appeal does not interpoſe an Appeal from the ſaid Sentence, the Party who appears for the publick Intereſt in the ſaid Proſecution ought to interpoſe an Appeal for him; becauſe the Condemned Perſon ought not to be ſuffered to renounce the Right which he has to defend his Life and his Honour before the ſuperior Judge [b].

[b] Non tantum ei qui ad ſupplicium ducitur, provocare permittitur: verum alii quoque nomine ejus; non tantum ſi ille mandaverit, verum quiſquis alius provocare voluerit: neque diſtinguitur, utrum neceſſarius ejus ſit, necne: credo enim humanitatis ratione omnem provocantem audiri debere: ergo & ſi ipſe adquieſcit ſententiæ, nec quærimus, cujus interſit. Quid ergo, ſi reſiſtat, qui damnatus eſt, adverſus provocationem? Nec velit admitti ejus appellationem, perire feſtinans? Adhuc putem differendum ſupplicium. *l.* 6. *ff. de appellationibus.*

III.

3. If there are ſeveral Perſons accuſed, they are all ſent to the ſuperior Judge.

When there are ſeveral Perſons accuſed of one and the ſame Crime, they ought all of them to be ſent, together with the Proceedings in the Cauſe, to the Judge who has the Right to determine the Merits of the Appeal, although there be but one of the Priſoners who has appealed, or who has been condemned [c]; becauſe it may ſo happen that one of them who is more ſteady and more dextrous than the others to find out Objections againſt the Witneſſes, and to enforce the Facts which ſerve for their Juſtification, may bring the others off, or procure a Mitigation of the Puniſhment. Beſides, the Judge has an Opportunity of being more throughly inſtructed, when he hears what every one of the Perſons accuſed have to offer in their Defence.

[c] Si in unâ eâdemque causâ unus appellaverit, ejuſque juſta appellatio pronuntiata eſt: ei quoque prodeſt qui non appellaverit. *l.* 2. *Cod. ſi unus ex pluribus appellaverit.*

IV.

4. The Perſon who is condemned upon the Appeal is ſent back to the Place from whence he was brought, there to have the Judgment put in Execution.

When the Judgment that is given in the Appeal from the Sentence pronounced by the inferior Court, condemns the Criminal to Corporal Puniſhment, the Perſon condemned is ſent back to the Place from whence he was brought, in order to have the Judgment put in Execution there [d]. For Crimes ought to be puniſhed in the Place where they were committed; unleſs there be ground to fear that the condemned Perſon may make his eſcape, when they are tranſporting him to the Place of Execution.

[d] Deſertorem auditum ad ſuum ducem cum elogio Præſes mittet: præterquam ſi quid gravius ille deſertor, in eâ provinciâ, in quâ repertus eſt, admiſerit: ibi enim eum plecti pœnâ debere, ubi facinus admiſſum eſt, divi Severus & Antoninus reſcripſerunt. *l.* 2. *ff. de re militari.*

V.

5. When the condemned Perſon dies before Judgment is given upon the Merits of the Appeal.

Seeing the Appeal vacates and extinguiſhes the Judgment, if the Perſon that is condemned departs this Life before the ſuperior Judge has determined the Merits of the Appeal, the Proſecution cannot any longer be carried on for the Puniſhment of the Crime, not even by pecuniary Puniſhments, ſuch as the Confiſcation of Goods, unleſs the Crime be of the Number of ſuch Crimes for which a Proſecution may be carried on againſt the Corpſe of Perſons deceaſed [e]. One may nevertheleſs in all ſorts of Crimes, continue the Proceeding with Reſpect to the Civil Intereſt, in order to have Reſtitution of what the Deceaſed had taken, or to oblige the Executors or Adminiſtrators of the Deceaſed to repair the Damage which the ſaid Deceaſed, whom they repreſent, had done to a third Perſon.

[e] Si quis cum capitali pœnâ vel deportatione damnatus eſſet, appellatione interpoſitâ, & in ſuſpenſo conſtitutâ, fati dum functus eſt, crimen morte finitum eſt. *l.* 6. *Cod. ſi reus vel accuſator mortuus fuerit.*

Defunctis reis publicorum criminum, ſive ipſi per ſe ea commiſerunt, ſive aliis mandaverunt, pendente accuſatione, præterquam ſi ſibi mortem conſciverint, bona ſucceſſoribus eorum non denegari notiſſimi juris eſt. *l.* 5. *ibid.*

Modeſtinus reſpondit, morte reæ, crimine extincto, perſecutionem eorum, quæ ſce'ere adquiſita probari poſſunt, fiſco competere poſſe. *l.* 9. *ff. de jure fiſci.*

VI.

6. The Manner of proceeding in order to purge the Memory of a deceaſed Perſon, who has been condemned by Default.

When he who is condemned by Default for his Contumacy in not appearing, dies within the Space of five Years from the Time of Condemnation, it is lawful for the Widow, the Children, and the Heirs of ſuch condemned Perſon to appeal from the Sentence of Condemnation, or to apply for Relief to the Judges themſelves who pronounced the Sentence of Condemnation, if the ſame has been pronounced by Judges in the laſt Reſort, from whoſe Decrees there lies no Appeal. But after the five Years of his Contumacy are elapſed, one cannot be admitted to purge the Memory of the Deceaſed, either by way of Appeal, or Application to the ſame Court, without having firſt obtained Letters of Licence from the Prince for that Purpoſe. The Heirs who are deſirous to purge the Memory of their deceaſed Anceſtor, cauſe the Party who has the Civil Intereſt in the Cauſe, and the Party who proſecutes for the Publick, to be cited, in order to ſee Proceedings carried on within the uſual Terms of Delay preſcribed for Civil Cauſes. The Judgment which is given is founded upon the Accuſation, the Informations, the Proceedings and the Writings upon which the Condemnation by Default is grounded. Nevertheleſs the Parties may on both ſides produce all the Writings which they judge may any way help to clear up the Facts, which have given Occaſion for the ſaid Criminal Proſecution.

1. Of Letters of Abolition.

TITLE VIII.

Of Pardons, Remiſſions and Abolitions.

The CONTENTS.

1. *Of Letters of Abolition.*
2. *Of Letters of Remiſſion.*
3. *Of Pardons.*
4. *Review of the Proceedings in a Criminal Cauſe.*
5. *The Recalling of one from Baniſhment, Commutation of Puniſhment, and the Reinſtating one in the ſame condition they were before Condemnation.*
6. *Letters of Abolition and Remiſſion muſt be regiſtred.*

I.

1. Of Letters of Abolition.

THERE is no Crime whatſoever but what the King may grant an Abolition of. The Letters which he grants for that purpoſe ought to be regiſtred when they are conformable to the Informations. However the Judges to whom the Letters are directed may give in their Remonſtrance againſt it to the King, when the Crime is of ſo heinous a Nature that it would be of dangerous Conſequence to grant an Abolition of it. The King does not uſually grant Letters of Abolition for Duels, premeditated Aſſaſſinations, nor for Rapes committed by Violence [a]. In caſe the Facts ſuggeſted in the Petition, upon which the Letters of Abolition have been obtained, are found to be falſe, the Criminal loſes the Benefit of the ſaid Letters, after the Sovereign has been informed of the Truth of the Facts.

[a] Fallaciter incuſantibus accuſationis abolitio non dabitur. ——— Abolitio non dabitur in illis criminibus (ut in violatâ Majeſtate, aut patriâ oppugnatâ vel proditâ, aut peculatu admiſſo, aut ſacramentis deſertis, omniaque quæ jure veteri continentur,) in quibus judex non minus accuſatorem ad docenda quæ detulit, quam reum ad purganda quæ negat, debet urgere. *l.* 3. *Cod. de abolitionibus.*

Et ſi non cognitio, ſed executio mandatur, de veritate precum inquiri oportet. Ut ſi fraus intervenerit, de omni negotio cognoſcatur. *l* 4. *Cod. ſi contra jus, vel utilitatem publicam, vel per mendacium fuerit aliquid impetratum.*

Et ſi legibus conſentaneum ſacrum oraculum mendax precator attulerit, careat penitus impetratis. Et ſi nimia mentientis inveniatur improbitas, etiam ſeveritati ſubjaceat judicantis. *l.* 5. *ibid.*

II.

The ſame Rule is obſerved in Letters of Remiſſion, as in Letters of Abolition. *2. Of Letters of Remiſſion.*

III.

Pardons are uſually granted in Caſes where no Corporal Puniſhment is to be inflicted, and which nevertheleſs cannot be altogether excuſed; for Inſtance, if one happens to be engaged in a Fray, where a Man has been killed, although he did not ſtrike the Deceaſed. *3. Of Pardons.*

[*In* England *the Word* Pardon *is of a more extenſive Signification, and takes in all Crimes whatſoever, where the Puniſhment due by Law is forgiven and pardoned. And ſome Pardons, are of Courſe and Right, as when a Perſon is convict of Manſlaughter, or of killing another in his own Defence. Other Pardons are of Grace, and flow only from the meer Mercy and Clemency of the Prince.* Hales's Pleas of the Crown. pag. 250.]

IV.

Sometimes the King grants unto condemned Perſons a Review of the Proceedings, although the Judgment has been given by a Court from which there lies no Appeal [b]. When the Proceedings have been reviewed by the Judges commiſſioned for that purpoſe, they may either acquit the Perſon accuſed, or condemn him to Corporal Puniſhment. *4. Review of the Proceedings in a Criminal Cauſe.*

[b] Litigantibus in ampliſſimo Prætorianæ Præfecturæ judicio, ſi contra jus ſe læſos affirment, non provocandi, ſed ſupplicandi licentiam miniſtramus: licet pro curiâ, vel qualibet publicâ utilitate, ſeu aliâ causâ dicatur prolata ſententia. Nec enim publice prodeſt ſingulis legum adminicula denegari: ita videlicet, ut intra biennium tantum noſtro numini contra cognitionales ſedis Prætorianæ Præfecturæ ſententias poſt ſucceſſionem Judicis numerandum, ſupplicandi eis tribuatur facultas. *l. un. Cod. de ſententiis Prafectorum Prætorio.*

V.

When a Criminal has been condemned to a Corporal Puniſhment, or a Puniſhment which is attended with Infamy, the Sovereign may by his Letters Patent recall him from Baniſhment, or releaſe him from the Gallies, and may commute his Puniſhment, and even reſtore the condemned Perſon to his Eſtate and his good Name, impowering him to contract and to ſue in Courts of Juſtice [c]. *5. The recalling of one from Baniſhment, Commutation of Puniſhment, and the reinſtating one in the ſame condition they were before Condemnation.*

[c] Relegati ſive in inſulam deportati, debent locis interdictis abſtinere. ——— nam contumacia ejus cumulat

cumulat pœnam: & nemo poteſt commeatum, remeatumve dare exuli, niſi Imperator, ex aliqua cauſa. *l.* 4. *ff. de pœnis.*

Cum ſalutatus eſſet à Gentiano, & Advento, & Opilio Macrino, Præfectis Prætorio, clariſſimis viris item Amicis, & Principalibus Officiorum, & utriuſque Ordinis viris & proceſſiſſet, oblatus eſt ei Julianus Licinianus, ab Opilio Ulpiano tunc Legato in inſulam deportatus: tunc Antoninus Auguſtus dixit, *Reſtituo te in integrum Provinciæ tuæ*, & adjecit: *Ut autem ſcias, quid ſit in integrum reſtituere, honoribus, & ordini tuo, & omnibus cæteris te reſtituo. l.* 1. *Cod. de ſententiam paſſis & reſtitutis.*

Cum patrem tuum in metallum damnatum fuiſſe proponas, ejus quidem bona meritò a fiſco occupata ſunt: nec ideò quod ex indulgentiâ meâ pœnâ tantummodo metalli liberatus eſſet, etiam bonorum reſtitutionem impetravit; niſi ſpeciale beneficium ſuper hoc fuerit impetratum. *l.* 2. *Cod. ibid.*

[*As to what is mentioned in this Article touching the Commutation of Puniſhments by the Sovereign, it is to be obſerved, that in* England *it is held as a Maxim in Law,* Non alio modo puniatur quis quam ſecundum quod ſe habeat condemnatio. *So that the King cannot by any Warrant under the Great Seal alter the Execution, otherwiſe than the Judgment of the Law doth direct. In caſe of High Treaſon, Beheading is Part of the Judgment, and therefore the King may pardon all the reſt ſaving Beheading, as is uſually done in caſe of Nobility. But if a Man being attainted of Felony, be beheaded, it is no Execution of the Judgment; becauſe the Judgment is, that he be hanged, until he be dead.* Coke 3d Inſtit. pag. 52. 212. Bracton, lib. 3. fol. 104.

VI.

6. *Letters of Abolition and Remiſſion muſt be regiſtred.*

Criminals who have obtained Leters of Remiſſion, or Abolition, cannot have them regiſtred, unleſs they themſelves be Priſoners and entred as ſuch in the Jailer's Book or Calendar. The preſenting of the Letters does not ſtay the Criminal Proceedings in the Cauſe, ſo that they may notwithſtanding proceed to repeat the Witneſſes, and confront them with the Parties accuſed. Notice is given of the ſaid Letters to the Party who has the Civil Intereſt, with Intimation to appear and ſhew Cauſe, if he has any, why they ſhould not be allowed and regiſtred.

See the Ordinance of 1670, *Title* 16.

[*In* England, *he who claims the Benefit of a Pardon muſt plead it. And he that pleads a General Pardon by Parliament, wherein there are Exceptions, muſt aver that he is none of the Perſons excepted. But of a General Pardon by Parliament without Exception, the Court* ex Officio *muſt take notice. And he that pleads a particular Pardon, muſt ſhew it under Seal.* Hales's Pleas of the Crown. pag. 252. Coke's 3d Inſtit. pag. 234.]

Here endeth the Supplement to the fourth Book of the Publick Law.

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FINIS.

FH
MVSEVM
BRITANNICVM